SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-113
District Docket No. VIII-2006-0015E

IN THE MATTER OF	:
GARY L. MASON	:
AN ATTORNEY AT LAW	:

Decision

Argued: June 19, 2008

Decided: September 9, 2008

Ronald Grayzel appeared on behalf of the District VIII Ethics Committee.

Glenn Reiser 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 discipline filed by the District VIII Ethics Committee ("DEC"). In a corporate matter, respondent engaged in a conflict of interest and conduct prejudicial to the administration of justice. The DEC recommended a reprimand. We determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1990. He has no prior discipline.

This matter was originally before us at our April 2006 session, as a post-hearing ethics appeal. We reversed the DEC's dismissal of the complaint and, in an April 25, 2006 letter, remanded the matter to the DEC for

> a new investigation and the filing of a complaint. The complaint should include a charge of RPC 1.9(a) (conflict – former client). The investigation should address respondent's representations to the Honorable Alexander D. Lehrer that he had not rendered legal advice to Marx Toys, his former client, a possible violation of RPC 3.3(a) (candor toward the tribunal).

A new complaint was filed, a hearing was held, and the matter came to us post-remand.

The complaint charged respondent with violations of RPC 1.8 (no subsection cited), RPC 1.9 (no subsection cited, presumably (a) and (c)(1)) (conflict of interest – former client), and RPC 8.4 (no subsection cited, presumably (d)) (conduct prejudicial to the administration of justice) for respondent's actions as corporate counsel to a toy company.

On May 1, 2003, Steven Wise, CEO of Marx Toys and Entertainment Corp., Inc., a publicly traded company ("Marx Toys"), retained respondent to represent the company in a dispute with United Internet Technologies ("UIT"). Marx Toys had

entered into a licensing agreement with UIT to market "IM Buddies", a computer software animated puppet designed to interact with America Online Corporation's ("AOL") instant-messaging system. Marx Toys hoped to sell millions of the toys through its partners, AOL and Warner Brothers. In fact, having no other products, the future of Marx Toys rested on the success of the IM Buddies project.

After meeting with Wise, Robert Lomonaco, a marketing and sales consultant to the company, and Vincent Nunez, a mortgage broker and financier, respondent wrote a May 21, 2003 letter to Wise, prominently marked PERSONAL AND CONFIDENTIAL ATTORNEY-CLIENT PRIVILEDGED INFORMATION. The letter advised Wise that he, Lomonaco, and Nunez should formalize their positions in the company with proper documentation. The letter discussed employment agreements that respondent had prepared for them, as well as a consulting agreement and a set of proposals for restructuring the company for an active future.

As corporate counsel, respondent participated in four or five meetings, between May and August 2003, with both Wise and Lomonaco. They discussed Marx Toys corporate structure, leasing office space, Marx Toys' stock, the capitalization of the company, and financing for the IM Buddies project.

According to Wise, who testified at the DEC hearing via telephone,[1] he and respondent had been in constant communication about the company, during respondent's tenure as its counsel. Wise estimated that, in addition to face-to-face meetings, they had spoken at least seventy times by telephone.

In early August 2003, UIT's CEO, Brian Shuster, called Wise to inform him that UIT was rescinding the IM Buddies agreement. According to Wise, Shuster told him to contact respondent for an explanation about that decision. Wise recalled having been surprised, because respondent was Marx Toys' attorney at the time. Wise immediately called respondent, who stated that he "could not talk about this anymore and that he could not be my attorney anymore."

On August 4, 2003, respondent wrote to Wise, criticizing his handling of the company and accusing him of manipulating Marx Toys' stock in order to artificially increase its value for sale at a large profit – in effect, an illegal "pump and dump" scheme. Respondent questioned Wise' promises of "significant working capital being infused into the company." These promises "ranged from a 100 million dollar line of credit, to a 5 million dollar investment by private investors." No funding ever

[1] Wise was convicted of financial crimes relating to the Marx Toys matter. He testified from federal prison.

materialized, however. Respondent further complained that Marx Toys had acquired another entity, Aztor Corp, without consulting corporate counsel. In respondent's view, Wise should have at least "advise[d] Bob Lomonaco or Brian Shuster of [his] interest in acquiring another company which could potentially overshadow the recognition and marketing of UIT's product." Respondent concluded the letter by terminating the representation and stating that the "resignation means nothing since, to date, I have rendered absolutely no services on behalf of Marx."

