SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-120
District Docket No. XIV-2005-0548E

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

Second Corrected Decision

Argued: July 16, 2009

Decided: September 30, 2009

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

Robert E. Ramsey appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline (two-year suspension) filed by Special Master Robert L. Grundlock. The complaint alleged that respondent engaged in a conflict of interest and improper business transaction with a client, failed to communicate with the client, and lied to

ethics investigators regarding a decedent's estate. We determine to impose a three-month prospective suspension.

Respondent was admitted to the New Jersey bar in 1992.

In 2007, respondent received an admonition for failing to set forth the rate or basis of his fee in an estate matter. In the Matter of David W. Boyer, DRB 07-032 (March 28, 2007). On March 26, 2008, respondent was suspended for three months for engaging in a conflict of interest when, in the course of representing a decedent's estate, he provided funding for the sale of estate real property to another entity he had represented, never informing the estate of his involvement. He also misrepresented that a jurat had been properly taken, when he knew that it had not been, and lied to ethics authorities about the extent of his involvement in the transaction. In re Boyer, 194 N.J. 3 (2008). Respondent has not applied for reinstatement.

The complaint alleged that respondent violated RPC 1.4, presumably (c) (failure to communicate with client), RPC 1.7(a)(1) and (2) (conflict of interest), RPC 1.8(a) and (b) (prohibited business transaction with client), and RPC 8.4(c) (misrepresentation) in an estate matter.

Prior to the ethics hearing, respondent and the OAE entered into a stipulation of facts, in which respondent conceded having violated the charged RPCs.

According to the stipulation, on July 22, 2000, Carol Monteverde, the executrix of the estate of Lincoln Austin, retained respondent to represent the estate. The Austin estate included a house in Hamilton, New Jersey. According to respondent, the house had not been occupied since he first visited the premises and discovered the "vitrified" body of Austin's "girlfriend" in a chair in the living room. The house was "a mess," with numerous building code violations that required attention.

On July 22, 2000, the estate listed the Austin house for sale ($93,900) with Robert Lambert, respondent's friend and the owner of Lambert Realtors. In September 2000, an agreement of sale ($88,000) was executed, but the buyers walked away from the deal in May 2001, after a leaky oil tank was discovered that required remediation through the Department of Environmental Protection.

In about May 2001, respondent arranged for the property to be rented to AJM Woodworking, LLC ("AJM"), an entity formed by

respondent's brother-in-law, Alex Marincas. According to Monteverde, respondent never disclosed to her his relationship to AJM. Respondent stipulated that he never advised her in writing of the relationship, but claimed to have told her that AJM was owned by his brother-in-law.

In May 2001, respondent arranged for his former clients in a bankruptcy matter, Michael and Speranza Marant, to rent the Austin house from AJM, with an option to purchase. Respondent handled all aspects of the rental for AJM. The rent checks were made out to "David Boyer."

Over the next year, the Marants made payments totaling $13,588, which respondent deposited into his trust account. From those funds he made various payments, until the balance zeroed out, on May 31, 2002. The complaint does not allege that respondent misused any of the Austin house rental funds.

In May 2002, Monteverde, on behalf of the estate, agreed to sell the Austin house to AJM for $68,000. According to respondent, the Marants were not in a position to buy the property. That same month, respondent established a real estate investment entity named Dawson Investors, LLC ("Dawson"), with his wife, Jennifer Boyer, as the registered agent.

On July 17, 2003, AJM's Marincas formed DDC Enterprises, LLC ("DDC"). Respondent opened a bank account for DDC and handled all of its matters as registered agent. AJM then assigned the contract of sale to DDC, which purchased the Austin house, on October 2, 2003, for the contract price of $68,000. DDC did not fund the purchase from its own resources. Rather, respondent provided the necessary funds for the purchase through Dawson. Monteverde claimed to have been unaware of respondent's extensive connections to AJM, DDC, and Dawson, and of respondent's loan for DDC's purchase. Respondent stipulated that he had not advised Monteverde or the estate, in writing, that he had close ties to the above entities, but claimed that he had done so orally.

