SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-233
District Docket Nos. XIV-01-366E
and VI-05-901E

IN THE MATTER OF	:
MICHAEL KAZER	:
AN ATTORNEY AT LAW	:

Decision

Argued: November 16, 2006

Decided: December 21, 2006

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

Melvyn Bergstein 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 VI Ethics Committee ("DEC"). The complaint charged respondent with violating RPC 1.8(a) (conflict of interest; improper business transaction with a client), RPC 1.8(e) (improperly providing financial assistance to a client in

connection with pending or contemplated litigation), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). These charges issued because respondent loaned funds to clients before the settlement of their personal injury cases. We determine that a reprimand is appropriate discipline.

Respondent was admitted to the New Jersey bar in 1976. He testified that he was also admitted to practice in New York, but is no longer "active" there. At the relevant time, he maintained a law office in Jersey City, New Jersey. He has no history of discipline.

Respondent admitted violating RPC 1.8(a) and RPC 1.8(e), but denied violating RPC 8.4(c). The factual basis for respondent's misconduct is set out in the complaint, in respondent's admissions, a joint stipulation of facts, and in testimony that focused on the charged violation of RPC 8.4(c).

Respondent began practicing law in Jersey City, as an associate in several different law firms, before opening a solo practice in 1980. He was also a part-time public defender in the Jersey City municipal court. His practice of law concentrates on personal injury and workers' compensation matters. His clients, generally from the neighborhood in which he practices, are mostly of "low economic means." Respondent stated that it is not unusual for him to represent generations of the same family.

On April 16, 2002, respondent became the subject of a demand audit by the Office of Attorney Ethics (OAE), after a grievance alleged that he had improperly loaned money to some of his clients in pending personal injury or other legal matters. The loans were to be repaid from funds obtained through a settlement or verdict. According to the parties' stipulation,

> [a]t the demand audit, respondent . . . stated that, at the time he made the loans to his clients, he did know that there were prohibitions against him lending money to his clients, although he thought there was latitude when the loan is close to settlement or in contemplation of settlement. He believed, however that such loans were frowned upon.
>
> [JS2¶1.][1]

The loan transactions at issue (Ex. C1) took place between 1992 to 2001. Respondent, however, admitted making loans to clients from the 1980s to the date of the DEC hearing.

Respondent testified that the clients who sought loans from him were desperate for funds to, among other things, stave off eviction, pay Christmas expenses, care for a sick relative, or pay funeral costs. Prior to making the loans, respondent would assess the legitimacy of his clients' needs. In many cases, he was very familiar with the clients because he either had developed a friendship with them or knew their relatives.

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[1] JS refers to Joint Stipulation Amending Pleadings, dated September 13, 2005.

In some instances, the clients were so desperate for funds that, if respondent did not lend them money, they wanted him to settle the case for less than it was worth. Respondent maintained that he would never take advantage of a client; that a case would have to have enough value so the loan would not become an impediment at the time of settlement; that he was never placed in an adversarial relationship with a client because of an unpaid loan; and that he never charged the clients for the loans, but for two instances (he collected the interest from one matter only, and then only in the amount of $20).

Respondent admitted that he did not advise his clients to obtain legal advice about the loans, explaining that he did not perceive their relationship as adversarial. In his view, he was not taking advantage of his clients or violating the ethics rules because, he said, with the exception of the client to whom he charged $20 in 1992, he did not charge interest or require collateral for the loans. He admitted that he did not review the ethics rules, and could not point to any New Jersey law that permitted such loans.

A more detailed explanation of respondent's loan practice is contained in a July 13, 2001 letter to the Honorable Charles Villanueva, J.A.D., submitted in a matter involving respondent's "financial transactions" with fourteen clients:

> When a client first asks for help, I always try to turn them away, as diplomatically as I can . . . . To them a loan to help them to survive is the ethical thing to do that raises, not lowers, the legal profession in their eyes. They have no understanding of yesteryear's rationale for not assisting the poor client; they have real, urgent need for financial help.
>
> After many supplications, I evaluate on the basis of desperate need and on the honesty of their appeal. In my mind, I have attempted to conform with both the spirit and the aim of the RPC 1.8 and with the requirements of RPC 1.8(a) (and prior disciplinary rules). The writing becomes either a promissory note or more usually the client signs the trust card.
>
> I have also justified this to myself that these loans are not "in connection with" the pending litigation but is [sic] "in connection with" raising these clients to a minimal living standard. I agree with those judges in other jurisdictions who believe that disciplinary rules, such as R.P.C. 1.8(e) – [unless made compatible with RPC 1.8(a)] – are unconstitutional for a number of reasons, including that it denies people access to the courts. These impoverished people would have to settle for a small fraction of what their cases were worth, if they were not given financial assistance to survive and continue their causes of action.
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> [Ex.C4.]

Even though respondent stipulated that he knew of a prohibition against making such loans, he claimed that he was unaware that it was a "black and white" prohibition. His understanding was that one could not charge a client exorbitant interest, or make a deal in which a client had to settle a case for less than its value.

In addition, respondent testified, his "general understanding through years of practice" was that there was some "latitude" to the prohibition when the client's case was close to settlement. He stated that he learned of the impropriety of such loans "during the context certainly of the Villanueva matter." He asserted a further understanding that the loans were permissible if the case had been settled and a release had been signed, because the lawyer could not take advantage of the client at that point.

In 1998 or 1999, respondent asked a colleague, a Jersey City attorney, to extend loans to his clients. According to respondent, he had approached the colleague because (1) the amounts his clients requested were getting too large, (2) he knew that there were businesses that provided these loans, but charged "extraordinary" amounts of interest "legally," and (3) the colleague had the money to invest. Respondent saw the loans as an "arms length transaction" and believed that the colleague's only concern was the interest rate that he could legally charge, rather than the ethical propriety of the loans.

Respondent's colleague provided his version of the events. He testified that he had known respondent for approximately twenty years. Sometime in 1998 or 1999, respondent had approached him about the loans. Respondent had explained that his clients were poor -- either not working or unemployed --

that some of them were ill, and that he could not lend money to clients because he believed that it would be "contrary to the ethics rules." Given respondent's statements, the colleague's assumption was that respondent was aware of the prohibition against loans to clients. The colleague testified that both he and respondent researched whether it was permissible for a third-party to make loans to an attorney's clients. They concluded that it was.

According to the colleague, respondent had asked him to help his clients because "these people were desperate" and respondent was concerned that "they would pull." The colleague understood that to mean that respondent's clients would "leave [respondent] and go to another attorney" if they did not obtain loans.

Exhibit C2 shows that, from 1999 to 2001, the colleague made twenty-six loans to respondent's clients, totaling $45,800. He claimed that a number of those loans were not paid off.

The colleague testified that, at one point, he discontinued the loans because he had other investment plans and, in addition, the loans had become a "nuisance."

Respondent, in turn, denied suggesting to the colleague that he was aware of the prohibition against such loans. As to the meaning of the statement "pull their cases," respondent explained

that he was concerned that, out of desperation for funds, the clients would settle their cases too early.

In the joint stipulation, respondent admitted violating RPC 1.8(a) and RPC 1.8(e). From respondent's records the OAE compiled a schedule of his loans to clients: nineteen loans to eleven clients, totaling $29,201, between December 1992 and January 2001.

In only nine of the nineteen loans did respondent have his clients sign promissory notes. In only two instances did respondent charge interest: a 1992 loan to Robert Duffie for $350 ($20 interest) and a 1996 loan to Gregory Hauman for $736 (interest rate of 10%; respondent neither requested the interest nor received it). Although the Hauman loan promissory note listed a ten percent interest rate, respondent neither asked for nor received any interest from Hauman when the loan was repaid.

Respondent's promissory notes contained a clause providing for attorney's fees in the event that the loans were not satisfied and had to be "placed for collection:"

> If this note is not paid when due, and if it to be [sic] placed with an attorney for collection, the maker, makers, endorser and guarantors agree to pay all cost of collection, including attorney's fee [either EIGHTEEN (18%) or FIFTEEN (15%) PERCENT] of the amount of this note, which is hereby agreed to be just and reasonable . . . .
>
> [S22c.] [2]

[2] S refers to the joint stipulation of facts dated August 2005.

Because all of the loans were repaid, respondent never sought attorney's fees for collection purposes.

The stipulation clarified that, to the extent that the contents of exhibit C1 were inconsistent with the stipulation, the exhibit was deemed incorrect.

The DEC determined that the only issue in dispute was whether respondent had violated RPC 8.4(c) by asking his colleague to make loans to his clients, partially because he knew that it was unethical to do so himself. According to the DEC, the resolution of this issue rested on the credibility of the witnesses.

The DEC found no evidence to suggest that the colleague "had any motive to testify untruthfully." On the other hand, it found that respondent's testimony as to "his knowledge and state of mind was equivocal and, at times, contradictory." The DEC found that, from respondent's discussions with the colleague, respondent knew which factors were essential in determining under what circumstances loans to clients were prohibited.

The DEC concluded that, in one of the "prohibited business transactions," respondent received a direct monetary profit in the form of interest ($20), as well as an indirect financial benefit from his and his colleague's loans, in that, once his clients' immediate financial needs were addressed, he was no longer

threatened by the prospect that his clients would retain new counsel, a circumstance that would affect his entitlement to fees.

The DEC also noted respondent's statement to the colleague that his clients would "pull" if he could not provide the loans. The DEC reasoned that the purpose of the loans was to encourage and/or retain client business. The DEC, thus, concluded that respondent did not make the loans merely for humanitarian reasons. The DEC also concluded that respondent knew that his conduct was prohibited, particularly because the purpose of his loans (living expenses) differed from the purpose of allowable loans (litigation expenses).

The DEC considered, as aggravating circumstances, that respondent made the loans knowing that they were prohibited, and that he misrepresented to the OAE, at the demand audit, that he was unaware that this practice violated the Rules of Professional Conduct. [3]

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[3] The DEC's finding as to the latter circumstance runs counter to paragraph 1. of the Joint Stipulation Amending the Pleadings. That paragraph provides:

> At the demand audit, respondent further stated that, at the time he made the loans to his clients, <u>he did know</u> that there were prohibitions against him lending money to his clients, although he thought there was latitude when the loan is close to settlement or in contemplation of settlement . . . . [emphasis supplied].

In mitigation, the DEC considered that respondent has no disciplinary history and that he was motivated, at least in part, by the desire to help clients in dire financial straits.

The DEC found violations of RPC 1.8(a), RPC 1.8(e), and RPC 8.4(c). As to the latter, the DEC remarked that that "it was dishonest and deceitful, in violation of RPC 8.4(c) for the respondent to continue making prohibited loans after soliciting [the colleague's] involvement because the respondent knew it was unethical to make such loans himself."

The DEC recommended a reprimand.

Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical is supported by clear and convincing evidence. As seen below, however, we are unable to agree with some of the DEC's findings.

RPC 1.8(e) states as follows:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Respondent admitted that he made loans to clients whose cases were pending. The loans were not for court costs or

litigation expenses, the only purpose permitted by the rule. Respondent argued, however, that he believed that RPC 1.8(e) afforded some "latitude" when the case was close to settlement. Respondent cited no support for this belief.[4] Instead, respondent pointed to an ambiguity in the rule, citing comments from the Report of the Debevoise Committee, which reviewed the ABA Model Rules. As to Model Rule 1.8(e), the report states:

> Model Rule 1.8(e) permits a lawyer to provide certain kinds of financial assistance to a client. Although the Committee endorses this rule, it notes that the term "litigation expenses" might in some circumstances be construed to include living expenses. In some situations, unless indigent clients are provided living expenses, litigation might not be possible. On the other hand, if lawyers are permitted to pay living expenses for clients pending litigation of their cases, such payments might be misused by attorneys as inducements to gain employment. The Committee, concluding that these problems will have to be dealt with on a case-by-case basis, recommends adoption of 1.8(e).

The Committee comments pre-dated In re Ciecka, D-90 (September 13, 2000) (unreported order), as well as the 2002 amendment to RPC 1.8(e). In Ciecka,[5] the Court directed the Professional Responsibility Rules Committee to examine RPC

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[4] Neither does the record show that the cases were close to settlement.

[5] The Court dismissed the complaint in Ciecka, in which the attorney advanced living expenses to his client. The attorney was motivated by a sincere concern for the health and welfare of his client. In re Ciecka, supra, D-90 (September 13, 2000) (unreported order).

1.8(e), in light of the comments to that rule in the Debevoise Report, and to report to the Court its view on whether RPC 1.8(e) should be amended. RPC 1.8(e) was amended on July 12, 2002 (effective September 3, 2002), to include section (e)(3). That section states:

> A non-profit organization authorized under R. 1:21-1(e) may provide financial assistance to indigent clients whom it is representing without fee.

The rule has been otherwise unchanged since that time. Moreover, the 2002 amendment did not alter the subsections governing this matter. Attorneys are still precluded from lending money to clients while the clients' cases are pending. Advances for court costs and litigation expenses are the only exception. By advancing funds to a client, an attorney obtains an interest in seeing money returned and may compromise the client's interest in securing optimum results. In re Rubin, DRB 97-095 (December 16, 1997) (slip op. at 7).

In this case, respondent ran afoul of the rules by providing loans for his clients' living expenses. We are persuaded, however, that he was motivated by altruistic reasons. In every instance, the recipients of the loans needed money to either forestall eviction, pay for medical costs incurred by sick relatives, or pay for funeral expenses. In only one instance did respondent collect interest – a total of $20 – and

later regretted doing so. Although respondent's conduct clearly violated RPC 1.8(e), we find, in mitigation, that it was not the product of greed or any other improper motive, but the desire to help clients who were facing financial hardship.

As to a violation of RPC 1.8(a), we find no such impropriety on respondent's part, despite his admission to the contrary. RPC 1.8(a) requires that certain requirements be met -- disclosure of the terms of the transaction to the client, advice to obtain independent counsel, and the client's written consent -- when a lawyer enters into a business transaction with a client. RPC 1.8(e), however, does not, on its face, require that the safeguards of RPC 1.8(a) be observed before the lawyer advances court costs and litigation expenses to a client. Therefore, respondent could not have violated RPC 1.8(a).

In addition, we are unable to agree with the DEC's finding that respondent violated RPC 8.4(c), in that he was dishonest and deceitful when he "continue[d] making prohibited loans after soliciting [the colleague's] involvement because respondent knew it was unethical to make such loans himself." More properly, respondent's conduct was a continuing violation of the rule prohibiting such loans, RPC 1.8(e). As to respondent's involvement of the colleague, the ethics rules do not prohibit an attorney

from making loans to another attorney's clients. We, thus, dismiss the charged violation of RPC 8.4(c).

Advancing funds to clients, without more, may result in an admonition if only one loan is involved. See In the Matter of James LaSala, DRB 93-119 (May 5, 1993) (admonition imposed for attorney who loaned $3,000 to a client in a personal injury matter). When additional violations are present or the attorney has an ethics history, reprimands have been imposed. See, e.g., In re Beran, 181 N.J. 535 (2004) (reprimand for attorney who routinely made loans to clients whose cases had not yet been settled; over the course of three months, the attorney made seventy-seven advances (multiple advances to many of the same clients), totaling $17,705; the attorney was unaware of the conflict of interest inherent to this practice, having been moved by his client's need of funds; the attorney also violated the recordkeeping rules and negligently misappropriated client funds); In re Tutt, 170 N.J. 63 (2001) (reprimand imposed in a default matter on attorney who advanced funds to a client and failed to cooperate with disciplinary authorities); In re Rinaldo, 165 N.J. 579 (2000) (reprimand for attorney who advanced funds to a client and acquired a proprietary interest in a litigated matter; the attorney had received a private reprimand, a public reprimand, and a three-month suspension); In re Rubin, 153 N.J. 354 (1998) (attorney reprimanded

for advancing a total of $20,012 to at least ten needy clients, and failing to comply with recordkeeping requirements; the attorney's disciplinary record included two prior private reprimands and a diversion); In re Daniels, 157 N.J. 71 (1999) (reprimand for loaning a total of $3,200 to two clients, violating the recordkeeping rules, and negligently misappropriating trust funds; the attorney had a private reprimand); and In re Powell, 142 N.J. 426 (1995) (reprimand for attorney who advanced funds to eight personal injury clients, failed to maintain required records, and negligently misappropriated client funds).

With the exception of Beran (seventy-seven loans), the attorneys who received reprimands made ten or fewer loans, and engaged in other misconduct, such as recordkeeping violations, negligent misappropriation, and/or failure to cooperate with disciplinary authorities. Some of the attorneys had ethics histories. Here, respondent made nineteen loans to eleven clients, totaling $29,000; his disciplinary record was unblemished before these incidents; and he was motivated by a desire to help clients in need. The improper loans were his sole violation. In aggravation, we have considered that respondent knew of the loan prohibition and continued to violate RPC 1.8(e).

Guided by the above cases and balancing respondent's conduct against the mitigating and aggravating factors, we

determine that a reprimand is the appropriate level of discipline in this matter.

Members Lolla and Neuwirth would have admonished respondent.

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 J. O'Shaughnessy, Chair

By: Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael C. Kazer
Docket No. DRB 06-233

Argued: November 16, 2006

Decided: December 21, 2006

Disposition: Reprimand

Members	Suspension	Reprimand	Admonition	Disqualified	Did not participate
O'Shaughnessy		X			
Pashman		X			
Baugh		X			
Boylan		X			
Frost		X			
Lolla			X		
Neuwirth			X		
Stanton		X			
Wissinger		X			
Total:		7	2		

By [signature]
Julianne K. DeCore
Chief Counsel