Wise testified that he never received respondent's August 4, 2003 letter. Nevertheless, in order to protect Marx Toys' rights under the licensing agreement, he immediately retained new counsel, Michael Chazen, to represent the company.

Respondent re-appeared on August 13, 2003, on the other side of the dispute, having been officially retained by Shuster to represent UIT. By this time, respondent had already held discussions with both Shuster and Lomonaco about wresting control of the exclusive license for IM Buddy from Marx Toys. In an August 13, 2003 letter to Chazen, respondent announced his retention and accused Wise of criminal wrongdoing:

> Please be advised of the following. First and foremost, my first phonecall [sic] tomorrow morning will be to the Securities and Exchange Commission. My contacts at Hale & Dorr, one of the world's foremost securities firms, have already arranged for

> a conference call with the heads of the compliance and fraud units. Mr. Wise's conduct over the last several months, which includes but is certainly not limited to, stock manipulation, "pump and dump" schemes and public misrepresentations represents something into which the SEC will certainly wish to sink its teeth. Irrespective of any civil litigation, Mr. Wise can most certainly look forward to a long vacation at the federal penitentiary. From what I hear about Mr. Wise, his reputation in the community and his penny stock games, his incarceration will be long overdue.
>
> Second, your mandate that UIT have no communication with me is hereby rejected. Until you garnish the black robe, you have no authority to make any such demands. With regard to my alleged conflict, just as the absence of a retainer agreement does not negate the existence of an attorney/client relationship, the existence of a retainer agreement does not necessarily create an attorney/client relationship if the actual relationship does not present the indicia of the same. As stated above, until a judge finds the existence of a conflict, I will be representing all defendants in any litigation.
>
> [Ex9.]

Also on August 13, 2003, Chazen filed an order to show cause ("OTSC") in Monmouth County Superior Court, seeking to prevent respondent from representing UIT in the dispute and to prohibit the termination of the licensing agreement. Chazen also wrote to Shuster at UIT, stating Marx Toys' position that the licensing agreement was still in force, informing him that he was filing an OTSC, and warning Shuster not to communicate with

respondent, who "served as counsel to Marx Toys and listed said affiliation on his website."

On August 14, 2003, the return date of the OTSC, the Honorable Alexander D. Lehrer, P.J. Ch., conducted a telephone conference with the parties. Respondent attended on UIT's behalf and fought for the right to represent UIT. Respondent told the judge that he should not be prevented from representing UIT because he had not been privy to any confidential information from Marx Toys, during his short tenure as corporate counsel, and because he had not given any legal advice to Marx Toys or Wise.

The following exchange took place:

> THE COURT: Did you ever do anything for Marx Toys?
> MR. MASON: I did absolutely nothing for Marx Toys.
> THE COURT: Did you ever bill them?[2]
> MR. MASON: I never billed them.
> THE COURT: Did you ever meet –
> MR. MASON: I sat in on one meeting with Steve Wise initially, at the very beginning of our relationship, at the beginning of May, to discuss things that I thought should be done with respect to the structure of the company, employment agreements. I had suggested that Steve Wise surrender

[2] Respondent's arrangement with Marx Toys initially called for an hourly fee, but later called for payment in the form of Marx Toys stock.

certain stocks to show, to give shareholder confidence.

THE COURT: So you gave him advice?

MR. MASON: I didn't give him any advice, Judge.

THE COURT: Excuse me. Mr. Mason, didn't you just tell me that you were in a meeting with your client after the retainer agreement was signed and you gave him certain recommendations on how to run his business and structure his life? Isn't that what you just told me?

MR. MASON: Yes, Judge.

THE COURT: Isn't that what lawyers do when representing clients?

MR. MASON: Yes, Judge, I did.

THE COURT: Okay.

MR. MASON: However, my advice was – the reality, Judge, is that I was sitting in that room and I was a mouthpiece. No one really cared what I –

THE COURT: The reality is you were sitting in that room with a retainer agreement with your client, giving him advice. That's the reality of it all?

MR. MASON: In general terms, yes, Judge.

THE COURT: Okay.

MR. MASON: Yes.