In December 2003, Lambert Realtors listed the Hamilton property for sale for $179,900.[1] In February 2004, Gerardo Prete and Christine Schwartz contracted to purchase the house for $162,000. Respondent, with Marincas' power of attorney, handled

[1] Respondent testified that the difference between the $68,000 price paid by DDC and the $179,900 was due to repairs/improvements made to the property.

the sale from DDC to Prete and Schwartz. There is no evidence that respondent acted as Prete and Schwartz's attorney.

On May 4, 2004, DDC repaid the purchase loan (with interest) to Dawson.

At the closing, DDC received $110,595 of the closing proceeds. After paying off the debt to Dawson and closing costs, $31,753 remained in the DDC account until February 22, 2005, when DDC opened a new account at Commerce Bank. Alex Marincas received $23,136 of those funds, while Jennifer Boyer received $7,607. It is unclear why respondent's wife received that sum, but there is no evidence that DDC's payment to her was improper.

Also at the closing, a disbursement of $38,000 was made to Kevin Bayer of Kevin Bayer Service Corporation. Respondent maintained, both in the stipulation and in his testimony, that the $38,000 represented payment to Bayer for remediation of the oil tank leak and required soil monitoring, as well as interior and exterior construction work on the house.

Bayer, in turn, claimed that he had made only about $3,000 in repairs to the house and that the $38,000 payment at closing was actually a "prepayment" to be used for future "fixing up and

general preparation of [respondent's] rental properties for sale."

Respondent conceded that by financing the purchase by DDC, an entity "formed and controlled" by him and by benefiting from the sale (the interest paid on the DDC loan), he knowingly acquired a pecuniary interest adverse to his client, a violation of RPC 1.8(a).

Respondent also stipulated that he failed to disclose to Monteverde that: a) he financed DDC's purchase; b) he intended to hold the property and resell it at a profit; and c) he intended to share in the profit from the sale. Respondent stipulated that, in so doing, he violated RPC 1.8(b) and RPC 1.4, presumably (c).

Respondent also admitted having violated RPC 1.7(a)(1) and (2) in two respects. First, he rented the Austin house to his bankruptcy clients, the Marants, while also representing the estate. Second, he represented both the estate and DDC in the later sale of the Austin house. Respondent never disclosed the nature and extent of his relationships to the various parties, such as Dawson, AJM, and DDC. Respondent also failed to obtain the consent of the parties (both the rental and the sale) to

waive the conflicts of interest that were present by virtue of respondent's dual representations.

Respondent stipulated that he had signed the RESPA statement as settlement agent, falsely representing that it was "a true and accurate account of the transaction." In addition, during the ethics investigation, he failed to disclose to the Office of Attorney Ethics ("OAE") his pecuniary interest in the sale of the Austin house. He also represented to the OAE that he had not received any funds in excess of the "purported loan to DDC."

Although the stipulation does not state the amount of the excess, it recited respondent's receipt of $80,000 for the $78,858 loan, for a difference of $1,142. Respondent testified that his "profit" was limited to the interest on the DDC loan. Respondent stipulated that his conduct in this regard constituted misrepresentation, a violation of RPC 8.4(c).

The special master found respondent guilty of having violated RPC 1.8(a) and (b), RPC 1.4, presumably (c), RPC 1.7(a)(1) and (2), RPC 8.1(a) and (b), and RPC 8.4(c).

The special master found that respondent's course of conduct "over several years [was] in gross and intentional

disregard of attorney ethics" and that he "obviously needed some degree of cooperation from the Estate in order to deal with the property in the unethical manner that he admittedly did over an extended period of time."

The special master recommended a two-year suspension, without citing supporting case law.

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

Respondent admitted having engaged in conflicts of interest and a prohibited business transaction with regard to his handling of the estate property. RPC 1.7(a) states as follows:

> 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 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 each client, except that a public entity cannot consent to any such representation.

