SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-099

IN THE MATTER OF

BRIAN T. KENNEDY

AN ATTORNEY AT LAW

Decision

Argued: May 16, 2002

Decided: June 26, 2002

Brian D. Gillet appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us based on a recommendation for an admonition filed by the District IX Ethics Committee ("DEC"), which we determined to bring on for a hearing.

Respondent was admitted to the New Jersey bar in 1965. He has no prior discipline.

The amended complaint[1] alleges that respondent violated RPC 1.1(a) (gross neglect),

[1]The complaint was amended orally at the November 20, 2001 DEC hearing.

RPC 1.7(b), RPC 1.7(c)(1), Advisory Committee on Professional Ethics ("ACPE") Opinion 312, 98 N.J.L.J. 646 (1975), ACPE Opinion 341, 99 N.J.L.J. 610 (1976) ACPE Opinion 518, 111 N.J.L.J. 513 (1983)(conflict of interest), RPC 4.1(a)(2) (truthfulness in statements to others) and RPC 8.4(c) (misrepresentation).

On November 15, 2001 respondent and the OAE entered into a stipulation of facts. The stipulation states as follows, in relevant part:

4. By letter dated February 10, 2000, Michael R. Rubino, Jr., Esq. advised the OAE of respondent's conduct in connection with a real estate closing which occurred on January 13, 2000, in which Rubino and Respondent represented the Parties. (Exhibit 1). [Footnote omitted.]

5. On November 8, 1999, Kimberly and Jeffrey Werley ('Werley') signed a contract to purchase property located at 720 Allaire Road, Spring Lake Heights, from William and Monique Armstrong ('Armstrong'). The purchase price was $450,000 with a total deposit of $100,000 required. (Exhibit 2). The buyer's agent or broker was Jackie Kennedy, of Diane Turton Realtors, who is respondent's wife. Respondent represented the Werleys. The Armstrongs, who signed the contract on November 12, 1999, were represented by Michael J. Rubino, Esq. ('Rubino'). (Exhibit 2).

6. The closing of this matter took place on January 13, 2000 at respondent's office.

7. Prior to the closing, the Werleys had difficulty obtaining a mortgage and the Armstrongs, through counsel, allowed them to occupy the premises before the transfer of title.

8. As a show of good faith, in addition to the $100,000 that was deposited with the Armstrong's attorney Rubino on November 17, 1999, on December 16, 1999, the Werleys provided the Armstrongs with another $180,000. All these funds, totaling $280,000 were deposited into Rubino's trust account. (Exhibit 3).

9. The Werleys entered the premises on/or about December 20, 1999 with the understanding that they were to close by the end of the year. Respondent's office advised Mr. Rubino during that time that the purchasers were having difficulty in obtaining a mortgage.

10. Shortly after January 1, 2000, Rubino was advised by respondent's office that the Werleys were going to obtain a mortgage and that they were liquidating assets so they could obtain the funds to close title. Title was to close on January 13, 2000 at respondent's office.

11. On January 13, 2000, Rubino attended a closing on behalf of the Armstrongs, who had previously moved to Georgia. He delivered his clients' Deed and Affidavit of Title. Respondent and the Werleys were present at the closing. At the closing, it was again represented that the Werleys had 'moved some assets around' in order to close. According to the HUD-1 Settlement Statement, the Werleys were to bring $175,131.47 to closing. (Exhibit 4).

12. According to the HUD-1, as of January 13, 2000, the Armstrongs owed $250,019.33 on their first mortgage to Monmouth Community Bank as well as $15,999.54 to First Union Bank.

13. Approximately 5 days before the scheduled closing Mr. Kennedy attempted to call the Werleys and left a message on their answering machine advising them of the amount of money needed for the closing and the need for a certified check. On the date of the closing, January 13, 2000, Mr. Rubino, although he represented the sellers, found it necessary to come to the closing with his attorney trust account check number 1335 in the amount of $125,997.00 due to the Werleys [sic] overpayment of funds directly to Mr. Rubino prior to closing. (Exhibits 3, 5A & 5B). These funds were deposited into respondent's trust account as noted on respondent's client ledger and bank statement. (Exhibits 5A, 5B & 6). The closing itself then lasted approximately 10 minutes as Mr. Rubino, [sic] dropped off the Deed and his check, signed the closing statement and left with a copy of the closing statement. Mr. Kennedy did not ask the Werleys for the certified check before the arrival of Mr. Rubino as no check was to be given to Mr. Rubino. After Mr. Rubino left the closing Mr. Kennedy then asked the Werleys for the certified check and Mr. Werley responded by handing Mr. Kennedy a personal check for the proceeds due. Mr. Kennedy then

reminded the Werleys as per his instruction to them, he did need a certified check for the balance of the proceeds. The Werleys assured Mr. Kennedy that funds were in their checking account by the time of the closing, but again Mr. Kennedy advised the Werleys that he could not do this. Mr. Kennedy recalls Ms. Werley saying to her husband that it's just as well, and that they would return on Monday (January 17) or Tuesday (January 18) with the certified check. Respondent never advised Rubino that his clients had not brought enough funds to close title on January 13, 2000.

14. Within days of the closing, respondent issued the following checks, despite the fact that his clients had not provided sufficient funds to close title:

Check No.	Check Date	Payee	Amount	Date Posted	Exhibit No.
3652	01/13/00	First Union	$15,999.54	01/19/00	7A
3654	01/13/00	Weichert Agency	$13,515.00	01/18/00	7B
3656	01/13/00	Michael Rubino, Esq.	$ 750.00	01/19/00	7C
3657	01/13/00	Diane Turton Realtors	$13,485.00	01/18/00	7D
3661	01/14/00	Midstate Abstract	$ 2,865.00	02/28/00	7E
3663	01/14/00	Thomas Stuart	$ 300.00	05/15/00	7F
3664	01/14/00	County of Monmouth	$ 2,025.00	03/01/00	7G
3665	01/17/00	M. Gretchen Stevens	$ 114.95	01/24/00	7H

15. The real estate commission due respondent's wife, Jackie Kennedy was paid by check #3657, in the amount of $13,485.00 dated January 13, 2000, the date of the closing. (Exhibit 7D).

16. As of Monday, January 25, 2000, the Armstrongs' mortgage, held by Monmouth Community Bank, had still not been paid off.

17. On January 26, 2000, Rubino spoke to respondent who advised Rubino that he had advised his clients (the buyers) to bring him a bank check for the amount due from them to the closing, but when they arrived, they only

had a personal check. Respondent related that he did not accept the personal check nor deposit it into his trust account, though Mr. Werley advised respondent that the check would clear in a few days. In that same conversation with Rubino, respondent finally advised that he had not had sufficient funds to pay off the Monmouth Community Bank mortgage.

18. By letter dated Thursday, January 27, 2000, a check payable to Monmouth Community Bank in the amount of $90,000 was transmitted to that bank as partial payment on the Armstrong mortgage. (Exhibit 8 & 9).

19. By letter of January 28, 2000, Rubino again advised respondent of his concern that the Armstrongs' mortgage had not yet been paid off. (Exhibit 10).

20. A review of respondent's bank statements and deposit slip tickets reveals that:

    A) On January 18, 2000, respondent deposited $5,331.47 on behalf of Werley into his trust account. (Exhibit 5B & 11);
    B) On January 20, 2000, $15,000 was wired into respondent's trust account from the Werleys. (Exhibit 5B & 12); and
    C) On January 24, 2000, another $30,000 was wired into respondent's trust account on behalf of the Werleys. (Exhibit 5B & 13).

21. By letter dated February 4, 2000 respondent forwarded to the Monmouth Community Bank his trust check in the amount of $30,000 with regard to the Armstrongs' mortgage. (Exhibit 14 & 15).

22. The Armstrongs' mortgage held by Monmouth Community Bank was not fully satisfied until February 29, 2000 when the Werleys obtained additional funds in the amount of $131,377.31 from ABEV Financial Services (Exhibits 16A & 16B). That pay-off was effectuated by Mid-State Abstract, an agent for First American Title Insurance Co. (Exhibit 17A & 17B).

23. Pursuant to the OAE's request, Mr. Kennedy advised that on June 16, 1999, Christopher Given, as buyer, purchased property located at 67 North Potter Avenue, Manasquan, New Jersey from Dean R. and Pamelyn G. Vervoort. Respondent served as attorney for Mr. Given as well as the settlement agent. In that transaction, respondent's wife, Jackie Kennedy

served as the buyer's real estate agent or broker. (Exhibit 18).

24. At the closing, Murray Realty received a check in the amount of $7,985.00 and Ward Wight Realty received a check in the amount of $8,220.00. (Exhibit 19).

[Exhibit J-1]

According to respondent, who testified briefly at the DEC hearing, he was unaware, until the final moments of the closing, that the Werleys did not have a certified check. Later, he believed that the Werleys would return in a few days with a certified check, as they had promised. Respondent testified that, when the Werleys did not do so, he nevertheless proceeded to disburse funds to as many parties as possible from the partial funds in his possession.

Respondent admitted that he did not tell Rubino that the Werleys had failed to provide sufficient settlement funds. Respondent stated, "I should have called [Rubino]. I thought about that. What would [Rubino] have done?" Furthermore, respondent acknowledged that Rubino should have been able to rely on the information contained in the RESPA statement that respondent prepared for the January 13, 2000 closing. Respondent denied, however, that his silence about the shortage of funds and the subsequent problems in obtaining those funds from his client violated any Rules of Professional Conduct.Respondent also denied any improper conduct with respect to the inaccurate RESPA statement. He characterized his omission as "[m]aybe a mistake. I didn't think – I was concentrating – I was focused on Werley and Werley, where is the money so we can pay off the mortgage. That was my focus, and that was my problem, not [Rubino's]." On that issue, Rubino wrote to respondent on

January 28, 2000 to express his "shock" and "dismay." Rubino's letter states as follows, in part:

> I am very incensed that you failed to advise me of this at the closing and that you failed to call off the closing. Your conduct violates every legal standard set upon attorneys at closing. You should have advised me that the funds were not available and we should not have closed.
>
> I am even more incensed that on call to your office last week concerning the mortgage payoff that you failed to advise my office of the fact that you did not have funds to pay it off. This again breached an obligation you owed to me.

Finally, respondent stated that he believed, at the time of the closing, that he could represent a buyer or seller in a real estate transaction in which his wife stood to earn a commission. Respondent sought partial exoneration for his ignorance by claiming that he had spoken to more than twenty other New Jersey attorneys on the conflict issue, none of whom were aware of the rules in this regard. In the end, respondent denied that his conduct in these two matters amounted to any ethics infractions. Indeed, at oral argument before us, respondent stated that he did not see the impropriety that is so apparent to us in his conduct.

* * *

The DEC found a violation of RPC 8.4(c) for respondent's failure to advise Rubino for two weeks, after the January 13, 200 closing, that the Werleys had failed to bring sufficient certified funds to close. The DEC specifically cited Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984), for the proposition that respondent's omission was a misrepresentation

by silence.[2] The DEC also found a violation of RPC 1.3 for respondent's failure to take prompt action, after he learned at the closing that the Werleys had not brought certified funds. The DEC found an additional violation of that rule "by [respondent's] providing checks to numerous parties involved in the transaction prior to having the full amount due from the buyers. Thus the transaction was not complete before he started issuing checks." The DEC did not address the charge of gross neglect. It is unclear therefore, if the DEC found that respondent's lack of diligence did not rise to the level of gross neglect or if it simply failed to state its finding in that regard.

With respect to respondent's payment of his wife's real estate commission at the closing, without further elaboration the DEC found a violation of RPC 8.4(c). The DEC also found a conflict of interest, under RPC 1.7(b), citing respondent's financial interest in obtaining his wife's real estate commissions. The DEC concluded that respondent's duty of loyalty to his clients had been placed in jeopardy. Moreover, the DEC concluded that the conflict could not have been cured under RPC 1.7(c)(1), thereby finding a violation of that rule as well.

The DEC found no misconduct in the Vervoort to Given transaction. Although the DEC recognized the applicability of ACPE Opinion 312, it considered it advisory, rather than mandatory.

The DEC recommended an admonition for respondent's misconduct.

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[2]The DEC did not resolve the issue of the RPC 4.1(a)(2) charge.

* * *

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

The facts are not in dispute. In Armstrong to Werley, respondent was surprised by his clients, the Werleys, who appeared at the closing without the necessary certified funds to close on their purchase of the Armstrongs' house. By the time that respondent asked them to produce those funds, Rubino had already left respondent's office. Rather than cancel the closing, respondent chose to issue a series of checks with the funds he had on hand. Among the expenses paid on that day was his wife's real estate commission. Respondent said nothing to Rubino. For the next two weeks, respondent hid from Rubino the fact that the Armstrongs' mortgage had not been paid off. When Rubino called respondent, respondent finally told him about the problem.[3] Respondent's failure to notify Rubino of these facts was a misrepresentation by silence. Respondent's argument that the failed closing was his problem alone and that Rubino had no interest in knowing immediately about the shortage of closing funds misses the mark. Respondent had a duty to inform Rubino that his clients' mortgage was not paid off at the January 13, 2000 closing. After all, Rubino delivered the deed to

[3]In a February 10, 2000 letter to the OAE, Rubino stated that, on January 19, 2000, the Armstrongs contacted him from their new home in Georgia to question why their bank still showed their mortgage as outstanding.

respondent on January 13, 2000 on the premise that, as settlement agent, respondent had in his possession certified funds sufficient to satisfy all of the items listed on the RESPA, including, of course, the Armstrongs' mortgage. For the above reasons, we found a violation of RPC 8.4(c).

As to the alleged violation of RPC 4.1(a)(2) (truthfulness in statements to others), the DEC failed to address that issue in its report. It is not so clear, however, that respondent violated RPC 4.1(a)(2). That rule is applicable to situations where, in representing a client, the attorney makes a false statement of material fact to a third person, thereby assisting a client's criminal or fraudulent act. There is no evidence that respondent affirmatively lied to Rubino. Therefore, we dismissed that charge.

In both Armstrong to Werley and Vervoort to Given, respondent acted as attorney for the buyers, while his wife took a commission as the buyers' real estate agent or broker. The DEC correctly found a conflict of interest under RPC 1.7 (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") and RPC 1.7 (c) (1) ("this rule shall not alter the effect of case law or ethics opinions to the effect that in certain cases or categories of cases involving conflicts or apparent conflicts, consent to continued representation is immaterial"). The DEC erroneously concluded, however, that ACPE Opinions are advisory only. R.1:19-6 states that "published opinions of the [Advisory Committee in Professional Ethics] shall be binding on the Ethics Committee in their

disposition of all matters." That committee has clearly articulated the limitations on an attorney in this very situation. Indeed, ACPE Opinion 312 holds that an attorney may not represent a buyer or seller in a real estate transaction in which the attorney's spouse is the listing or selling agent. ACPE Opinion 518 extends that prohibition to cases where the attorney has obtained the client's consent to continue the representation after full disclosure of the conflict. Here, respondent admitted that his wife earned substantial commissions in both transactions. His duty to his clients was compromised by his own financial interest in obtaining his wife's commissions out of the settlement proceeds. That respondent may have been ignorant of his duties in this regard is irrelevant. "Lawyers are expected to be fully versed in the ethics rules that regulate their conduct. Ignorance or gross misunderstanding of these rules does not excuse misconduct." In re Berkowitz, 136 N.J. 134, 147 (1994). In light of the foregoing, we found that respondent violated RPC 1.7(b), RPC 1.7(c)(1) and ACPE Opinions 312 and 518.

We also found that respondent violated RPC 1.3 when, for a period of six weeks, he failed to satisfy the Armstrongs' outstanding mortgage on property now owned by his clients. Respondent unreasonably delayed the resolution of the matter by his failure to vigorously pursue the Werleys for the remainder of the funds for the six-week period in question. However, we did not believe that respondent's misconduct rose to the level of gross neglect. Accordingly, we dismissed that charge.

An aggravating factor was respondent's cavalier attitude in refusing to accept the fact

that his actions exposed parties, other than himself, to great risk. The shortage of funds at closing was not respondent's problem alone, as he argued. In addition to also placing the Armstrongs at risk by not timely paying off their mortgage, respondent placed the parties to the real estate commissions at risk. Had the Werleys been unable to obtain their mortgage, the Armstrongs would have been compelled to sue for the return of the $26,000 real estate commission, half of which was for respondent's wife. In fact, respondent's conduct in this respect violated RPC 1.15. After all, he disbursed funds at closing that should have been held in escrow, pending certified funds from the Werleys to complete the transaction. As settlement agent, respondent was required to disburse funds to no one without sufficient funds to pay everyone. Although respondent was not specifically charged with a violation of RPC 1.15, the facts contained in the stipulation support a finding of a violation of that rule. Furthermore, respondent did not object to the admission of such evidence in the record. In light of the foregoing, we deemed the complaint amended to conform to the proofs. R. 4:9-2; In re Logan, 70 N.J. 222, 232 (1976).

As to the issue of discipline. "In cases involving conflict of interest, absent egregious circumstances or serious economic injury to the clients involved, a public reprimand constitutes appropriate discipline." In re Berkowitz, supra, 136 N.J. at 148. Likewise, a reprimand is the appropriate discipline for misrepresentation alone. In re Kasdan, 115 N.J. 472, 488 (1989). See, also, In re Carney, 138 N.J. 43 (1994) (public reprimand for attorney who failed to reveal to a client that the financial consultant whom the attorney recommended

for advice on how to invest a substantial settlement was the attorney's wife). Here, in aggravation, we considered that respondent derived a personal benefit from his actions, when he prematurely disbursed the sellers' funds to pay his wife's real estate commission. In unanimously determining to impose only a reprimand, we took into account that this is respondent's first disciplinary matter since his admission to the bar thirty-seven years ago.

One member did not participate.

We also required respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Brian T. Kennedy
Docket No. DRB 02-099

Argued: May 16, 2002

Decided: June 26, 2002

Disposition: Reprimand

Members	***Disbar***	***Suspension***	***Reprimand***	***Admonition***	***Dismiss***	***Disqualified***	***Did not participate***
Peterson			X				
Maudsley			X				
Boylan							X
Brody			X				
Lolla			X				
O'Shaughnessy			X				
Pashman			X				
Schwartz			X				
Wissinger			X				
Total:			8				1

Robyn M. Hill 7/22/02
Robyn M. Hill
Chief Counsel