SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-402
District Docket No. XIV-02-245E

IN THE MATTER OF

NICHOLAS J. TURCO

AN ATTORNEY AT LAW

Decision

Argued: April 17, 2008

Decided: June 10, 2008

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

Robert J. DeGroot 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 reprimand filed by the District VA Ethics Committee (DEC), based on its finding that respondent had engaged in a conflict of interest by recommending to an individual client that she invest

in a corporation that also was his client and then representing both parties in the loan transaction.

The Office of Attorney Ethics (OAE) sought a six-month suspension for respondent, whereas respondent requested that we impose a reprimand, as recommended by the DEC. We determine to censure respondent, conditioned on his payment of $20,000 to his individual client's estate.

Respondent was admitted to the New Jersey bar in 1972 and to the New York bar in 1981. At the relevant times, he maintained an office for the practice of law in Newark.

In 1988, respondent received a "severe private reprimand" for entering into a business transaction with a client, without having made a written disclosure to him of the terms of the transaction and the possibility of a serious conflict of interest, and without having obtained the client's written consent to the waiver of his right to seek the advice of independent counsel.

In a one-count complaint, the OAE charged respondent with violating RPC 1.1(a) (gross neglect), former RPC 1.4(b) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), and RPC 1.7(a) and (b) (conflict of interest

based on lawyer's representation of two clients whose interests are adverse; conflict of interest based on lawyer's representation of a client that may be materially limited by the lawyer's responsibilities to another client, a third person, or the lawyer's own interests). The charges stemmed from respondent's investment advice to his now-deceased client, Jane Woznik Lamb (Lamb), and his dual representation of Lamb and a corporate client in a loan transaction.

In May 2007, the parties entered into a stipulation of facts in this matter. In June 2007, the DEC heard the testimony of respondent and the lawyer who represented him in the malpractice suit instituted by Lamb as a result of the investment.

Respondent testified that he and Robert Lamb (Robert) met in 1970, when they clerked together in the prosecutor's office. They became friends and remained so until Robert's death, in 1991.

After the Lambs married in the 1970s, respondent socialized with them "a lot." In 1986, the Lambs stayed with respondent and his wife at their Key Largo condominium. Upon respondent's recommendation, they bought a unit in the same complex. Respondent did not represent the Lambs in that transaction.

The couples grew closer between 1986 and Robert's death. After Robert passed away, respondent and his wife spent "a fair amount of time" with Lamb, providing her with "emotional and moral support," and even coordinating their Florida vacations. During this time, respondent and Lamb also discussed investments.

In July 1992, respondent "made various financial suggestions to Lamb," which resulted in her investment in three separate entities, known as Jaman Development Corporation (Jaman), American Home Medical Services (AHMS), and B.R.O. Realty (B.R.O.). At the time of the investments, no attorney-client relationship existed between Lamb and respondent. Nevertheless, he "advised Lamb in writing of the terms and conditions of each investment."

In February 1995, the B.R.O. investment resulted in Lamb's receipt of $52,037.98, which was deposited into respondent's trust account on March 2, 1995. On April 4 and April 21, 1995, respondent disbursed from these proceeds $10,000 to "World Club," as an investment loan from Lamb to the company.

World Club Ltd. (World Club) was a New York company, incorporated on January 30, 1995. It was organized for the purpose of leasing rooms at Manhattan's Best Western Woodward

Hotel (Woodward Hotel), "for sale at a reduced rate and/or the sale of timeshares to its customers."

Jack Halperin was World Club's principal officer and sole equity owner. Respondent described him as "a pretty big player," who owned a substantial amount of New York real estate and, in respondent's opinion, could take World Club "to the next level."

Respondent testified that Halperin had invested his own money in World Club. In addition, respondent understood from Halperin that some Israeli investors were going to infuse more than one million dollars into the project.

Respondent was not a World Club officer and did not own any stock in that company. He was World Club's attorney. He incorporated World Club, co-signed its money market and checking accounts, and "held a titled position as registered agent." He had represented Halperin previously.

Respondent played no part in World Club's day-to-day business activities. He did not participate in the ongoing negotiations with the Woodward Hotel. On occasion, he went to World Club's office to "monitor the account as best [sic] if I was needed to do that and that was basically it." Respondent monitored "primarily the financial status of the loans," but did

not have much to do in this regard because "the finances never hit."

