SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-211
District Docket Nos. XIV-03-094E and
XIV-03-095E

IN THE MATTER OF	
V. JAMES CASTIGLIA	
AN ATTORNEY AT LAW	

Decision

Argued: October 17, 2008

Decided: December 10, 2008

John McGill, III appeared on behalf of the Office of Attorney Ethics.

Pamela Lynn Brause appeared on behalf of respondent.

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

complaint alleged that, in a residential real estate closing in which respondent represented the buyer, he engaged in a conflict of interest, failed to safeguard funds, made misrepresentations in the closing statement and failed to explain the matter to the extent necessary for the client to make informed decisions about the representation. We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1977. On May 5, 1997, respondent received an admonition for failure to communicate with the client in an estate matter. In the Matter of V. James Castiglia, DRB 97-022 (May 5, 1997). On May 3, 1999, he was reprimanded for failing to communicate the basis or rate of his fee to clients, in writing, engaging in a conflict of interest, and improperly taking a jurat. In re Castiglia, 158 N.J. 145 (1999).

The complaint charged respondent with having violated RPC 1.4 (c) (failure to explain a matter to the extent reasonably necessary for the client to make informed decisions about the representation), RPC 1.7 (a) and (b) (conflict of interest), RPC 1.15(a) and (b) (failure to safeguard funds and failure to promptly deliver funds to which the client or a third party is entitled) and RPC 8.4(c) (misrepresentation).

On March 1, 2001, respondent represented Sally Casseus in the purchase of a Jersey City property from Mirielle Dyer. The purchase price was $120,000. Respondent was the only witness to the transaction to testify at the DEC hearing. He admitted, at the inception of the hearing, that he had violated the RPCs charged in the complaint.[1]

Respondent recalled receiving a telephone call from the lender, National City Mortgage ("NCM"), on February 21, 2001, about providing representation to the buyer in this transaction. Respondent had received real estate client referrals from NCM in the past.

According to respondent, Casseus was the first-floor tenant of the property owned by the seller, Dyer. Dyer, who was also Casseus' good friend, lived in an upstairs apartment. Respondent explained that

> Mrs. Dyer's house was in extreme disrepair. I'm talking about a situation where the cellar of the house was covered with dog feces and this was [in] really poor condition and she received numerous notices from the Housing Authority threatening to condemn the property and she was stuck

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[1] In addition, in a July 31, 2008 brief to us, respondent's counsel reiterated that respondent admitted the charged violations and sought only to address the appropriate level of discipline to be imposed.

> because she had no money and no income. As I understood it, she had made an agreement to sell the house to Mrs. Casseus, assuming Mrs. Casseus could qualify for a mortgage, and that out of the proceeds of the sale of the house they were going to take some money and make repairs necessary to bring the house up to code. So this was not exactly an arms length transaction between buyer and seller, that was my understanding of the transaction as it was related to me.
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> [T25-5 to 22.][2]

The closing, which took place on March 1, 2001, was respondent's fifth real estate closing in two days. He admitted that he had been somewhat inattentive to the details in the transaction and that, at several points, he should have terminated the closing.

Respondent recalled that Dyer had agreed to spend $60,000 of the sale proceeds for major repairs to the house, which were needed in order to obtain a certificate of occupancy. NCM selected Carl Tattoli, a general contractor, to perform the repairs. Tattoli had agreed to "front" the materials and labor to prepare the property for sale. He was to be paid at the closing, out of the proceeds of sale.

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[2] "T" refers to the transcript of the October 23, 2007 DEC hearing.

Respondent had a prior relationship with Tattoli. For about a year prior to this closing, NCM had referred to respondent other transactions involving Tattoli as the general contractor for property repairs. In fact, respondent had held funds in his trust account for Tattoli's repairs and had disbursed them to Tattoli in those other matters.