THE COURT: That's a lawyer/client relationship, isn't it?

MR. MASON: Well, I don't believe so, Judge and I don't think that -- I think that if I have an opportunity to --

THE COURT: What else do lawyers do?

MR. MASON: I'm sorry?

THE COURT: What else do lawyers do, but sit in rooms with clients and give their clients advice?

[Ex13 at 20-8 to 22-4.]

Judge Lehrer's August 14, 2003 order temporarily restrained UIT from entering into another licensing agreement for the IM Buddies technology and directed respondent "not [to] perform any

legal work which involves Marx Toys and [not to make] any disclosures regarding Marx."

Within a week of the entry of the court order, Chazen held a settlement conference at his law office. Chazen testified that respondent attended the conference without Chazen's approval or a waiver of conflict from Wise. Chazen recalled telling respondent that he should not be in attendance and initially refusing to allow the meeting to go forward. Ultimately, Chazen relented, but only, he claimed, after bringing Shuster, UIT's CEO, into the meeting by telephone.

Chazen testified that, during the meeting, he learned that respondent was still working with Shuster: "There was a proposed resolution, and [Shuster] said he wanted to run it by counsel. And I think he mentioned [respondent.] And I said, 'It can't be [respondent.] And I told him he had to get his own attorney.'"

Finally, Chazen testified that he had never intended to handle a complicated commercial litigation, only Marx Toys' emergent application. Therefore, the day after the settlement meeting, he terminated the representation.

Soon after Chazen's departure, Wise retained Allan Wasserman to represent Marx Toys in its feud with UIT. Wasserman testified at the DEC hearing that, as soon as he became involved, he contacted respondent by email at Wise's urging,

because Wise had been "very insistent" that respondent "should get out of the case." In an August 20, 2003 email to respondent, Wasserman stated:

> Based upon your prior representation of Marx, I can not believe your active participation in this matter, adverse to Marx. On behalf of Marx, if it wasn't clear already, you are to cease from any (active or passive) representation or communication with UIT, Shuster, LoMoncia [sic] and any other person or entity adverse to Marx. My client and I consider any participation by you to be in violation of your fiduciary and legal duties as set forth in the RPC. Your conclusions as to no prejudice to Marx is clearly misplaced. . . . If I discover that your involvement continues, or your involvement to now is a proximate cause of any damages suffered by Marx, I suggest you obtain representation for yourself.
>
> [Ex12.]

According to Wasserman, respondent would not budge. Rather, he continued to communicate to UIT important information "that went directly to the 'financial viability' of Marx Toys."

Respondent's August 20, 2003 reply to Wasserman stated that he had Chazen's explicit consent to appear, a claim that Chazen flatly denied.

On August 23, 2003, Wise and respondent discussed the case, after which Wise wrote a letter to Judge Lehrer:

> As President and CEO of Marx Toys and Entertainment Corp. (the plaintiff in this case) I hereby request a waiver of the conflict of interest related to Gary Mason

> (attorney for the defense) for the purpose of Mr. Mason appearing before the court on behalf of the defendants to request an adjournment for an Order to Show Cause on Monday August 29, 2003 at 9:00 am.
> The parties are negotiating a settlement of this matter and agree that an adjournment until Friday August 29, 2003 will allow sufficient time for the negotiations.
>
> [Ex28.]

Wasserman testified that he was unaware, until the letter was sent, that his client had been discussing the case with respondent or had written to the judge. He was "stupefied" that Wise had done so, after both he and his predecessor, Chazen, had done so much, at Wise' request, to prevent respondent's further involvement in the case. According to Wasserman, he terminated the representation shortly thereafter, in late September 2003.

Robert Lomonaco also testified about the Marx Toys litigation. According to Lomonaco, Wise alone "was the company, he was the chairman, CEO, the only person," when they first met in 2002.

Lomonaco first met respondent at a meeting sponsored by Vincent Nunez, a mortgage broker and financier, at Nunez' New Jersey office. Wise was also at the meeting, which was a product demonstration for IM Buddies.

When asked if he had attended any other meetings with respondent, after the product demonstration, Lomonaco recalled a meeting at respondent's office, in July or August 2003:

> And I'm not sure if there were any other meetings in between. But at a point, UIT was going to terminate the contract because Marx was just not doing anything, not raising money, not performing. And I met with [respondent] to discuss the possibility of finding other investors to just start another company to take the product over.
>
> [2T100-25 to 2T101-7.]

Lomonaco was not sure if the licensing agreement had been terminated prior to this second meeting, but he was sure that it was at least "in the process of being terminated." He also believed that Wise and Marx Toys were unaware of the meeting.

Lomonaco was also questioned about respondent's role in those meetings. He stated that, at the time, he thought that respondent was part of "the group that was trying to raise the money." He was unaware, until sometime later, that respondent had represented Marx Toys in the deal.

Lomonaco also recalled that he telephoned respondent, after being served with Marx Toys' OTSC. When asked why he had chosen respondent, Lomonaco replied that respondent was a lawyer and that they had already discussed setting up a new company to market IM Buddies. Finally, Lomonaco recalled that he and Shuster had held a series of discussions with respondent, prior

to Shuster's retaining respondent to represent UIT. Lomonaco did not know if Shuster had paid respondent for the representation.

In September 2003, after Wise's arrest, Lomonaco became the president and chairman of Marx Toys. He then dismissed the litigation against UIT and the other defendants.

For his own part, respondent did not deny that he had participated in the case, after terminating his representation of Marx Toys. He was adamant, however, that his activities thereafter had not violated the RPCs. When questioned about it by the presenter, he replied:

> Q. You are aware of the fact that as a consequence of the hearing before Judge Lehrer, that [sic] a provision of the order precluded your further participation in the matter. Is that correct?
>
> A. The order reflected my agreement not to participate any further.
>
> Q. Well, regardless of whether you agreed or not, the order was in effect and the order established the fact that you were not going to participate, correct? In other words, the fact that you agreed to an order –
>
> [Respondent's Counsel]: You have to let him answer. He was going to, but you continued on. I don't mean to interrupt?
>
> A. I was precluded from representing any party in that litigation, correct?
>
> . . . .
>
> Q. That order never was vacated, was it?

A. Correct.

Q. Did you ever move to vacate the order?

A. No.

[3T54-9 to 3T56-10.][3]

Respondent challenged Chazen's recollection of the settlement meeting at Chazen's office, shortly after the temporary restraining order was issued. Respondent claimed that Chazen had not been surprised by his presence, did not express discomfort about his presence, and did not insist on Shuster's presence by telephone, in order to continue the meeting. He also reiterated his claim that Chazen had explicitly consented to his appearance at the meeting.

Respondent went on to defend his actions, claiming that he had not represented anyone at the meeting:

> I was specifically asked to participate in the meeting trying to resolve the case, by a party to the litigation. So, I mean, yes, the order was entered. It precluded my representation of any party. The order was never vacated. Yes, I did participate in

[3] "3T" refers to the transcript of the October 16, 2007 DEC hearing.

certain events trying to resolve the litigation, after the order was entered.

[3T60-5 to 13.]

Respondent faulted Wise, Shuster, Lomonaco, and others for his continued involvement in the case, claiming that they all wanted him to continue to participate in the matter. According to respondent, Wise called him at 3:00 a.m., pleading for him to remain involved in the case. Respondent and Wise discussed contacting the court "for a waiver." Respondent concluded that it would not be proper for him to do so, and "[t]hat's why Steve did it."

Thereafter, in mid-September 2003, respondent held an investors' meeting with Lomonaco and others, the same meeting Lomonaco recalled having taken place in July of that year. Respondent recalled that, after Wise' arrest, in early September 2003, Lomonaco had become chief executive of Marx Toys. Respondent then held a meeting at his office, at Lomonaco's request, to seek funding for IM Buddies. In addition to respondent, Lomonaco, Shuster, David Strumeier (a marketer that respondent recommended to Lomonaco), and an unidentified Florida investor (via telephone), attended.

At every turn, respondent defended his participation in the feud between Marx Toys and UIT with claims that he had no inside knowledge of the various parties' positions and that he had

always remained neutral about the dispute. When asked how he could have remained neutral when he "represented Marx on the one hand and then you represented UIT and [had] been advised by the court not to contact anybody else," he replied:

> Because I had no interest in either way. I had no interest if Marx succeeded in the lawsuit. I had no interest if UIT succeeded in the lawsuit. I brought to the table – you know, without tooting my own horn, I have good business sense. I've helped companies restructure.
>
> My suspicion, I'm just guessing, is that these parties believed that another head of [sic] the table with a good sense of business, who could possibly create some way that we could join forces again and make this work, would be an asset to this meeting.
>
> Q. Did you not see that as a conflict?
>
> A. I did not, because I was not there representing any of the parties.
>
> Q. But you had knowledge of what both parties' positions were vis-à-vis the outcome of the litigation, inside knowledge?
>
> A. I did not have inside knowledge. I had knowledge on the one hand from Bob Lomonaco, post my resignation. The only knowledge I had regarding Marx' position is what I read in the complaint. That's all I knew of what Marx' position was.
>
> [3T115-21 to 3T116-20.]

Respondent's counsel brief to us challenged numerous aspects of the proceedings against respondent. He urged us to

dismiss the complaint in its entirety or, at most, to impose an admonition.

Counsel challenged the new ethics proceedings on the grounds that they did not adhere to our remand instructions, that is, the DEC failed to conduct a new investigation, as evidenced by the lack of a new investigative report; the new complaint failed to cite the relevant subsection of RPC 1.9 alleged to have been violated; and the complaint charged violations of RPC 1.8 and RPC 8.4, rules that were not specified by this Board for inclusion in the complaint, and both of which lacked reference to the subsections alleged to have been violated.

Counsel argued that the DEC failed to prove, by clear and convincing evidence, that respondent had violated RPC 1.9. He claimed that respondent's representation of UIT was not adverse to Marx Toys' interests, the representation concerned issues unrelated to the prior representation, and the conflict of interest rules did not apply.

Counsel contended also that RPC 1.8 does not apply to this situation because it addresses only current clients; in this instance, respondent terminated Marx Toys' representation prior to becoming counsel for UIT.

Counsel urged the dismissal of the RPC 8.4(d) charge, on

the basis that respondent had not violated Judge Lehrer's order. Counsel's position was that respondent had acted as a mediator, not an attorney, after the entry of the order. Furthermore, counsel argued, respondent had acted at the invitation of Wise, who later had asked the judge for a waiver of the conflict. Counsel also argued that the court, Wise, and Marx Toys had been unharmed by respondent's actions.

The DEC found that respondent engaged in a conflict of interest when he represented UIT in substantially the same matter as his former client, Marx Toys, without having obtained a written waiver of the conflict and, furthermore, when he revealed to UIT information to the disadvantage of Marx Toys, violations of RPC 1.9 (a) and (c)(1). The DEC found another violation of RPC 1.9 (c)(1) by respondent's use of information against Marx Toys, in his OTSC arguments as counsel for UIT. The DEC noted that respondent had obtained the information while acting as counsel for Marx Toys.

The DEC also found that respondent violated RPC 8.4(d) by ignoring Judge Lehrer's order, prohibiting him from performing legal work and making disclosures about Marx Toys. Instead, respondent participated in a meeting between the parties less than a week after the order was entered. The DEC rejected respondent's argument that he was attempting to mediate the

matter to promote the resolution of the dispute, as opposed to acting as a lawyer. The DEC concluded that "respondent could not act in any capacity as a neutral mediator given his prior position as attorney for Marx Toys and an advocate for UIT in the hearing before Judge Lehrer."

The DEC also rejected respondent's argument that Wise had waived any conflicts by asking him to participate in the meeting. The DEC pointed out that the court order prohibited respondent's involvement.

Finally, in the "Findings of Fact and Conclusions" portion of the hearing panel report, the DEC determined that respondent's direct communication with Wise about contacting the court for a waiver, when Wise was represented by Wasserman, violated RPC 4.2, which prohibits attorneys from communicating with represented persons. Presumably because RPC 4.2 was not charged in the complaint, the "Determination" portion of the report does not contain a finding that respondent violated that RPC.

The DEC dismissed the RPC 1.8 charge for lack of clear and convincing evidence. The DEC recommended a reprimand.

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.

Unquestionably, respondent engaged in a conflict of interest in this matter. In fact, respondent's argument to the contrary is somewhat disingenuous. Beginning with his May 21, 2003 letter to Wise, prominently marked PERSONAL AND CONFIDENTIAL ATTORNEY-CLIENT PRIVILEDGED INFORMATION, respondent discussed Marx Toys issues that bore directly on the representation. He held at least four meetings and as many as seventy telephone conversations with Wise, Marx Toys' principal and CEO, and discussed numerous issues related to the company and its deal with UIT.

When respondent "jumped ship" to become UIT's corporate counsel, in August 2003, he immediately drew upon information gained while at Marx Toys to call into question Wise' handling of the organization. In the August 4, 2003 termination letter, respondent attempted to shield himself from a conflict by stating that his "resignation meant nothing since, to date, [he had] rendered absolutely no services on behalf of Marx." That statement belied the facts.

On August 13, 2003, in a letter announcing his retention by UIT, and using information gathered as Marx Toys' counsel, respondent criticized Wise's handling of the company, threatened to involve federal securities authorities, and rejected calls that he refrain from switching sides.

RPC 1.9 states, in relevant:

> (c) lawyer who has formerly represented a client in a matter . . . shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client.

By using information related to the earlier representation against his former client, in a bid to remain involved in the case as UIT's attorney, respondent violated that rule.

Thereafter, respondent also prejudiced the administration of justice by violating a court order directing that he "not perform any legal work which involves Marx Toys and [not make] any disclosures regarding Marx." Although the order remained in force throughout respondent's involvement in the case, he was undeterred. He refused to remain uninvolved in the dispute between Marx Toys and UIT.

Two subsequent Marx Toys' attorneys, Chazen and Wasserman, testified that they tried unsuccessfully to convince respondent between August and September 2003, to step away from the case. They each recalled that, while acting as Marx Toys' attorney, respondent had obtained information about Wise and the company that rendered his continued involvement inappropriate.

Respondent soldiered on, brushing Chazen and Wasserman aside with claims that he was acting not as a lawyer, but as an

impartial mediator; he was just trying to save the Marx Toys/UIT deal, at the invitation of the underlying parties, all of whom sought his participation at meetings about the case.

Regardless of whether Wise and the others sought his continued involvement, respondent was bound by a court order not to "make any disclosures about Marx." Yet, that is exactly what he continued to do. He disclosed information about Marx Toys in order to deny it the UIT license, and used that information with the others at UIT to market the license to another entity. Through all of it, respondent violated the term in Judge Lehrer's order precluding his involvement in the manner, thereby violating RPC 8.4(d).

We now address several points raised in respondent's brief. As to procedure, counsel argued that this disciplinary matter is flawed because, apparently, the post-remand DEC did not issue a new investigative report. We find no indication, however, that, if true, this omission prejudiced respondent in any way. Ultimately, a complaint was filed and the matter proceeded to a hearing, about which respondent raised no objection.

So, too, respondent was not prejudiced by the failure of the DEC to cite RPC subsections in the ethics complaint. RPC 1.8 deals with conflicts of interest with current clients. At issue here is respondent's handling of a matter dealing with a former

client. Hence, RPC 1.8 does not apply and the DEC properly dismissed the charge.

RPC 1.9, in turn, addresses conflicts of interest with former clients. Although no subsection was cited in the complaint, respondent had fair notice that subsections (a) and (c)(1) were implicated. Those subsections fit squarely within the factual charges contained in the complaint. They address the very essence of the conduct that Wise complained about and of the charges fully litigated below. Therefore, there was no violation of respondent's due process rights.

As to RPC 8.4, which deals with a variety of misconduct, counsel argued that the complaint should not have included that charge because our remand letter did not call for the inclusion of RPC 8.4 in the new complaint. This argument is meritless. Our remand instructions called for a new complaint to include specific charges, but it did not preclude the DEC from charging respondent with additional misconduct, as it deemed appropriate.

Counsel further urged that the complaint's failure to cite a specific subsection of RPC 8.4 left the charge too vague to prosecute and that, without an amendment to the complaint alleging subsection (d) (conduct prejudicial to the administration of justice), the RPC 8.4 charge should be dismissed. He also alleged that the complaint failed to state

conduct that could be considered prejudicial to the administration of justice.

The complaint, however, refers to the entry of Judge Lehrer's order and to respondent's continued participation in the dispute, despite the prohibition in the court order. Furthermore, counsel acknowledged, in his brief to us, that subsection (d) was a topic of argument before the DEC, and that it was the only subsection of the rule discussed at the ethics hearing.

Indeed, counsel argued forcefully before the hearing panel, as evidenced by several pages of transcript in his closing argument, that respondent had not intentionally violated Judge Lehrer's order and had not violated RPC 8.4. At the time, counsel concluded that the presenter had not met his "burden of proof under rule 8.4. It was not conduct that was prejudicial to the administration of justice. Again [respondent] was asked to participate and believed in good faith that he had the consent of the parties to continue participating." Counsel was aware, thus, that RPC 8.4(d) was at issue. The issue was fully litigated below. Here, too, respondent's due process rights were not in any way violated.

In one respect, respondent is the beneficiary of the DEC's failure to closely adhere to our remand instructions, which

directed that the investigation address respondent's representations to Judge Lehrer that he had not rendered legal advice to Marx Toys, a potential violation of RPC 3.3(a) (candor toward the tribunal). This RPC was apparently not investigated on remand. Therefore, the propriety of respondent's representations to the judge did not find its way into the new complaint, as perhaps it should have.[4]

In summary, respondent engaged in a conflict of interest with a former client (RPC 1.9 (a) and (c)(1)) and in conduct prejudicial to the administration of justice (RPC 8.4(d)). In mitigation, we considered that he has no prior discipline, in his eighteen years at the bar.

Since 1994, it has been well-established that a reprimand is the measure of discipline imposed on an attorney who engages in a conflict of interest, absent egregious circumstances or serious injury to clients. In re Berkowitz, 136 N.J. 148 (1994). Accord In re Mott, 186 N.J. 367 (2006) (reprimand imposed on attorney who prepared, on behalf of buyers, real estate agreements that provided for the purchase of title insurance

[4] At this late stage, when the matter has been tried, appealed, and tried again on a new complaint, it would be unfair to respondent, and an inefficient use of disciplinary system resources, to consider yet another remand to properly explore the possible misrepresentation to Judge Lehrer.

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) (reprimand imposed on attorney who engaged in a 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).

If the conflict 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 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").

Attorneys who violate court orders have generally received a reprimand, even if that infraction is accompanied by other, non-serious violations. See, e.g., In re Gourvitz, 185 N.J. 243 (2005) (attorney engaged in conduct prejudicial to the administration of justice by repeatedly disregarding several court orders requiring him to satisfy financial obligations to his former secretary, an elderly cancer survivor who sued him successfully for employment discrimination; he had refused to allow her to return to work after her recovery from cancer surgery that disfigured her face); In re Carlin, 176 N.J. 266 (2003) (attorney failed to comply with two court orders and failed to comply with mandatory trust and business recordkeeping requirements; gross neglect, lack of diligence, failure to communicate and failure to deliver funds to a third person also found); and In re Malfara, 157 N.J. 635 (1999) (attorney failed to honor a bankruptcy judge's order to reimburse the client $500 for the retainer given in a case where he failed to appear at two court hearings, forcing the client to represent himself;

gross neglect also found; the attorney also failed to cooperate with ethics authorities during the investigation of the matter). But see In re Davis-Daniels, DRB 05-218 (September 22, 2005) (admonition for attorney who, as personal representative in an estate matter in South Carolina, failed to respond to numerous deadlines set by the court for filing an inventory and failed to appear or to explain her non-appearance to the court in a hearing scheduled for her to explain why she had not performed her duties; violation of RPC 1.16 also found for the attorney's failure to withdraw from the representation when her physical condition materially impaired her ability to properly represent the client; compelling mitigating factors considered).

Each of respondent's violations calls for the imposition of a reprimand. Combined, they warrant a censure. Although, in mitigation, we considered that respondent does not have a disciplinary record, we took into account, in aggravation, his steadfast refusal to recognize any wrongdoing on his part. On balance, a censure is the suitable degree of discipline for his conflict of interest and conduct prejudicial to the administration of justice.

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 Gary L. Mason
Docket No. DRB 08-113

Argued: June 19, 2008

Decided: September 9, 2008

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Boylan			X			
Clark			X			
Doremus			X			
Lolla			X			
Stanton			X			
Wissinger			X			
Total:			9			

Julianne K. DeCore
Chief Counsel