The only money respondent received from World Club was reimbursement for the costs of incorporation, which he had advanced to the organization. He did not hold a pecuniary interest in World Club; he had no compensation or retainer agreement with World Club; he never sent a bill to World Club for his legal services, and he did not contemplate sending a bill. He did not record his time when he rendered services to World Club. Instead, he trusted Halperin and, in reliance on their personal relationship, expected that he would be compensated eventually for past and future legal services.

After World Club's incorporation in January 1995, it began "looking for investors," in addition to the Israelis. Presumably, at some point between March 2 and April 4, 1995, respondent approached Lamb about investing in the company.

When respondent discussed the investment with Lamb, he knew that World Club had not raised sufficient funds to perfect its lease with the Woodward Hotel and that Lamb's money was intended to be used to cover World Club's operating costs and expenses "until the bigger financing came in" and "hopefully to make her a profit." Respondent was not told that World Club would fail

immediately unless $10,000 to $20,000 was infused into the company.[1]

Respondent informed Lamb that he represented World Club, outlined the company's basic operations, and expressed the opinion that it "was a very good concept." He told Lamb that, while the investment was speculative, World Club "had great investment potential, inasmuch as its marketing concept was 'the wave of the future.'"

World Club had published a document titled "Commonly Asked Questions About World Clubs," which explained things such as the cost of the program and how the program worked. Respondent did not show that document to Lamb. Instead, he testified, he conveyed its contents to her orally.

Respondent explained to Lamb that Halperin had invested in World Club and was getting large sums of money from Israeli investors and others to secure the lease. He informed Lamb

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[1] According to the lease agreement, the first payment was due on March 1, 1995. The amount of the payment is not identified in the agreement. According to Woodward Hotel's June 28, 1995 letter canceling the agreement, World Club never made the payment.

that, initially, she would "get a high rate of return on her money and then stock options, et cetera."

Respondent proposed that Lamb's money be used as an investment loan to World Club at an undetermined interest rate, with the future option of Lamb's converting the loan into an undetermined equity position in the company. When Lamb's money was invested in World Club, respondent hoped that, once the money was received from the Israeli investors, "a note, stock option, stock ownership plan" would be put into place for her.

Respondent also stipulated that, at the time of the investment, he represented both World Club and Lamb. Respondent did not consider the dual representation a conflict of interest and, in fact, he "did not give it that much concern."

Respondent stipulated that he failed to disclose to Lamb his current representation of World Club and his prior representation of Halperin. At the DEC hearing, however, respondent testified that World Club was aware of his prior professional relationship with Lamb and that Lamb was aware that he was the attorney for World Club. Respondent clarified the discrepancy between the stipulation and his testimony, by stating that the stipulation referred to a written disclosure.

He testified that, although he did not inform Lamb of the representation in writing, he did so orally.

Respondent failed to obtain the written consent of both Lamb and Halperin to his dual representation in the Lamb/World Club loan transaction. He also failed to advise Lamb and World Club of the desirability of seeking the advice of independent counsel regarding the loan transaction.

With respect to the transaction itself, respondent failed to provide Lamb with any written documentation describing World Club, its financial health, the risks associated with the loan, and the terms and conditions of the loan. After respondent outlined the investment to Lamb, he answered her questions about the investment loan. He then asked her if she wanted to invest in World Club. Lamb agreed to a $10,000 loan. When Halperin communicated to respondent the need for an additional $10,000 "to try to hold the business together," respondent asked Lamb if she was interested in contributing additional funds. She replied that she was.

Respondent claimed that he "made the investments at Lamb's request and direction." Although respondent failed to obtain Lamb's written authorization for the World Club loan, he

contended that she had given him oral authorization to proceed with the transaction.

Respondent did not secure the loan. When he discussed the investment with Lamb, he contemplated that she would receive documentation, such as promissory notes or stock options – "whatever I could negotiate for her to the best extent to get her the best return of her money to be issued by World Club." Respondent knew that he had an obligation to secure Lamb's interest in the investment. He raised that issue with Halperin. Halperin told him to wait until the infusion of capital was made so that it could all be done at the same time and under one package. Lamb's only security was her reliance on respondent's "advice to her that there was a potential investment and our relationship was such that that was sufficient for her." Respondent added that the terms of the advancement of Lamb's money had not been decided, but merely "discussed," that the interest rate that she would receive was undetermined because "there were other considerations," and that the future option of converting the loan into a specific equity position also was "undetermined."

Ultimately, neither respondent nor World Club provided Lamb with a signed promissory note for the loans. Respondent

obtained no written document that secured her $20,000 investment. He noted, however, that the document would have been "an empty piece of paper." He did not discuss a personal guaranty with Halperin.

The infusion of capital from the Israelis never occurred. On June 28, 1995, just two months after Lamb's investment, the Woodward Hotel canceled its agreement with World Club, due to its "failure to fully comply with the financial terms necessary to secure the lease." World Club then ceased to function.

According to respondent, he informed Lamb of World Club's collapse. She was understanding. Respondent also told her that he "felt bad" that she had lost her money on the World Club investment and orally promised her that he "would see she got her money back." In addition, respondent reminded Lamb that her other investments, such as the condo, Jaman, and AHMS, were doing well. Respondent received no compensation as a result of Lamb's investment in World Club.

On April 7, 1998, Halperin died. On September 23, 1998, World Club was dissolved by proclamation.

Respondent took no action to recover Lamb's funds from World Club. In 1999, Lamb sued him for legal malpractice, but voluntarily dismissed that action in 2001. Respondent and his

attorney in the civil action testified that, during its pendency, Lamb rejected a $20,000 settlement offer. Nevertheless, respondent and the OAE stipulated that, up through the execution of the stipulation, in May 2007, respondent never followed through on his promise to repay Lamb because, during that time, he was not financially able to do so.

Lamb died on November 2, 2005. In May 2007, respondent's counsel deposited $20,000 into his trust account, which he was "authorized to pay to the Estate of Jane Lamb to cover her losses on the 'World Club' transaction."

Attorney Robert J. McKenna represented respondent in the lawsuit instituted against him by Lamb. McKenna testified that, pursuant to respondent's authorization and instructions, he offered the $20,000 to Lamb "throughout the litigation," but it was never accepted.

Fifteen witnesses submitted letters to the DEC, attesting to respondent's qualities as a friend and a lawyer.

The DEC found that respondent had violated RPC 1.7(a) and RPC 1.7(b). At the time of Lamb's investment, respondent represented her and World Club. Not only were the clients' interests adverse, but respondent's expectation of compensation from World Club's future success "created a manifest risk that

his representation of Lamb would be materially limited in terms of the loan transaction." Accordingly, the DEC determined, respondent violated RPC 1.7(a).

The DEC also found that respondent violated RPC 1.7(b), inasmuch as he failed to confirm his dual representation, in writing, with Lamb and World Club. He also failed to reduce to writing his clients' oral consent to the dual representation, as required by the rule.

The DEC found no violation of RPC 1.1(a) or RPC 1.4(b). It noted that, although respondent "exhibited lapses of professional judgment with respect to Lamb's investment" by failing to take "steps to better protect Lamb's investment," this did not rise to the level of gross neglect. Moreover, respondent's failure to take steps to secure the investment until after it had been made was, according to the DEC, "belated and ill-considered," but not grossly negligent.

With respect to RPC 1.4(b), the DEC accepted respondent's uncontroverted testimony that he had explained the investment to Lamb, including its risks, and that he had invested Lamb's funds with her informed consent. The DEC observed that respondent had advised Lamb "over a significant period of time on a variety of investments." Moreover, while his and Lamb's friendship "len[t]

itself to a less formal way of dealing," that relationship "did not compel the conclusion that Respondent failed to explain to Lamb the World Club investment to the extent reasonably necessary."

In determining the appropriate measure of discipline for respondent's conflict of interest, the DEC noted that, ordinarily, a reprimand is imposed, absent "egregious circumstances or serious economic injury to clients." According to the DEC, egregious circumstances did not exist in this case. In addition, there was no serious economic injury to Lamb, given respondent's "good-faith restitution efforts" and Lamb's and her estate's "refusal to accept repayment sooner."

Finally, the DEC noted, in mitigation, that twelve years had lapsed since the incident; that respondent has attempted to repay the $20,00 and that he has a "demonstrated record of serving his clients and the legal profession well, as attested to by friends, colleagues, and clients." The DEC recommended the imposition of a reprimand for respondent's misconduct.

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

The DEC correctly concluded that respondent had engaged in a conflict of interest with respect to the World Club investment. At the time of respondent's alleged misconduct, RPC 1.7(a) and (b) provided, in pertinent part:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless:
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> (1) the lawyer reasonably believes that representation will not adversely affect the relationship with the other client; and
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> (2) each client consents after a full disclosure of the circumstances and consultation with the client. . . .
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after a full disclosure of the circumstances and consultation with the client. . . . When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

In this case, respondent violated both rules. See, e.g., In re Caswell, 157 N.J. 623 (1999). There, the attorney recommended that his client, Carolyn Johnson, invest in his corporate client, Environ Water Management, in the form of a loan to the corporation. In re Caswell, DRB 98-297 (December 11, 1998) (slip op. at 3). However, that attorney failed to disclose that the corporation was his client. Id. at 4. He failed to advise Johnson to consult with independent counsel about the loan, id. at 6, failed to advise her that the company was in poor financial condition, id. at 4, and failed to secure Johnson's loan until after it was made, although he was aware of Environ's precarious financial condition. Id. at 8.

At the time of the attorney's recommendation to Johnson, Environ was not in a financial position to pay him for his legal services. Id. at 3. Instead, Environ had promised to compensate the attorney in the future. Ibid. The attorney also knew that his corporate client required funds immediately in order to "keep its doors open." Ibid. Due to its poor financial condition, Environ neither paid Johnson the agreed-upon interest on the loan or returned the principal. Id. at 5.

We concluded that the attorney's conduct had violated RPC 1.7(a) and (b). Id. at 8-9. In so ruling, we observed that

Johnson had believed that the attorney was her lawyer, that the attorney put Environ's interests above Johnson's, that the promissory noted favored Environ because Johnson had not been apprised of Environ's poor financial condition, and that the attorney had failed to have each client's consent after full disclosure. Id. at 8. In addition, the attorney failed to secure Johnson's loan until after the investment had been made, which caused her "considerable financial harm." Id. at 8-9.

Finally, the attorney violated RPC 1.7(b) inasmuch as he had "compromised Johnson's interests by putting Environ's interests above hers, as well as his own, because the attorney was slated to be paid for his work for Environ in company stock." Id. at 9. The attorney received a six-month suspension. Id. at 12.

Like the attorney in Caswell, respondent violated RPC 1.7(a) and RPC 1.7(b) in his simultaneous representation of Lamb and World Club in the loan transaction. He did not advise either Lamb or World Club to seek independent counsel as a result of the dual representation, and he did not obtain the written consent to the representation of either World Club or Lamb. Moreover, respondent knew that World Club was having financial problems at the time, but he did not disclose these

problems to Lamb. Finally, he took no steps to protect Lamb's interests with respect to the loan.

Even before respondent became Lamb's attorney in the loan transaction, he failed in his duties to her. Respondent had been friends with Lamb and her husband for years. He provided her with care and emotional support following Robert's death. She almost certainly relied on respondent to look out for her interests in suggesting investments to her. It matters not, thus, that, in the beginning of the transaction, there was no attorney-client relationship between them. See, e.g., In re Gold, 149 N.J. 23 (1997) (in the absence of a formal attorney-client relationship, conflict of interest rules applied when it was reasonable for the putative clients "to assume that [the attorney] was representing their interests;" the wife of the putative clients was the attorney's secretary; six-month suspension for this and other misconduct); In re Chester, 127 N.J. 319 (1992) (secretary, though not strictly a client, had reason to rely on her attorney-employer in representing her interests in a connection with loan that, upon the attorney's solicitation, she agreed to make to one of his clients; (public) reprimand for this and other misconduct). Therefore, we find that respondent breached his fiduciary obligations to Lamb both

before and after she became his client for the purpose of this transaction.

Whether because of his self-dealing or his incompetence, respondent also violated RPC 1.1(a) and RPC 1.4(b). The former proscribes gross negligence in the handling of a matter entrusted to a lawyer. The latter requires a lawyer to explain a matter to the client "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Here, respondent's failure to secure Lamb's loan was grossly negligent. Moreover, his failure to apprise her of his financial interest in World Club and to disclose its precarious financial condition constituted a violation of RPC 1.4(b). See, e.g., Caswell, supra, slip op. at 11. Despite respondent's claim that he had nothing to do with the day-to-day operations of World Club, he admittedly monitored its finances, and, therefore, was in a position to know that, at the time he solicited Lamb's investment, World Club had missed, or was about to miss, its first payment under the lease agreement. He also knew that World Club needed cash to cover its operating costs and expenses.

Parenthetically, we note that, although respondent's failure to disclose these circumstances to Lamb raises the

specter of dishonesty and deceit, respondent was not charged with such improprieties. Nevertheless, in assessing the appropriate measure of discipline for respondent's misconduct, we may consider his dishonesty as an aggravating factor.

As the DEC recognized, "in cases involving a conflict of interest, absent egregious circumstances or serious economic injury to the clients involved, a public reprimand constitutes appropriate discipline." In re Berkowitz, 136 N.J. 134, 148 (1994). Accord In re Olivo, 189 N.J. 304 (2007); In re Mott, 186 N.J. 367 (2006); In re Poling, 184 N.J. 297 (2005); In re Schnepper, 158 N.J. 22 (1999); In re Kessler, 152 N.J. 488 (1998). But see In the Matter of Anton Muschal, DRB 99-381 (February 4, 2000) (admonition imposed on attorney who represented a client in the incorporation of a business and renewal of a liquor license and then filed a suit against her on behalf of another client) and In the Matter of Jeffrey E. Jenkins, DRB 97-384 (December 2, 1997) (admonition for attorney who engaged in a concurrent non-litigation conflict of interest by continuing to represent husband and wife in a bankruptcy matter after the parties had developed marital problems and had retained their own matrimonial lawyers).

Although this case is factually similar to Caswell, the aggravating factors here do not warrant a six-month suspension. In Caswell, the attorney's client was in a "dire financial condition" at the time of the investment, which was not the case with Lamb. There was no evidence that she was on the verge of destitution when she made the loan to World Club. Moreover, Caswell had affirmatively misrepresented to the client that money would be forthcoming. In this case, there is no evidence that respondent lied to Lamb and told her that she would actually receive a return on her investment. Nevertheless, the facts in this case do not justify the imposition of a reprimand for respondent's conflict of interest.

With respect to the Berkowitz test, although there was some economic injury to Lamb, it was not serious. Certainly, Lamb lost $20,000 when World Club collapsed. However, unlike the client in Caswell, the record in this case contains no suggestion that Lamb had any financial problems at the time she gave the money to World Club. Although respondent did not keep his promise to repay Lamb the $20,000, prompting her to file a lawsuit against him, Lamb refused his offer of settlement and, ultimately, dismissed the action. Presently, respondent's counsel in this matter holds $20,000 in his trust account, which

respondent is willing to pay immediately to Lamb's estate, although there has been no offer to compensate the estate for the loss of interest on the monies. When considered as a whole, these facts demonstrate that Lamb certainly suffered economic injury, but the facts do not demonstrate that the injury was serious.

The facts do suggest, however, that the circumstances surrounding the loan transaction were egregious. Respondent's testimony that he provided Lamb with emotional support, following her husband's death, suggests that she was vulnerable when he approached her about the loan transaction. Moreover, respondent acted out of self-interest. He stood to benefit financially from his relationship with World Club, but only if it remained a viable entity. At the time of Lamb's investment, World Club had missed the first payment due under its lease with the Woodward Hotel. Respondent knew that the company needed money to cover its operating costs and expenses. Yet, he failed to disclose these facts to Lamb, when he recommended the investment to her. He then failed to protect her investment in any way.

When considered together, Lamb's vulnerability, respondent's knowledge of World Club's financial instability,

his self-interest, and his failure to protect Lamb's investment in any way amount to egregious circumstances that would justify the imposition of a censure for his misconduct. There is, however, respondent's disciplinary history to consider as well.

In 1988, respondent was disciplined for entering into a business transaction with a client without having made a written disclosure to him of the terms of the transaction and of the possibility of a serious conflict of interest, and without having obtained the client's written consent to the waiver of his right to seek the advice of independent counsel. Respondent made the same omissions in his representation of Lamb. He should have known better. His failure, once again, to make a written disclosure of the terms of the transaction and to advise his client of the right to seek the advice of independent counsel or obtain a written waiver of that right shows that he failed to learn from his prior mistake. Nevertheless, we balance this aggravating factor with two considerations.

First, at least nine years have passed between the conduct that led to respondent's 1988 reprimand and his conduct in this matter. Second, for some time now, respondent's counsel informs us, respondent has made numerous efforts to return the $20,000 either to Lamb or to her estate, without success. In fact,

respondent's attorney presently holds the monies in his attorney trust account.

In light of these two factors, we believe that a censure is sufficient discipline for respondent's misconduct in this matter. This measure of discipline is conditioned on respondent's payment of the funds to the proper parties. Within sixty days, he must either prove that he has complied with this requirement or explain why he has not done so.

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 Nicholas J. Turco
Docket No. DRB 07-402

Argued: April 17, 2008

Decided: June 10, 2008

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Boylan			X			
Doremus						X
Lolla			X			
Stanton			X			
Wissinger			X			
Total:			7			1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel