SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-362

IN THE MATTER OF

TERRY J. FINKELSTEIN

AN ATTORNEY AT LAW

Decision

Argued: January 29, 2004

Decided: March 12, 2004

Patrick W. Foley appeared on behalf of the District VIII Ethics Committee.

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 discipline filed by the District VIII Ethics Committee ("DEC"). The complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with client), and RPC 1.8(b) (conflict of interest – using information relating to representation of a client to the disadvantage of the client unless the client consents after consultation).

Respondent was admitted to the New Jersey bar in 1985 and the Ohio bar on an unknown date. Apparently, his Ohio license is inactive because of his failure to participate in Ohio's mandatory legal education program.

Respondent maintains a law office in East Brunswick, New Jersey. In 1999, he successfully completed an agreement in lieu of discipline pursuant to R. 1:20-3(i)(2)(B)(i) for failing to communicate with a client in a real estate matter. In January 2004, we granted a motion for discipline by consent (admonition) for respondent's gross neglect, lack of diligence, and failure to communicate with client. In the Matter of Terry J. Finkelstein, Docket No. DRB 03-420.

The following facts were gleaned from testimony at the DEC hearing, and a stipulation of facts entered into between respondent and the DEC.

Darryl Hansel and his wife, Bertha Ching ("the Hansels"), retained respondent in January 1999, to file a lawsuit against the sellers of property they had purchased on June 1, 1998. Immediately after closing on the property, the Hansels began experiencing problems with it, including mold, mildew, and water in the basement, among other defects. The Hansels made the required repairs. Mr. Hansel believed that the repairs cost in excess of $30,000 to $40,000. He testified that he had to liquidate about $17,000 worth of stock to make some of the repairs.

In February 1999, respondent filed a complaint on behalf of the Hansels against the sellers of the property. The Hansels wanted to recoup the cost of the repairs. After filing the complaint, respondent took no further action in the matter until June 1999, when Mr. Hansel contacted respondent to inquire about the status of the matter. Afterwards, respondent forwarded the complaint to Guaranteed Subpoena Service. The defendants were served at the end of June 1999.

Again, respondent took no further action. On August 8, 1999, Mr. Hansel wrote to respondent to inquire about the status of the matter, and to remind him that the thirty-five day period to answer the complaint had passed. Thereafter, the defendants' attorney contacted respondent to request an extension of time to file an answer. Respondent consented to the

request. Although the attorney prepared a draft answer, it appears that he never filed it with the court.

On September 20, 1999, the court issued a notice of motion to dismiss the complaint for lack of prosecution, returnable October 29, 1999. Respondent failed to oppose the motion. As a result, on October 29, 1999, the court issued an order dismissing the case, without prejudice, for lack of prosecution. Respondent did not notify the Hansels of the dismissal, and took no action to have the case reinstated.

In March 2000, the Hansels signed a listing agreement to sell the property. The listing agreement had appended to it the seller's disclosure statement. The disclosure statement listed the problems with the property as well as the remedial measures taken by the Hansels. The Hansels succeeded in obtaining a prospective purchaser, and entered into a contract of sale. Dennis Haag, Esq. represented the Hansels in connection with the sale. The purchasers, by chance, consulted with and retained respondent to represent them in purchasing the property from the Hansels. Respondent did not advise the Hansels that he was representing the prospective purchaser, and did not advise the prospective purchasers that he had previously represented the Hansels. Likewise, respondent did not obtain a written waiver for the representation.

Respondent informed the prospective purchasers about the problems in the basement of the house. He testified that at that time he was not aware that the problems had been remediated. He only knew that the Hansels had obtained an appraisal for certain repairs. As a result of their conversations with respondent, the prospective purchasers determined to cancel the contract. Respondent then contacted Haag to notify him that the contract of sale was being cancelled, and of the fact that he had represented the Hansels in the lawsuit regarding the condition of the basement. According to respondent, he assumed that, because he had spoken to Haag about

representing the Hansels in the lawsuit, and represented the purchasers, Haag had passed that information on to the Hansels.

From the time the contract was terminated in the spring of 2000 until the spring of 2002, respondent did not communicate with the Hansels, nor did he inform them that their lawsuit had been dismissed in October 1999. According to the stipulation, in the spring of 2002, respondent and Mr. Hansel exchanged correspondence that ultimately led to Mr. Hansel filing a grievance against respondent.

In his own defense, respondent testified that he apologized to Mr. Hansel, admitted that he made a mistake, and cooperated fully with the DEC. Respondent believed that although he engaged in a conflict of interest, it was a technical violation and was "exceedingly, exceedingly minor." He believed that the Hansels should have known that he was representing the prospective purchasers either "orally" from Haag or from Haag's office, and that it would have been better if the Hansels had objected to his representation of the purchasers at that time; he would have gotten out of the matter.

Respondent admitted that he often represents the purchaser of property in one transaction, and then later represents the new purchaser buying the property from his prior client. He claimed that if there had not been an ongoing lawsuit in the Hansel matter, there would not have been a conflict of interest. He admitted, however, that he should not have represented the prospective purchasers.

The DEC found that respondent's failure to properly handle the Hansels' lawsuit by failing to prosecute the case once the complaint had been filed, ultimately leading to its dismissal, violated RPC 1.1(a) (gross neglect), and RPC 1.3 (lack of diligence). The DEC also found that respondent failed to keep his clients adequately and accurately informed about the status of their matter and failed to inform them of the dismissal of their case, violating RPC

1.4(a) (failure to communicate with client). Finally, the DEC found that respondent's representation of the prospective purchasers of the Hansels' property violated RPC 1.8(b) (conflict of interest). According to the DEC, based on respondent's experience, he should have known that there was an inherent conflict of interest. Without full disclosure and a waiver from the Hansels, he was not in a position to represent the purchasers of the Hansels' home. The DEC, therefore, believed that a reprimand was the appropriate discipline for respondent's transgressions.

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

RPC 1.8(b) states: "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation." Clearly, respondent failed to consult with the Hansels about his representation of the prospective purchaser and thus failed to obtain the Hansels' consent to the representation. Respondent's claim that he believed that his contact with Haag would somehow satisfy the requirements of RPC 1.8(b) was disingenuous, particularly because he had contacted Haag after the fact, to notify him that the contract of sale was being canceled. Respondent admitted that his conduct in this regard was a technical violation of the rule. Respondent's conduct was more than a technical violation of the rule. Moreover, the information he gave the prospective purchasers was inaccurate since he was unaware at the time that the Hansels had remediated the problems with the property. Had he complied with the requirements of the rule and consulted with the Hansels, the cancellation of the contract of sale may have been averted. Similarly, respondent cannot escape a finding that he engaged in a conflict of interest by claiming that the information relayed to the prospective purchasers was public information because it had been set forth in the complaint he filed in the Hansels' behalf.

After respondent filed the complaint on behalf of the Hansels, he failed to pursue the litigation on their behalf. Instead, he allowed the matter to be dismissed for lack of prosecution and failed to take any action to reinstate the complaint, violating RPC 1.1(a) and RPC 1.3. Respondent also failed to communicate with his clients, and failed to notify them that their case had been dismissed. RPC 1.4(a).

It is well-settled that, absent egregious circumstances or economic injury to clients, a reprimand constitutes sufficient discipline for engaging in a conflict of interest situation. See In re Berkowitz, 136 N.J. 134, 148 (1994) (conflict of interest existed between clients of partners in the same law firm, due to proximity of first client's commercial property to second client's proposed residential development); In re Porro, 134 N.J. 524 (1993) (conflict of interest for attorney representing a developer operating in a municipality where the attorney was both the municipal attorney and the attorney for the sewer authority; representing those entities at the same time while an associate in the attorney's firm served as counsel to the planning board that approved the developer's subdivision; and representing the municipality in a lawsuit in which the authority was a co-defendant); In re Doig, 134 N.J. 118 (1993) (conflict of interest where an attorney undertook the dual representation of two individuals in a business/real estate transaction without obtaining their consent after full disclosure; attorney also engaged in a misrepresentation and had a prior private reprimand); and In re Woeckener, 199 N.J. 273 (1990) (conflict of interest where an attorney represented his wife in connection with city development at the same time he was the city attorney).

Respondent's additional violations do not automatically require increased discipline. See In re Kraft, 167 N.J. 615 (2001) (reprimand where attorney failed to communicate with clients in four matters, failed to explain a matter to the extent reasonably necessary to permit client to make informed decisions about the representation, failed to act with diligence in four matters,

failed to communicate the basis or rate of the fee in writing, and engaged in a conflict of interest; attorney had a prior admonition); In re Levine, 167 N.J. 608 (2001) (reprimand where attorney engaged in a conflict of interest, commingled personal and trust funds, and failed to comply with recordkeeping requirements); In re Garcia, 167 N.J. 1 (2001) (reprimand where attorney engaged in a conflict of interest and shared legal fees with a client); In re Maione, 158 N.J. 21 (1999) (reprimand for conflict of interest and notarizing a deed signed outside of the attorney's presence); In re Auerbacher, 156 N.J. 552 (1999) (reprimand for engaging in a conflict of interest and the unauthorized practice of law); and In re Doig, supra, 134 N.J. 118.

In the absence of egregious circumstances, or a finding of economic injury to the Hansels,[1] we unanimously determine that a reprimand is sufficient discipline for respondent's transgressions in this matter. Two members did not participate.

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

Disciplinary Review Board
Mary J. Maudsley, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

[1] The record did not establish whether the Hansels suffered serious economic injury. Even though they did expend a significant amount to rectify problems with their home, they continued to live there, benefited from the repairs, and elected to forgo reinstating their lawsuit against the prior owners.

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Terry J. Finkelstein
Docket No. DRB 03-362

Argued: January 29, 2004

Decided: March 12, 2004

Disposition: Reprimand

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley			X				
O'Shaughnessy							X
Boylan			X				
Holmes			X				
Lolla							X
Pashman			X				
Schwartz			X				
Stanton			X				
Wissinger			X				
Total:			7				2

Julianne K. DeCore
Chief Counsel