SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-156

IN THE MATTER OF :
:
IRVING TOBIN :
:
AN ATTORNEY AT LAW :
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Decision

Argued: September 21, 2000

Decided: February 6, 2001

Tangerla Mitchell Thomas appeared on behalf of the Office of Attorney Ethics.

Stephen L. Ritz appeared on behalf of respondent.

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

This matter was before us based on a stipulation signed by the Office of Attorney Ethics ("OAE") and respondent. In the stipulation, respondent admitted that he violated *DR*

5-105[1] and *RPC* 1.7 (conflict of interest), *DR* 5-101, *DR* 5-104 and *RPC* 1.8(a) (business transaction with client) and *DR* 1-102(A)(4) and *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (count one); *DR* 5-101, *DR* 5-104 and *RPC* 1.8(a) (count two); *RPC* 1.15(a) (failure to safeguard funds, resulting in negligent misappropriation of client funds), *DR* 9-102(A) and (C), *RPC* 1.15(a) and (d) and *R.* 1:21-6(a)(1) (commingling funds belonging to investors, including respondent, and clients' funds) and *RPC* 1.15(d) and *R.* 1:21-6(b)(8) and (c) (recordkeeping violations) (count three).

Respondent was admitted to the New Jersey bar in 1957. He has no disciplinary history. At all relevant times, he maintained a law office in Elizabeth, Union County, New Jersey.

The Beckman Matter (District Docket Nos. XIV-99-002E AND XII-99-901E)

Respondent, also a certified public accountant, prepared income tax returns for Cecile Beckman in the early 1970s. He also represented Beckman in the 1972 purchase and 1976 sale of her house and in an estate matter. In addition, respondent pooled funds of several clients to purchase "jumbo" certificates of deposit bearing interest rates higher than those

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[1] Because respondent's improprieties began before the enactment of the *Rules of Professional Conduct*, the *Disciplinary Rules*, as well as the *Rules of Professional Conduct*, apply.

paid on ordinary certificates. Respondent sometimes participated in these transactions as an investor.

At some point between 1974 and 1975, Beckman began investing in these certificates of deposit. Respondent did not advise Beckman to seek the advice of independent counsel. Although Beckman orally agreed to the investments, respondent did not obtain her written consent to the transactions.

The certificates designated Gluck & Tobin, respondent's law firm, as the owners. With each certificate of deposit, however, respondent gave Beckman a letter listing the purchase date, the amount of the certificate, the interest rate, the maturity rate and the amount of and percentage of Beckman's investment. Respondent charged an administrative fee of $100 to $250 for services such as researching interest rates, verifying federal insurance and collecting and transferring the funds. The investment funds were placed in respondent's trust account, in which client funds were also deposited. Beckman sustained no economic loss from these investments. In fact, she earned a profit from them.

In 1975, respondent began investing in mortgages, using Beckman's monies along with funds belonging to other clients, his family members and himself. According to Beckman, respondent approached her about the mortgage investments. Respondent, however, claimed that it was Beckman who had asked him for assistance in diversifying her investments and obtaining higher interest rates. Although the borrowers of many of the mortgage loans were respondent's current and former clients, he contended that he represented only the lenders. Beckman was aware that respondent knew the borrowers, but denied knowing that they were his clients. Respondent, in turn, maintained that Beckman knew that fact. In any event, respondent did not notify Beckman of the potentially adverse interests of his investor clients and his borrower clients and did not advise Beckman to seek the advice of another attorney before entering into the mortgage transactions.

Only respondent's name, as nominee, appeared on the mortgage documents. Respondent gave Beckman a letter for each investment, explaining as follows:

> All papers have been made out in the name of Irving Tobin for convenience, but you may retain this letter as evidence that the name of Irving Tobin appears as a nominee only to the extent of your interest and that you are the actual owner of this loan to the extent of the percentage set forth.

The letter also contained the following information about each mortgage: the mortgage date, the mortgage amount, the mortgagee, the property address, the interest rate, the monthly interest payment, the maturity date, the amount of the investment and the ownership percentage.

Respondent sent Beckman annual investment summaries with information about her investment activity. Respondent did not give Beckman information about the borrowers' credit status or copies of financial statements or appraisals of the mortgaged properties. Beckman was aware that some of the loans constituted second mortgages.