Respondent admitted having taken none of the precautions set out in the rule when handling the sale of the Austin house

to DDC. Respondent also stipulated that he engaged in a conflict of interest by renting the Austin house to the Marants, his bankruptcy clients, while also representing the estate. He did not disclose to either client the nature of the dual representation. He also failed to seek the clients' waiver of conflict. In so doing, he violated RPC 1.7(a)(1) and (2).

Respondent also stipulated that he violated RPC 1.8(a) and (b), which states that:

> a lawyer shall not knowingly enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
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> (1) the transactions and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;
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> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and
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> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
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> (b) Except as permitted or required by these rules, a lawyer shall not use information

> relating to representation of a client to the disadvantage of the client unless the client after full disclosure and consultation, gives informed consent.

Respondent did not fully explain the terms of the DDC transaction to Monteverde and did not advise her that he had acquired a pecuniary interest in it. He failed to advise Monteverde about the propriety of seeking independent counsel and he failed to obtain her written consent to waive the conflict, all in violation of the stipulated RPCs 1.8(a) and RPC 1.4, presumably (c).

So, too, respondent misrepresented in the RESPA statement the nature and extent of the work performed by Bayer and for which Bayer received over $38,000 of the closing proceeds. Respondent also lied to ethics investigators that he had not received funds exceeding the initial loan amount to DDC, when he had received interest on the loan, and failed to reveal to that office his pecuniary interest in the transaction. Respondent conceded the RPC 8.4(c) violations in this regard.

There is, however, no factual support for the stipulated violation of RPC 1.8(b). Nothing in the stipulation details a possible use by respondent of information relating to the

estate, to the detriment of the estate. We, therefore, make no finding in this regard.

Finally, respondent's counsel agreed before us that respondent has endured a lengthy "self-imposed" suspension since the expiration of his March 26, 2008 three-month suspension. The Supreme Court has ruled against that argument, stating in In re Asbell, 135 N.J. 446 (1994):

> We reject this argument. In [In re Farr, 115 N.J. 231, 238 (1989)], we expressly noted that a voluntary suspension would not be considered a mitigating factor unless imposed by order of this Court. [Citation omitted]. Respondent's voluntary suspension was not pursuant to an order by that respondent voluntarily suspended himself cannot be considered as a form of discipline.
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> [In re Asbell, 135 N.J. 446, 459 (1994).]

Since 1994, it has been a well-established principle that a reprimand is the measure of discipline imposed on an attorney who engages in a conflict of interest, absent egregious circumstances or serious injury to clients. In re Berkowitz, 136 N.J. 148 (1994). Accord In re Mott, 186 N.J. 367 (2006) (reprimand for conflict of interest imposed on attorney who prepared, on behalf of buyers, real estate agreements that

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

If the conflict involves "egregious circumstances" or results in "serious economic injury to the clients involved," then discipline greater than a reprimand is warranted. In re Berkowitz, supra, 136 N.J. at 148. See also In re Guidone, 139 N.J. 272, 277 (1994) (reiterating Berkowitz and noting that, when an attorney's conflict of interest causes economic injury, discipline greater than a reprimand is imposed; the attorney, who was a member of the Lions Club and represented the Club in

the sale of a tract of land, engaged in a conflict of interest when he acquired, but failed to disclose to the Club, a financial interest in the entity that purchased the land, and then failed to (1) fully explain to the Club the various risks involved with the representation and (2) obtain the Club's consent to the representation; the attorney received a three-month suspension because the conflict of interest "was both pecuniary and undisclosed").

In addition to engaging in conflicts of interest, respondent made misrepresentations both in a RESPA statement and to ethics authorities. The discipline imposed for misrepresentations on closing documents depends on the number of misrepresentations involved, the presence of other ethics infractions, and the attorney's disciplinary history. Reprimands are usually imposed when the misrepresentations are unaccompanied by additional instances of misconduct. See, e.g., In re Spector, 157 N.J. 530 (1999) (attorney concealed secondary financing to the lender through the use of dual RESPA statements, "Fannie Mae" affidavits, and certifications); In re Sarsano, 153 N.J. 364 (1998) (attorney concealed secondary financing from the primary lender and prepared two different

RESPA statements); and In re Blanch, 140 N.J. 519 (1995) (attorney failed to disclose secondary financing to a mortgage company, contrary to its written instructions).