Respondent readily admitted, at the DEC hearing, that he had not disclosed his working relationship with Tattoli to Casseus. Respondent did not verify the completion of the repairs, prior to the closing. He did, however, orally confirm with Casseus and Tattoli that the repairs had been completed. Respondent did not obtain a certificate of occupancy from the seller or the contractor. He candidly admitted that his prior satisfactory dealings with Tattoli had clouded his judgment: "I think in my own mind [I] relied on my previous course of business with Mr. Tattoli and the fact that I hadn't previously heard a complaint about his work from anybody."

Respondent also admitted that he had not adequately advised Casseus of all of her rights under the contract. For instance, he did not advise her about the three-day attorney review period to which she was entitled. He did not conduct "the same kind of back and forth interaction [in explaining the contract] I would

have had – if I was doing a contract under the initial three-day attorney review period." He admitted that, for these reasons, he had violated RPC 1.4(c).

Respondent also required Casseus to sign an indemnification agreement at the closing. Despite Casseus and Tattoli's assurances that the repairs had been completed, respondent wanted to "get her to acknowledge that the repairs had been done to her satisfaction." According to respondent, the agreement also stated that

> she indemnifies me and holds me harmless and won't come back . . . and complain to me about any of the problems that may have happened with those repairs and that was a conflict of interest because I don't think I took any time to adequately explain and also the indemnification and hold harmless part. I mean, I suppose you can say that was to cover my rear end.
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> [T30-1 to 10.]

Respondent conceded that his representation of Casseus was materially limited by his relationship with Tattoli, and by his own personal interest in requiring the indemnification agreement, a violation of RPC 1.7(a)(2).

Respondent prepared two RESPA statements for the transaction. The first one failed to reference the $60,000 repair credit. Respondent claimed that he had not included that

figure initially because he did not know the cost of repairs before the closing. He recalled preparing a second RESPA statement for NCM, post-closing, which included the $60,000 repair credit. He testified that he was hiding nothing from NCM, which was fully aware of the repairs and also had arranged for Tattoli's involvement. Additionally, the repairs had been discussed between respondent and NCM's mortgage officer prior to the closing.

Respondent agreed, however, that his first RESPA statement was misleading, to the extent that it did not "disclose all the information" that would have made it "completely accurate". He acknowledged that, in hindsight, he should have "stopped the closing" and obtained "something in writing from NCM telling me how they wanted me to handle the repair credit, either put it on the HUD or don't put it on the HUD." He added that he "wasn't paying close enough attention to realize – everyone wanted to close, I should have stopped it, I didn't." Respondent admitted that the initial RESPA misrepresented the true use of the repair credit, a violation of RPC 8.4(c).

At the closing, respondent accepted uncertified funds from Casseus. Although Casseus was required to provide certified funds in the amount of $17,003.36, she arrived at the closing

with her personal checkbook. Because Casseus' mortgage commitment would expire in two days, the parties wanted the closing to proceed. Therefore, Tattoli agreed to accept her personal check for $17,003.36 of his $60,000 repair charge. Tattoli received the remainder of the funds from the sale proceeds.

Respondent was asked if he had verified Casseus' payment to Tattoli. He conceded that had not asked to see the check before it had been given to Tattoli, but noted that Tattoli had accepted it. Respondent apologized for accepting the uncertified funds. He stated, "in retrospect it's a huge problem on that day I was sloppy and inattentive and, no, obviously these things did not occur to me on that day or I should have stopped the closing."

To quell any suggestion that Tattoli may have filed a mechanic's lien on the property for any outstanding balance, respondent provided a certification from Tattoli, who was not called to testify. In his certification, Tattoli stated that the repair contract called for $60,000 in repairs to the property, that he had purchased the materials, and that he had hired a subcontractor to complete the work. The certification made no reference to an outstanding balance due. Respondent recalled

having spoken with Tattoli after the ethics investigation was underway. Tattoli had no recollection that Casseus owed him anything for the repairs.

OAE investigator G. Nicholas Hall testified that the OAE became involved in the case after Dyer gave a real estate agent, Christine Miller, a large portion of the proceeds of the Casseus sale as a deposit on a new house. Miller apparently stole the funds. Dyer had suspected that respondent was somehow involved, but the OAE investigation revealed that there was no connection between respondent and Miller. The conduct giving rise to the within charges was, however, uncovered.

The DEC found respondent guilty of having violated RPC 1.15(a) and (b), RPC 1.4(c), RPC 1.7(a) and (b), and RPC 8.4(c).

The DEC erroneously found violations of RPC 1.1(a) and (b), believing that references in the complaint to RPC 1.15 (a) and (b) were typographical errors because "such Rules of Professional Conduct do not exist." When the OAE dispelled that notion, the DEC amended the report, finding that respondent had violated RPC 1.15(a) and (b) for his failure to safeguard the repair funds. The DEC then dismissed the RPC 1.1(a) and (b) findings. The DEC also found that respondent violated RPC 1.3

(lack of diligence), although the complaint did not charge respondent with having violated that rule.

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.

Admittedly, respondent mishandled this simple real estate transaction. Fortunately, no one was harmed by his conduct. In fact, the matter came to light only because of an unrelated claim that some of the sale proceeds had been stolen.

The DEC found lack of diligence because respondent failed to confirm that Tattoli had completed the required house repairs, failed to obtain an invoice detailing the work performed, and failed to obtain a certificate of occupancy for his client.

We are unable to agree with the DEC in some respects. For instance, as to the repairs, respondent confirmed with both Tattoli and his client that they had been completed. Ordinarily, it is not the buyer's attorney that conducts a pre-closing inspection, but, rather, the buyer. After the final "walk-through," the buyer then reports any problems to the attorney.

Here, respondent asked Casseus if the repairs had been made and she informed him that they had.

Similarly, with regard to Tattoli's invoice, there is no evidence in the record that the parties had placed an additional duty on respondent, beyond oral confirmation, to obtain an invoice from Tattoli.

On the other hand, respondent may have lacked diligence by his failure to obtain a certificate of occupancy from the seller or the contractor before the closing. The certificate of occupancy was critical to his client's interest in taking title to the house in marketable condition.

We are aware that the complaint did not charge respondent with having violated RPC 1.3. R. 1:20-4(b) requires an ethics complaint to specify the rules alleged to have been violated. Here, however, both at the DEC hearing and in his brief to us, respondent admitted having lacked diligence. Under these circumstances, due process considerations do not preclude a finding of a violation of RPC 1.3.

Respondent also conceded that he did not adequately advise Casseus about important aspects of the representation. He failed, for instance, to explain the real estate contract to

Casseus. Likewise, he did not alert her to his numerous dealings with Tattoli. His failings in this regard violated RPC 1.4(c).

Respondent also engaged in a conflict of interest situation. RPC 1.7(a)(2) and (b) state, in relevant part, that "an attorney shall not represent a client if . . . there is a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer," unless the client consents, in writing, after full disclosure and consultation.

Respondent conceded that his judgment was clouded by his prior dealings with Tattoli and that the representation of Casseus was materially limited by that relationship. In addition, he had Casseus sign an indemnification agreement designed to hold him harmless, in the event that Casseus had a complaint about Tattoli's work. Respondent took no steps to explain the document or to obtain Casseus' consent to waive the conflict.

Although the contract of sale did not require respondent to obtain documentation that the repairs had been completed, respondent believed that he had failed to safeguard Casseus' funds (RPC 1.15(a) and (b)) by settling title without an invoice

from Tattoli, and only on Casseus and Tattoli's representations that the repairs had been completed. It is unclear why respondent conceded having violated that rule. Although it may have been desirable to have an invoice from Tattoli, time was short. In addition, there was no requirement that respondent obtain one for the purposes of settling title. We, therefore, dismiss those charges.

With regard to RPC 8.4(c), the first RESPA statement did not reflect that the seller had not received the entire $120,000 purchase price. The RESPA lacked the $60,000 repair credit. Had the seller paid Tattoli for the repairs outside of settlement, the RESPA would have been accurate without such a reference. Because, however, Tattoli was paid directly from the settlement funds — largely from the mortgage proceeds — the document should have contained a reference to it. The reduction in the amount due to the seller (line 520 of the RESPA) should have read $61,936.99 ($1,936.99 for municipal taxes and sewer charges plus the $60,000 repair credit), not simply $1,936.99. Respondent's failure to reflect this information was inaccurate. However, it was not material to the parties, all of whom were aware of the repairs. So, too, respondent ultimately prepared a second RESPA containing the repair credit. We find that respondent's initial

RESPA, while inaccurate, did not mislead anyone. We therefore dismissed this aspect of the RPC 8.4(c) charges against respondent.

The buyer was also required to bring $17,003.36 in "certified" funds to the closing, as reflected on line 303 of the RESPA. Tattoli, however, agreed to waive the requirement by accepting Casseus' personal check. Thus, although a technical violation of the rule occurred, no one was misled by this aspect of the transaction, nor were funds at risk. Thus, we dismiss the RPC 8.4(c) charge in this regard.

In all, respondent violated RPC 1.3, RPC 1.4(c) and RPC 1.7(a)(2) and (b).

Cases involving conflict of interest, absent egregious circumstances or serious economic injury to the clients, ordinarily result in a reprimand. In re Guidone, 139 N.J. 272, 277 (1994), and In re Berkowitz, 136 N.J. 134, 148 (1994). But see In the Matter of Anton Muschal, DRB 99-381 (February 4, 2000) (admonition for attorney who represented a client in the incorporation of a business and the renewal of a liquor license and then filed a lawsuit against the former client on behalf of another client).

At times, a reprimand may still result if, in addition to engaging in a conflict of interest, the attorney displays other forms of unethical behavior that are not considered serious enough to merit a suspension. See, e.g., In re Barone, 180 N.J. 518 (2004) (reprimand for attorney who engaged in conflicts of interest on two occasions by simultaneously representing driver and passenger in automobile matters; after filing the complaints, the attorney allowed them to be dismissed and took no further steps to have them reinstated; the attorney was found guilty of gross neglect, lack of diligence, and failure to communicate with clients); and In re Kraft, 167 N.J. 615 (2001) (reprimand for attorney whose unethical conduct encompassed four matters; in one matter, he was found guilty of a conflict of interest by failing to explain to the client the advantages or disadvantages of pursuing her case jointly or independently of the client's co-worker, who was also represented by the attorney; in another matter, the attorney failed to clearly explain to the client his legal strategy, thereby precluding her from making an informed decision about the course of the representation and the pursuit of her claims; in all four matters, the attorney exhibited lack of diligence and failure to

communicate with clients; and, in one of the matters, the attorney failed to prepare a written fee agreement).

In aggravation, respondent has prior discipline, including a 1997 admonition and in 1999, a reprimand for similar misconduct. There, on a motion for discipline by consent, respondent received a reprimand for engaging in a conflict of interest by simultaneously representing various parties with adverse interests, repeatedly failing to communicate to his clients, in writing, the basis or rate of his legal fee, and witnessing the signature on a deed and affidavit of title, even though the documents had been signed outside of his presence. In re Castiglia, 158 N.J. 145 (1999).

In mitigation, no parties suffered as a result of respondent's actions, and, according to respondent's counsel, he has taken remedial action, including several real estate and ethics courses, to prevent any future occurrences.

As seen in the above cases, a reprimand is the starting point for misconduct such as this. Respondent was reprimanded in 1999 for similar misconduct. However, we consider the length of time (eight years) since the prior misconduct to be an additional mitigating factor. We determine, thus, that a

reprimand is the appropriate sanction for this respondent. Member Doremus 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
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 James Castiglia
Docket No. DRB 08-211

Argued: October 17, 2008

Decided: December 10, 2008

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Boylan			X			
Clark			X			
Doremus						X
Lolla			X			
Stanton			X			
Wissinger			X			
Total:			8			1

Julianne K. DeCore
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Chief Counsel