Respondent disclosed to Beckman and to the other investors, in writing, that he would retain between 0.5 percent and 1.2 percent of the mortgage interest as a service fee. In almost all of the mortgages, respondent also received origination fees from the borrowers, as well as extension fees when the due dates of mortgage loans were extended. Although Beckman claimed no knowledge of these additional fees, respondent contended otherwise. Respondent admitted, however, that, whenever a mortgage loan date was extended, he would not disclose to Beckman that he was collecting an extension fee.

Every month respondent sent Beckman a check from his trust account representing her share of the interest in each mortgage and a cover letter or stub containing information about the investment, the amount being paid, the allocation between interest and principal, the year-to-date payments on interest and principal and the remaining loan balance.

In 1989, the interest payments to Beckman began to decrease and some of the mortgages went into default. Respondent did not bring foreclosure actions against any of the defaulting mortgagors[2] and did not notify Beckman of the foreclosures until 1996. Although Beckman ceased investing additional funds with respondent in 1990, she remained in contact with him about the status of her existing investments.

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[2] Although the stipulation recites that respondent did not file foreclosure proceedings, in a letter to Beckman respondent referred to a foreclosure, as follows: "Zahn, 86 Manhattan Avenue, is one of the most troublesome investments I ever made. My foreclosure is still pending and has been delayed for years, because of her bankruptcy."

In response to an inquiry from Beckman, on May 6, 1996, respondent sent her a letter about the status of her investments, offering to buy her share of two mortgages for their principal balances of $18,846.44 and $22,373.63, respectively. Respondent ended the May 6, 1996 letter as follows:

> You are certainly welcome to look at all the records and my collection efforts. If you wish, you may bring an attorney, an accountant or other advisor with you, and I will go over all these things in detail. The reason I write this is because I am setting forth my judgment as to these investments in this letter, yet I am the one who is buying you out. I therefore would like you to feel confident that I am not in any way taking advantage of you. The choice as to what you wish to do is obviously yours.

That was the first time that respondent suggested to Beckman that she could consult with an attorney about her investments.

Beckman sold her $18,846.44 interest to respondent. He did not, however, purchase her $22,373.63 interest in another mortgage.

As of 1997, Beckman had invested $171,200 in nine mortgages and was owed approximately $109,000. Beckman then retained another attorney in an effort to collect this amount from respondent. According to the 1999 investment summary that respondent prepared, Beckman was owed $102,942.97 on eight mortgage loans.

With respect to the specific ethics violations charged, the stipulation provides as follows:

> Respondent's failure to disclose to Beckman the potential conflict of interest in extending mortgages in which she had invested to other clients and

> his failure to obtain her consent violated *D.R. 5-105*, previously in force, and *R.P.C. 1.7*, which prohibits an attorney from representing clients with adverse interests unless the clients consent after full disclosure.
>
> Respondent's failure to advise Beckman to seek the advice of independent counsel prior to investing her monies in certificates of deposits and mortgages, his extension of mortgages, his earning origination and extension fees from the borrowers, in some instances without Beckman's knowledge, all constitute a violation of *D.R. 5-101*, previously in force, which prohibits an attorney from entering into a business transaction with a client if his professional judgement on behalf of the client may reasonably be affected by his own financial interest, unless the client consents after full disclosure; a violation of *D.R. 5-104*, previously in force, which prohibits an attorney from entering into a business transaction with a client if they have differing interest [sic] therein and if the client expects the attorney to exercise his professional judgment for the protection of the client, unless the client consents after full disclosure; a violation of *R.P.C. 1.8(a)*, which prohibits an attorney from entering into a business transaction with a client unless the client consents after full disclosure and is advised of the need for independent legal advice; and a violation of *D.R. 1-102(A)(4)*, previously in force, and *R.P.C. 8.4(c)*, which prohibits engaging in conduct involving misrepresentation.[3]
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> [Stipulation of facts at 8]

The Tarnofsky Matter (District Docket Nos. XIV-97-196E and XII-99-900E)

In 1956 Isaac Tarnofsky retained respondent to form a corporation known as Comet Messenger and Delivery Systems, Inc. ("Comet"). Respondent performed legal services for Comet and accounting services for Tarnofsky.