At times, a reprimand may still result even when the misrepresentation is combined with other unethical acts, such as gross neglect, See, e.g., In re Agrait, 171 N.J. 1 (2002) (reprimand for attorney who, despite being obligated to escrow a $16,000 deposit shown on a RESPA, failed to verify it and collect it; in granting the mortgage, the lender relied on the attorney's representation about the deposit; the attorney also failed to disclose the existence of a second mortgage prohibited by the lender; the attorney' misconduct included misrepresentation, gross neglect, and failure to communicate to the client, in writing, the basis or rate of his fee).

Suspensions are warranted when other serious unethical acts are added to the misrepresentation. See, e.g., In re De La Carrera, 181 N.J. 296 (2004) (three-month suspension in a default case in which the attorney, in one real estate matter, failed to disclose to the lender or on the RESPA that the sellers were taking back a secondary mortgage from the buyers, a practice prohibited by the lender; in two other matters, the

attorney also disbursed funds prior to receiving wire transfers, resulting in the negligent invasion of clients' trust funds); In re Nowak, 159 N.J. 520 (1999) (three-month suspension for attorney who prepared two settlement statements that failed to disclose secondary financing and misrepresented the sale price and other information; the attorney also engaged in a conflict of interest by representing both the second mortgage holders and the buyers); In re Fink, 141 N.J. 231 (1995) (six-month suspension for attorney who failed to disclose the existence of secondary financing in five residential real estate transactions, prepared and took the acknowledgment on false RESPA statements, affidavits of title, and Fannie Mae affidavits and agreements, and failed to witness a power of attorney); In re Newton, 157 N.J. 526 (1999) (one-year suspension for attorney who prepared false and misleading RESPA statements, took a false jurat, and engaged in multiple conflicts of interest in real estate transactions); and In re Frost, 156 N.J. 416 (1998) (two-year suspension for attorney who prepared misleading closing documents, including the note and mortgage, the Fannie Mae affidavit, the affidavit of title, and the settlement statement; the attorney also breached an escrow agreement and failed to

honor closing instructions; the attorney's ethics history included two private reprimands, a three-month suspension, and a six-month suspension).

As previously stated, respondent lied to ethics investigators that he had not received funds exceeding the initial loan amount to DDC, when he had received interest on the loan, and failed to reveal to the OAE his pecuniary interest in the transaction.

Generally, in matters involving misrepresentations to ethics authorities, the discipline ranges from a reprimand to a term of suspension, depending on the gravity of the offense, the presence of other unethical conduct, and aggravating or mitigating factors. See, e.g., In re Sunberg, 156 N.J. 396 (1998) (reprimand for attorney who created a phony arbitration award to mislead his partner and then lied to the OAE about the arbitration award; mitigating factors included the passage of ten years since the occurrence, the attorney's unblemished disciplinary record, his numerous professional achievements, and his pro bono contributions); In re Homan, 195 N.J. 185 (2008) (censure for attorney who fabricated a promissory note reflecting a loan to him from a client, forged the signature of

the client's attorney-in-fact, and gave the note to the OAE during the investigation of a grievance against him; the attorney told the OAE that the note was genuine and that it had been executed contemporaneously with its creation; ultimately, the attorney admitted his impropriety to the OAE; extremely compelling mitigating factors considered, including the attorney's impeccable forty-year professional record, the legitimacy of the loan transaction listed on the note, and the fact that the attorney's fabrication of the note was prompted by his panic at being contacted by the OAE and his embarrassment over his failure to prepare the note contemporaneously with the loan); In re Bar-Nadav, 174 N.J. 537 (2002) (three-month suspension for attorney who submitted two fictitious letters to the district ethics committee in an attempt to justify his failure to file a divorce complaint on behalf of a client; the attorney also filed a motion on behalf of another client after his representation had ended and failed to communicate with both clients); In re Rinaldi, 149 N.J. 22 (1997) (three-month suspension for attorney who did not diligently pursue a matter, made misrepresentations to the client about the status of the matter, and submitted three fictitious letters to the ethics

