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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-209
District Docket No. XIV-04-079E

IN THE MATTER OF
DAVID W. BOYER
AN ATTORNEY AT LAW

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Decision

Argued: November 15, 2007

Decided: December 20, 2007

Janice L. Richter appeared on behalf of the Office of Attorney Ethics.

Robert E. Ramsey 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 (three-month suspension, with conditions) filed by Special Master Tina E. Bernstein. The complaint alleged that respondent lacked diligence, engaged in a conflict of interest and in an improper business transaction with the client, failed to communicate with the client, and made misrepresentations to ethics investigators. Respondent's conduct in the underlying

matter occurred in Pennsylvania. We voted to impose a three-month suspension.

In March 2007, respondent received an admonition for failing to set forth the rate or basis of his fee in an estate matter. In the Matter of David W. Boyer, DRB 07-032 (March 28, 2007).

On a procedural note, after the DEC hearing in this matter, respondent's counsel made a motion to dismiss for lack of jurisdiction all of the charges against respondent, with the exception of the ones to which he stipulated. Counsel argued that New Jersey discipline for the out-of-state actions of New Jersey attorneys is appropriate only when connected to an Office of Attorney Ethics ("OAE") motion for reciprocal discipline or an OAE motion for final discipline. The OAE countered that RPC 8.5(a), dealing with choice of law issues, provides that a lawyer admitted to practice in this state is subject to the disciplinary authorities of this state, regardless of where the lawyer's misconduct took place.

The special master denied respondent's motion as a "thirteenth hour" attempt to avoid jurisdiction on "weak" grounds. We agree with the special master that, under RPC 8.5(a), the New Jersey disciplinary system has jurisdiction over attorney misconduct that took place out of state.

The complaint alleged that respondent violated RPC 1.16, presumably (d) (failure to turn over client file upon termination of representation), RPC 1.3 (lack of diligence), RPC 1.4, presumably (c) (failure to explain a matter to the extent reasonably necessary to permit client to make informed decisions regarding the representation), RPC 1.15(a) (failure to safekeep property), RPC 1.5(a) (unreasonable fee), RPC 1.7(a)(2) (conflict of interest), RPC 1.8(a) and (b) (prohibited business transaction with client and use of information relating to the representation of a client to the disadvantage of the client unless the client consents), RPC 8.4(a) (assisting another in violating the Rules of Professional Conduct), and RPC 8.4(c) (misrepresentation).

On January 17, 2007, respondent and the OAE entered into a stipulation of facts. Respondent conceded having violated several RPCs, when he mishandled a portion of an estate matter.

The facts are as follows.

In 2001, Arthur Lamont retained respondent to represent him in Lamont's capacity as administrator of the estate of his sister, Elizabeth Allan, who died intestate on January 8, 2001.

Among the estate assets was a house at 7527 Tabor Road, Philadelphia, Pennsylvania. On December 30, 2001, Lamont and a

business associate of respondent, Kevin Bayer, entered into a \$40,000 contract of sale for the property.

Bayer funded the purchase through a \$60,000 mortgage loan, with documents prepared by respondent, naming "AJM Woodworking" as the lender/mortgagee. That reference was apparently an inadvertent mistake caused by the use of a document template. The lender/mortgagee was actually "Paxwood, LLC," an entity owned by respondent's father and respondent's wife, although, as it turned out, respondent and his wife provided the funds for the transaction. The loan was secured by a first mortgage on Bayer's "personal residence," a house that he shared with his mother. Respondent and his wife stood to personally benefit from the loan interest payments.

Respondent stipulated that he did not inform Lamont that he and his wife were the true funding source for the transaction. Respondent also stipulated that

[b]y financing the purchase of the estate's property by a business associate, [respondent] violated RPC 1.7(a)(2) and RPC 1.8(a), which precludes a lawyer's acquiring a pecuniary interest adverse to the client unless the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be understood by the client; and the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advise [sic] of independent counsel concerning the

transaction; and the client gives informed consent, in [sic] writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction. By failing to fully inform [his] client of the essential facts surrounding the transaction, [respondent] violated RPC 1.4. Respondent's wrongful actions in the transaction posed a significant risk of materially breaching his responsibilities to his client.

Further, respondent violated RPC 1.8(b), which provides a lawyer shall not use information relating to representation of a client to the disadvantage of the client, unless the client after full disclosure and consultation, gives informed consent.

[S19-110.]¹

As seen below, count three addressed the charges that were the subject of respondent's stipulation. We will return to count three, following a recitation of the facts that gave rise to the charges in counts one and two.

Count one alleged lack of diligence (RPC 1.3) and failure to turn over the client file to subsequent counsel, upon termination of the representation (RPC 1.16(d)).

Shortly after Allan's January 18, 2001 death, Lamont retained a Pennsylvania attorney, Lee Rockafellow, to represent the estate. The estate assets consisted primarily of the

¹ "S" refers to the stipulation of facts.

aforementioned Tabor Road property, as well as properties in Morrisville and Blakeslee, Pennsylvania.

A few months into the representation, Lamont became dissatisfied with Rockafellow. In April 2001, he retained respondent to represent him as administrator. An undated fee agreement signed by Lamont provided for respondent to receive a \$7,500 retainer and a \$235/hour attorney fee.

Two years later, on June 10, 2003, Lamont was removed as administrator. Bruce Crawford, the decedent's son and an heir, was appointed in his place. Crawford immediately terminated respondent's representation and re-hired Rockafellow to represent the estate.² Crawford sent respondent letters on June 23 and July 10, 2003, asking him to assemble the file and prepare, for Rockafellow's benefit, an accounting of the financial aspects of the estate.

On July 8, 2003, respondent replied to Crawford, stating that he would be "glad to forward all the files," but could not prepare any documents or an accounting until his outstanding

² Rockafellow testified that, during the two years that respondent maintained the file, the two had an informal understanding - a division of work in the estate. Respondent represented Lamont, who mistrusted Rockafellow. Rockafellow, in turn, represented the remainder of the heirs. The complaint does not allege any improprieties stemming from this agreement.

fees were paid. At the time, respondent had received \$41,369.78 against fees totaling \$41,638.47.

Although Rockafellow wrote to respondent, on July 29 and October 15, 2003, stating that he could not address a number of urgent estate matters without the file, he allegedly received only a few "disjointed" documents from respondent, in late summer 2003.

Respondent, in turn, claimed that he had turned over to Rockafellow everything he had, including at least two boxes of documents. He added that Lamont had taken most of the estate records from his office (at least eighteen boxes), before Lamont moved to New York, in January 2003.

Count one of the complaint alleged that respondent violated RPC 1.3 and RPC 1.16 by failing to make any distribution to the beneficiaries, by not providing an accounting to the estate, and by refusing to deliver the estate files to Rockafellow. As seen below, the special master dismissed those charges, although she found respondent guilty of lack of diligence in another respect.

Count two alleged that respondent charged an unreasonable fee (RPC 1.5(a)) for duplicative and unnecessary legal services, retaining another attorney, Edward Gore, to provide services to the estate. Gore rented law office space from respondent, in respondent's building. The complaint alleged that respondent

overbilled the estate by charging twice for work first performed by respondent and then by Gore; by charging the estate for expenses that were not supported by receipts, including a videotape and a locksmith; by charging the estate for services provided to Lamont individually; and by paying himself fees for work that did not appear on any invoice or billing statement.

Prior to the DEC hearing, respondent prepared a formal bill for legal services, in which he accounted for all of his legal services. When questioned about the time he had spent on the case and about the appropriateness of his \$41,000 fee, respondent defended the reasonableness of the fee by saying that he had worked about two and a half years on the matter.

No evidence was adduced for the remainder of the RPC 1.5(a) allegations, that is, that respondent improperly charged the estate for a videotape and a locksmith, for services provided to Lamont individually, and for services that did not appear on his billing statement.

As noted earlier, count three addressed allegations of misconduct in connection with the Tabor Road transaction. Respondent stipulated violations of RPC 1.7(a)(2), RPC 1.8(a) and (b), and RPC 1.4, presumably (c). This count also charged respondent with having violated RPC 1.15(a) (failure to

safeguard property), a topic that is not part of the stipulation.

According to the complaint, Bayer paid significantly less than the listing price for the property, a semi-detached Philadelphia row house (\$40,000 for a \$51,000 listing) and respondent wasted estate assets by needlessly involving a real estate broker, Prudential Fox & Roach, who charged a commission.

Bayer, respondent's friend, business associate, and former client, testified that he was familiar with the property, having been asked by respondent to make some repairs to the house. According to Bayer, respondent asked him to fix some damage to the locks from a break-in, as well as a leaky kitchen faucet. He testified that there had been extensive water and mildew damage to the house, which had been "closed up for an extensive period of time. The plaster was falling [and the] ceiling had collapsed in two rooms." According to Bayer, all of the walls required repair or replacement.

Bayer further testified that, "sometime down the road," he approached respondent about buying the house from the estate. Boyer wanted to start a new business rehabilitating houses. He and respondent did not discuss a purchase price. Rather, he recalled advising the broker of his highest offer (\$40,000) for

the property, in its poor condition, which offer was relayed to respondent.

On December 30, 2001, Lamont signed a \$51,000 listing agreement with Prudential Fox & Roach, as well as an agreement for sale to Bayer for \$40,000. The remaining parties signed those agreements on January 8, 2002. The record contains no evidence that the fair market value of the property exceeded the \$40,000 purchase price.³

Count four alleged violations of RPC 8.4(a) (assisting another to violate the RPCs) and RPC 8.4(c) (misrepresentation). With regard to RPC 8.4(a), the complaint alleged that respondent prompted Gore, an inexperienced attorney who rented office space from him, to improperly take the jurat of respondent's father, Leon Boyer, as the mortgagee.

Gore recalled that he had given the blank mortgage document to respondent, who returned it to him prior to the closing, with Leon Boyer's signature affixed to it. Respondent, on the other hand, testified only that he did not recognize the signatures on the mortgage documents. Respondent was not directly questioned about the authenticity of Leon Boyer's signature on the mortgage

³ A \$65,000 listing agreement with another real estate agency was introduced at the DEC hearing. It had been rejected by Lamont, perhaps because it called for an almost ten-percent broker's fee of \$6,000.

documents, or about Gore's statement that he had given the documents to respondent to obtain signatures.

Leon Boyer was not present at the closing. His signature was already on the mortgage documents when Gore took the jurat.⁴ Asked why he had taken the improper jurat, Gore stated that he had acted foolishly, as a new attorney involved in his first real estate transaction. Gore did not implicate respondent in his decision to take the jurat.

The complaint also alleged that respondent lied to ethics investigators that Paxwood was the mortgagee, when, in fact, the funds had been provided by him and his wife. On this score, respondent conceded that he had not disclosed to Bayer that he and his wife were funding the loan for Paxwood. Respondent stated that he, however, held no ownership interest in Paxwood.

The complaint further alleged that respondent lied that the mortgage documents had been prepared by Gore. On this issue, respondent testified that Gore had, in fact, prepared the mortgage documents, but had done so from respondent's word-processing template, which he had given Gore for revisions.

The complaint also charged that respondent lied that he had turned over the estate records to Rockafellow, having earlier

⁴ Gore testified that Pennsylvania ethics authorities are pursuing an action against him, based on these facts.

claimed that Lamont had taken eighteen boxes of records. As seen above, respondent explained that he had given Rockafellow all he had, exclusive of the materials taken by Lamont.

Another allegation of falsehood concerned respondent's statement to ethics authorities that the Tabor Road property had been appraised. Respondent testified that he had merely told the investigators that no formal appraisal existed - only an appraisal by the real estate multiple listing service.

Finally, the complaint alleged that respondent had falsely advised ethics authorities that Gore had approached him about private financing for the Bayer purchase. According to respondent, however, Paxwood's involvement had, in fact, arisen out of Gore's statement to him that Bayer's proposed lender would charge him a ten-percent pre-payment penalty, a financial term not advantageous to Bayer. At this juncture, respondent volunteered to Gore that his father's business could finance the transaction "for a lot less than Mr. Bayer was otherwise being charged." Respondent, thus, denied that his statement to the DEC was false.

The special master found that, in addition to the stipulated violations of RPC 1.4, RPC 1.7(a)(2) and RPC 1.8(a) and (b), respondent had lacked diligence through his failure "to use ordinary prudence in maintaining records regarding the

assets of the Estate." The special master dismissed the charges of RPC 1.5(a), RPC 1.15(a), and RPC 1.16(d), making no findings with regard to RPC 8.4(a) or (c). The special master recommended a three-month suspension with conditions (unspecified ICLE course for suspended attorneys and a two-year proctor).

Respondent and the OAE entered into a joint recommendation for discipline concluding that "an appropriate level of discipline to be imposed for the RPC violations to which Respondent has admitted and other violations charged" is a three-month suspension with the above conditions.

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

With regard to count one of the complaint, we concur with the special master's partial dismissal of the allegations of lack of diligence (RPC 1.3) and dismissal of the charged failure to turn over the file, upon termination of the representation (RPC 1.16(d)).

Specifically, this count alleged that respondent lacked diligence by failing to make distribution to the beneficiaries and to provide an accounting to the estate. Yet, the record does not establish that it was respondent's duty to make distributions or prepare an accounting. As the special master

pointed out in her report, the duty rested with Lamont, not respondent.

However, respondent lacked diligence in another respect. We agree with the special master that respondent's "handwritten diagram of the disposition of estate accounts as the only record he could produce was an insult when presented to the OAE investigator, [] and apparently [was] never reduced to a more legible form for this [hearing]".

With respect to RPC 1.16(d), the testimony from respondent and Rockafellow was highly divergent. On the one hand, respondent testified that he had cooperated fully with Rockafellow, having given him at least two boxes of documents comprising "everything" he had; Lamont had taken the remainder of the file, over eighteen boxes in all, to New York. On the other hand, Rockafellow recalled receiving only a few documents related to the case. Absent further evidence on this issue, we are unable to conclude, to a clear and convincing degree, that respondent violated RPC 1.16(d).

We dismiss also the charge that respondent had charged an unreasonable fee to the estate. That issue was never explored below. No evidence was adduced at the hearing that respondent's fee was unreasonable.

Count three addressed the charges that respondent stipulated. RPC 1.7(a) essentially provides that a lawyer shall not represent a client if the representation will be directly adverse to another client, unless the lawyer reasonably believes that the representation will not adversely affect the relationship with the other client, and each client consents after a full disclosure of the circumstances and consultation with each client.

RPC 1.8(a), in turn, prohibits a lawyer from knowingly acquiring a security or other pecuniary interest adverse to a client, unless the transaction and terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client, in a manner the client can understand, and the client is advised, in writing, of the desirability of seeking the advice of independent legal counsel. The client must also give informed consent in writing.

RPC 1.8(b) proscribes a lawyer's use of information relating to the representation of a client, to the client's disadvantage, unless the client, after full disclosure and consultation, gives his informed consent.

Respondent stipulated that he violated the above rules in the Tabor Road transaction. He acquired a pecuniary interest in the collection of interest payments on the mortgage loan to

Bayer; he failed to disclose to Lamont, the estate representative, that he and his wife were "the true source of the funding for the sale of the property;" he also failed to advise Lamont of the desirability of seeking independent counsel; and he failed to obtain his client's written consent to the transaction. In short, respondent stipulated that his interests were in conflict with the interests of the estate. We agree. For instance, at any time before the completion of the transaction, respondent could have withdrawn his financing for any reason, thereby defeating the estate's interest in quickly accomplishing the uncomplicated disposal of a troublesome estate asset.

Respondent also stipulated that his non-disclosure to Lamont violated RPC 1.4, presumably (c) (failure to explain a matter to the extent reasonably necessary to permit client to make informed decisions regarding the representation).

We find, however, no factual support for the stipulated violation of RPC 1.8(b). Nothing in the stipulation details a possible use by respondent of information relating to the estate, to the detriment of the estate. We are, therefore, unable to make a finding in this regard.

As to RPC 1.15(a), we find no clear and convincing evidence that respondent failed to safekeep estate property. At most, the

record establishes that the Tabor Road transaction was a bungled one, with errors and ethics infractions committed by both attorneys involved. However, the record does not establish that the estate was financially injured. To the contrary, the property was apparently in "horrible" condition when Lamont unloaded it to Bayer, in late 2002. On this record, we are unable to find a violation of RPC 1.15(a).

Count four charged respondent with having violated RPC 8.4(a), by assisting or inducing Gore to take a false jurat. Gore, however, never implicated respondent in his decision to take the improper jurat. Nothing in the record demonstrates that respondent played a role in Gore's decision. Gore attributed his misconduct solely to having acted foolishly in his first real estate transaction. Although we harbor a suspicion that respondent was involved in this aspect of the transaction, we are compelled to dismiss the RPC 8.4(a) charge for lack of clear and convincing evidence.

We find, however, violations of RPC 8.4(c) in two respects. First, respondent misrepresented to Lamont and Bayer (and later to the world, upon the submission of the closing documents), that the jurat had been properly taken, when he knew that his father, Leon Boyer, had not signed the documents in Gore's presence. Second, respondent violated RPC 8.4(c) by his non-

disclosure to Bayer that he and his wife were the real funding source for the Paxwood loan. This latter misrepresentation was made by his silence, a violation of RPC 8.4(c). "In some situations, silence can be no less a misrepresentation than words." Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984).

Finally, the complaint sets out four additional instances of misrepresentation (to ethics authorities), which we dismiss for lack of clear and convincing evidence.

We now address the appropriate sanction for respondent's infractions.

Since 1994, it has been a well-established principle 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 for conflict of interest imposed on attorney who prepared, on behalf of buyers, real estate agreements that provided for the purchase of title insurance from a title company that he owned; notwithstanding the disclosure of his interest in the company to the buyers, the attorney did not advise buyers of the desirability of seeking, or give them the opportunity to seek, independent counsel, and did not obtain a

written waiver of the conflict of interest from them); and In re Poling, 184 N.J. 297 (2005) (reprimand imposed on attorney who engaged in conflict of interest when he prepared, on behalf of buyers, real estate agreements that pre-provided for the purchase of title insurance from a title company that he owned – a fact that he did not disclose to the buyers, in addition to his failure to disclose that title insurance could be purchased elsewhere).

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").

In addition to engaging in conflicts of interest, respondent made misrepresentations to several parties in this matter. He misrepresented to Lamont and Bayer (as well as to the world) that the jurat as to Leon Boyer was proper and did not disclose to Bayer that he and his wife were the funding source for the mortgage loan.

The Court has held that one single instance of misrepresentation to clients warrants a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). Since Kasdan, attorneys who make misrepresentations to clients have been reprimanded. See, e.g., In re Wiewiorka, 179 N.J. 225 (2004) (attorney did not inform the client about the status of the matter and the expiration of the statute of limitations, misled the client that a complaint had been filed, and took no action in the client's behalf); In re Onorevole, 170 N.J. 64 (2001) (attorney made misrepresentations about the status of a matter, grossly neglected and lacked diligence in the matter, and failed to reasonably communicate with the client; prior admonition and reprimand); In re Till, 167 N.J. 276 (2001) (attorney engaged in misrepresentations and gross neglect; for a nine-month period, the attorney lied to the client about the status of the case; no

prior discipline); and In re Riva, 157 N.J. 34 (1999) (attorney misrepresented the status of a case to the clients, grossly neglected a matter, thereby causing a default judgment to be entered against the clients, and failed to take steps to have the default vacated; no prior discipline).

Here, respondent engaged in a pattern of misrepresentation. For these repetitive infractions alone, discipline greater than a reprimand is justified. In addition, respondent has a prior admonition, for failure to set forth the rate or basis of his fee in writing.

For the totality of the circumstances, we determine that a three-month suspension, as recommended by the special master and agreed to by respondent, is the suitable sanction in this case.

Member Lolla did not participate.

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
William O'Shaughnessy, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

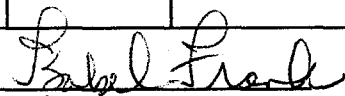
In the Matter of David W. Boyer
Docket No. DRB 07-209

Argued: November 15, 2007

Decided: December 20, 2007

Disposition: Three-month suspension

Members	Three-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
O'Shaughnessy	X				
Pashman	X				
Baugh	X				
Boylan	X				
Frost	X				
Lolla					X
Neuwirth	X				
Stanton	X				
Wissinger	X				
Total:	8				1

for 
Julianne K. DeCore
Chief Counsel