In the late 1960s Tarnofsky began investing in mortgages arranged by respondent, ultimately investing in forty to fifty syndicated mortgage loans over the next twenty years. Respondent sent Tarnofsky monthly interest payments from his trust account until 1990,

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[3] The charge of misrepresentation stems from respondent's failure to disclose to Beckman his receipt of origination and extension fees.

when the interest payments ceased. Tarnofsky then retained an attorney who filed a civil complaint against respondent, alleging negligence and fraud in his management of Tarnofsky's mortgage investments.

On April 22, 1996, after a non-jury trial, the court awarded Tarnofsky $177,796[4], finding that respondent had committed negligence and fraud. The finding of fraud was based on respondent's failure to disclose to Tarnofsky his receipt of origination and extension fees. Tarnofsky's request for punitive damages was denied. After respondent appealed, the Appellate Division reversed the finding of negligence; affirmed the damage award of $9,474, but reversed the finding of fraud, ruling that respondent breached a fiduciary duty by receiving origination and extension fees without Tarnofsky's prior notice; affirmed respondent's obligation to pay the fees of the court-appointed expert; and remanded the matter for further proceedings on the issue of negligence. After Tarnofsky died, the matter was settled.

According to the stipulation, during the above trial respondent made the following admissions:

a. Respondent and Tarnofsky had a lawyer and client relationship.

b. Respondent was also a business advisor to Tarnofsky and recommended that he advance monies into mortgages.

c. Respondent neither advised Tarnofsky to seek the advice of independent counsel prior to investing in the mortgage loans nor did

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[4] The damage award consisted of $162,420 for negligence, $9,474 for fraud and about $6,000 for the fees of a court-appointed expert.

he obtain Tarnofsky's written consent to invest in any of the mortgage transactions.

d. Although respondent maintained that he represented the investors in the business transactions, many of the mortgage loans were extended to respondent's past or present clients.

e. Respondent, and also members of his family, participated in the mortgage investments.

f. For the most part, respondent's name solely appeared on the mortgage documents.

g. Respondent retained a percentage of the interest payments made on the mortgage loans as a servicing fee.

h. Respondent was also earning origination and extension fees from the borrowers.

I. Respondent owed a fiduciary obligation to the mortgage investors.

j. However, in many cases respondent failed to obtain appraisals of the mortgaged properties and failed to verify the income or credit status of the borrowers.

k. When various borrowers defaulted on their mortgage loans, respondent failed to initiate foreclosure proceeding. Also, respondent failed to confer with the investors as to their desired plan of action.

l. Respondent maintained the investment funds in his attorney trust account with his attorney client funds. [References to exhibits omitted.] [Stipulation of facts at 10-11]

With respect to the specific ethics violations in *Tarnofsky*, the stipulation provides as follows:

Respondent's failure to advise Tarnofsky to seek the advice of independent counsel prior to advancing his monies in mortgages, his failure to obtain Tarnofsky's written consent to invest, his earning origination and extension fees, without Tarnofsky's knowledge, all constitute a violation of

> *D.R. 5-101*, previously in force, which prohibits an attorney from entering into a business transaction with a client if his professional judgement on behalf of the client may reasonably be affected by his own financial interest, unless the client consents after full disclosure; a violation of *D.R. 5-104*, previously in force, which prohibits an attorney from entering into a business transaction with a client if they have differing interest [sic] therein and if the client expects the attorney to exercise his professional judgment for the protection of the client, unless the client consents after full disclosure; and a violation of *R.P.C. 1.8(a)*, which prohibits an attorney from entering into a business transaction with a client unless the client consents after full disclosure and is advised of the need for independent legal advice.
> [Stipulation of facts at 12]

The stipulation also addressed respondent's recordkeeping violations. In 1988 the OAE had conducted a random audit of respondent's trust and business accounts, identifying various deficiencies, including the failure to maintain a running balance in his attorney trust account checkbook. On May 1, 1989 respondent represented to the OAE that the deficiencies had been corrected.

On July 24, 1997 the OAE performed a demand audit of respondent's trust and business accounts in connection with an unrelated grievance. At the audit, respondent conceded that, because he believed it unnecessary, he had not maintained running balances in his trust and business account checkbooks. He also admitted that his trust account contained funds belonging to investment clients.

After the OAE auditor identified a $19,910.38 shortage in respondent's trust account for the period of January 1997 through May 1997, respondent deposited $20,000 into the account. Despite the OAE's requests for information about the shortage, respondent's failure to reconcile his trust account prevented him from providing an explanation.

With respect to the recordkeeping violations, the stipulation provides as follows:

> Respondent's failure to maintain running balances for his attorney trust account, his commingling of client funds and investment funds in that account, and his failure to properly reconcile his attorney trust account in accordance with *R. 1:21-6* all contributed to the creation of a shortage in respondent's attorney trust account, and an invasion of client funds, a violation of *R.P.C. 1.15(a)*, a failure to safeguard funds held in the attorney trust account.
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> Respondent's commingling of investment funds with his attorney client funds in his attorney trust account constitutes a violation of *DR 9-102(A)* and *(C)*, previously in force, and *R.P.C. 1.15(a)* and *(d)* and *R. 1:21-6(a)(1)*. Respondent's failure to properly prepare attorney trust account reconciliations and his wilful failure to maintain running balances in his attorney trust account checkbooks, constitute violations of *R.P.C. 1.15(d)* and *R. 1:21-6(b)(8)* and *(c)*.
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> [Stipulation of facts at 13-14]

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Respondent acknowledged that he violated *DR* 5-105, *RPC* 1.7, *DR* 5-101, *DR* 5-104, *RPC* 1.8(a), *DR* 1-102(A)(4), *RPC* 8.4(c), *RPC* 1.15(a), *DR* 9-102(A) and (C), *RPC* 1.15(d) and *R.* 1:21-6(a)(1), (b)(8) and (c). The stipulation provides ample basis to support those violations. Respondent entered into a business transaction with a client, Beckman, when she invested in jumbo certificates of deposit that respondent obtained by pooling funds of multiple clients. Respondent did not advise Beckman to consult with another attorney and did not obtain her written consent to the transactions. He commingled these investment funds and client funds in his trust account.

In addition, respondent arranged for mortgage loans by Beckman and others to his current and former clients. Although there were factual differences between Beckman's and respondent's versions of these events, it is undisputed that respondent did not notify Beckman of the potential adverse interests of his investor/clients and borrower/clients or obtain her consent to the representation of clients with adverse interests. Moreover, respondent did not advise Beckman to consult with independent counsel before investing in the mortgages. Also, he did not always inform her when he extended the due dates of mortgages, from which he earned extension fees paid by the borrowers. Respondent, thus, entered into a business transaction with a client without following the requirements of the rule, that is, consent and full disclosure. Respondent also admitted that he violated *RPC* 8.4(c) and its predecessor, *DR* 1-102(A)(4). Although the stipulation is not very clear, it appears that the violation arose from respondent's failure to disclose to Beckman his receipt of the origination and extension fees paid by the borrowers. In some situations, silence can be no less a misrepresentation than words. *Crispin v. Volkswagenwerk, A.G.*, 96 *N.J.* 336, 347 (1984).

In *Tarnofsky*, respondent had formed a corporation for his client and provided him with legal and accounting services for many years. Respondent recommended that Tarnofsky invest in mortgage loans, without advising him to seek independent counsel or obtaining his written consent to the transactions, which had as borrowers respondent's current and former clients. Respondent earned origination, servicing and extension fees on these mortgage transactions, also participating in some of them as an investor. Although in a civil lawsuit by Tarnofsky against respondent the Appellate Division ruled that respondent's receipt of origination and extension fees without Tarnofsky's prior notice did not amount to fraud, the court found that it violated respondent's fiduciary obligation to Tarnofsky. The court also reversed the trial court's finding of negligence.

Unlike the *Beckman* matter, neither the stipulation nor the complaint in *Tarnofsky* contained a charge of a violation of *RPC* 8.4(c) for the non-disclosure of these fees. Because a finding of an additional *RPC* 8.4(c) violation would not have affected quantum of discipline here, we have not addressed that issue.

Although respondent owed a fiduciary duty to the mortgage investors, in many cases he did not obtain appraisals of the mortgaged properties and did not verify the income or credit status of the borrowers. After various borrowers defaulted on their mortgage loans, respondent did not institute foreclosure proceedings or discuss the matters with Tarnofsky or the other investors. He, thus, violated *RPC* 1.8(a) and its predecessors, *DR* 5-101 and *DR* 5-104, prohibiting an attorney from entering into a business transaction with a client unless the client consents after full disclosure and is advised of the need to obtain independent legal advice. As in *Beckman*, respondent commingled investment and client funds in his trust account.

As a result of a 1988 random audit, respondent represented to the OAE that he had corrected all noted deficiencies, including the failure to maintain a running balance in his trust account checkbook. In connection with an unrelated grievance, on July 24, 1997 the OAE performed a demand audit of respondent's trust and business accounts. During the audit, respondent admitted that, despite his representation that he had corrected the earlier deficiencies, he had failed to maintain running balances in his trust and business account checkbooks. Respondent also admitted that he commingled investment and client funds in his trust account. The demand audit further revealed that respondent did not properly reconcile his attorney trust account. Because respondent's records were not properly maintained, the OAE could not discern the cause of a $19,910.38 shortage in his trust account for the period of January 1997 through May 1997.[5] Respondent, thus, failed to safeguard funds, commingled client and investment funds, did not properly reconcile his trust account and negligently misappropriated client funds.

In sum, in two matters respondent engaged in a conflict of interest situation by representing clients with potentially adverse interests, entered into business transactions with clients without following the required safeguards, engaged in conduct involving misrepresentation by failing to disclose earned fees, failed to safeguard client funds and committed various recordkeeping violations. No venal motives can be gleaned from respondent's conduct. Although he benefitted from these transactions, it appears that his purpose in arranging the loans was to assist his clients.

Cases involving similar transgressions to respondent's have led to reprimands. *See In re Noto*, 128 *N.J.* 607 (1992) (attorney violated *DR* 1-102(A)(4) and *DR* 5-105 [the

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[5] While an unexplained trust account shortage may raise the specter of knowing misappropriation of client funds, the complaint charged negligent misappropriation only. Presumably, the OAE did not believe that there was sufficient cause to charge respondent with knowing misappropriation.

predecessors of *RPC* 8.4(c) and *RPC* 1.7] when he engaged in two conflict of interest situations by representing both the buyer and seller in a real estate transaction; in a separate matter, where he represented both a partnership and an individual client in a real estate transaction, the attorney misrepresented that the individual client had paid his financial share owed to the partnership and breached a fiduciary duty by reducing the sale price of properties without the clients' authorization; numerous mitigating factors considered); *In re Doig*, 134 *N.J.* 118 (1993) (attorney violated *RPC* 1.7 and *RPC* 8.4(c) when she engaged in a conflict of interest situation by representing buyers with potentially adverse interests in a real estate transaction, altered the real estate deed to reflect the ownership interest of one of the buyers without disclosing the alteration to the other buyer or the lender and misrepresented that the reason for the change was that the buyer's name had been inadvertently omitted; in fact, it had been intentionally excluded because of the buyer's poor credit history); *In re Birch*, 135 *N.J.* 347 (1994) (attorney violated *RPC* 1.2, *RPC* 1.7, *RPC* 1.8(1) and *RPC* 8.4(a) and (d) when he engaged in a conflict of interest situation by representing multiple buyers of real estate with adverse interests, compounded the conflict by buying the interest of one of the buyers, in violation of the tenancy-in-common agreement that the attorney had drafted, advised his clients to attempt to defraud the lender and failed to disclose to the lender the ownership interest of a buyer whose mortgage application had been rejected by the bank).

Although here, in addition to the conflict of interest and misrepresentation, there were recordkeeping violations and failure to safeguard funds, respondent's conduct was no more serious than Doig's, Noto's or Birch's, all of whom received reprimands. In addition, respondent has had an unblemished career of forty-seven years. Hence, we unanimously determine to impose a reprimand. Two members did not participate.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 2/6/2001

By:
LEE M. HYMERLING
Chair
Disciplinary Review Board