committee in an attempt to show that he had worked on the matter); In re Katsios, 185 N.J. 424 (2006) (two-year suspension for attorney who prematurely released a buyer's deposit (about $20,000), which he held in escrow for a real estate transaction, to the buyer/client, his cousin, without the consent of all the parties to the transaction; ordinarily, that misconduct would have warranted no more than a reprimand, but the attorney panicked when contacted by the OAE and then sought to cover up his misdeed; like the special master, we noted that the cover-up had been worse than the "crime"); In re Silberberg, 144 N.J. 215 (1996) (two-year suspension imposed on an attorney who, in a real estate closing, allowed the buyer to sign the name of the co-borrower; the attorney then witnessed and notarized the "signature" of the co-borrower; the attorney stipulated that he knew at the time that the co-borrower was deceased; after the filing of the ethics grievance against him, the attorney falsely stated that the co-borrower had attended the closing; on another occasion, the attorney sent a false seven-page certification to the district ethics committee in order to cover up his improprieties); and In re Penn, 172 N.J. 38 (2002) (three-year suspension for attorney who failed to file an answer in a

foreclosure action, thereby causing the entry of default against the client; thereafter, to placate the client, the attorney lied that the case had been successfully concluded, fabricated a court order, and signed the name of a judge; the attorney then lied to his adversary and to ethics officials; the attorney also practiced law while ineligible).

Here, in aggravation, respondent has a prior admonition (2007) for failure to set forth the rate or basis of his fee in writing. So, too, in March 2008, he received a three-month suspension for almost identical misconduct: conflicts of interest, an improper pecuniary interest, and misrepresentations in the sale of a decedent's real estate to entities related to respondent and Bayer.

In fact, the misconduct in this and the earlier suspension matter occurred during the very same period of time. In the three-month suspension matter, respondent was retained to represent an estate in 2001, sold the property to a Kevin Bayer entity in 2001, and was terminated from the representation by June 2003. In the within matter, respondent was retained even earlier, in July 2000, rented the property in 2001, and sold it to a related entity in 2003.

This is not a case where an attorney was disciplined for serious misconduct and then engaged in the same misconduct down the road. Due to the closeness in time of the events presented in both disciplinary matters, it cannot be said that, in this instance, respondent has not learned from prior mistakes, and that enhanced discipline is warranted. Rather, the question is, if it had been possible for the two matters to be combined below and heard together, would additional discipline have been imposed for the inclusion of this matter?[2]

We determine that if the matters had been consolidated for resolution, it is likely that we would have imposed a six-month suspension, because this sort of misconduct in two matters, as opposed to one matter, shows respondent's proclivity to repeatedly place his own pecuniary interests above the interests

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[2] A review of the OAE attorney ethics system indicates that, although the misconduct occurred at about the same time, the ethics investigations did not track together. The ethics investigation into this matter was initiated about twenty months after that of the 2008 matter, for which respondent was suspended. OBC Chief Counsel confirmed with the OAE that it discovered respondent's misconduct in this matter during the investigation of the 2008 matter. Respondent's failure to "come clean" with the OAE may have exacerbated the delay. The same OAE investigator and deputy ethics counsel were assigned to both investigations.

of his clients, to lie, and to obfuscate. He also made misrepresentations anew to the OAE in the investigation into this matter, having done so previously. For all of these reasons, we determine that another three-month suspension is warranted.

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 David W. Boyer
Docket No. DRB 09-120

Argued: July 16, 2009

Decided: September 30, 2009

Disposition: Three-month suspension

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh		X				
Clark		X				
Doremus		X				
Stanton		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		9				

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel