SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-409

IN THE MATTER OF :

EDWARD C. DELANEY :

AN ATTORNEY AT LAW :

Decision

Argued: January 29, 2004

Decided: March 10, 2004

Timothy J. Little appeared on behalf of the District VIII Ethics Committee.

Pamela L. Brause 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 recommendation for an admonition, filed by the District VIII Ethics Committee ("DEC"), which we determined to bring on for oral argument.

Respondent was admitted to the New Jersey bar in 1987. He is a sole practitioner in Kendall Park, Middlesex County, New Jersey. He concentrates his practice on real estate matters and performs approximately 350 closings annually.

Respondent has no disciplinary history.

In July 2002, we reviewed an appeal filed by Dawn Miller, following the DEC's dismissal of her grievance against respondent, alleging that her signature on a contract addendum was not genuine. We reversed and remanded the matter for an investigation by a new

investigator. The investigator was to contact the Office of Attorney Ethics ("OAE") to retain an expert to determine the authenticity of the signature. We also directed that a complaint be filed and a hearing held, in the event that the investigator found evidence of other unethical conduct. The present matter stems from the hearing that followed that new investigation.

The formal ethics complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.4(a) (failure to keep the client reasonably informed about the matter), RPC 1.7 (conflict of interest), RPC 3.2 (failure to expedite litigation and to treat with courtesy and consideration all persons involved in the legal process), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

One of the allegations of the complaint is that respondent committed a fraud by either inducing Miller to sign or affixing Miller's signature to an addendum to a contract of sale of real property, in violation of RPC 8.4(c). At the DEC hearing, the presenter withdrew that allegation, conceding that there was insufficient proof to support it. Miller agreed with the withdrawal of that charge.

The facts that gave rise to this disciplinary matter are as follows:

Dawn Miller and James DeAngelis, who shared a romantic relationship, decided to purchase a house together. They signed a contract of sale on March 9, 2000. The sellers, Edwin and Ann Lopez, were represented by Andrew Newman. Miller and DeAngelis retained respondent, who charged them a $675 legal fee. The parties did not sign a retainer agreement.

Miller's name was listed on several pre-closing documents, such as the termite inspection certification, the radon test result, and the survey. According to Miller, she paid for those expenses. She testified that respondent was aware of her financial contributions toward the

purchase of the house. Respondent denied this contention, but acknowledged being aware that Miller had an interest in the property.

Miller and DeAngelis filed a joint mortgage application with Chase Manhattan Mortgage ("Chase"), who approved only DeAngelis for the loan. Although the reason for Chase's action is unclear, it is undisputed that Chase required the removal of Miller's name from the contract. Obviously, that meant that Miller's name could not be listed on the deed. One of the questions we must decide is whether respondent informed Miller of this circumstance.

On May 5, 2000, respondent faxed to Chase a copy of an unsigned addendum to the contract, providing for the deletion of Miller's name from the contract. Respondent testified that, because of his longterm professional relationship with Chase, the bank allowed him to submit a signed copy after the closing.

The closing took place on May 8, 2000. According to Miller, she met respondent for the first time at the closing, although they had spoken by phone. Miller claimed that, although she knew, before the closing, that her name would not be on the mortgage documents, no one had told her that her name would not be on the contract. She testified that, at the closing, she was informed that her name could not be listed in the contract, but asserted that no one disclosed to her, at any time, that her name would be absent from the deed as well:

> It was somewhat explained that I was being removed from the contract, not the deed . . . . Nobody told me at the closing that I was not going to be remained on the deed. They all, [the brokers], [respondent], told me that I was benefitting by signing the papers . . . . I broke down crying. [One of the brokers] had taken me in the back office, because I was ready to take up all the papers and walk out of there, because they had told me that I had to take my name off the contract, but they still guaranteed to me that it would be on the deed. So they convinced me that I was benefitting by signing off on the contract and letting James have the mortgage for himself, because then he was solely responsible for the financial

needs to the home, and I would be the owner.

[T56-T57.][1]

When the presenter pointed out to Miller that she kept referring to "they" and asked her to state specifically what respondent had told her, she replied as follows:

> That I was going to be benefitting by not being on the mortgage, but being on the deed . . . .
>
> [T57.]
>
> [The brokers], [respondent], and James DeAngelis [told me] that I was benefitting. I walked out of that office believing that I was benefitting by not having a financial responsibility to the home, but still to remain as co-owner with James DeAngelis to the home.
>
> [T62.]

Later, however, Miller admitted knowing, in advance of the closing, that her name had to be removed from the contract.

At the closing, Miller signed an "Addendum to Sale Contract" stating as follows:

> ADDENDUM TO SALE CONTRACT
>
> THIS ADDENDUM TO A CERTAIN Contract for Sale of Real Estate between James DeAngelis and Dawn Miller, as Purchasers and Edwin Lopez and Ann Lopez, as Sellers covering premises known as 60 Vineyard Avenue, Middletown, New Jersey is hereby amended to remove Dawn Miller from the contract.
>
> [Exhibit 22.]

Although respondent knew that Miller had an equitable interest in the property, he did not prepare an agreement to protect her interest. Neither did he advise her to consult with independent counsel before the closing proceeded.

[1] T denotes the transcript of the DEC hearing on July 10, 2003.

Miller testified that she left the closing with the understanding that both she and DeAngelis were the buyers of the property. Respondent, in turn, testified that Miller was aware that her name would not be on the deed initially. As detailed below, although the deed did list both Miller and DeAngelis as grantees, respondent testified that there had been a mistake; he, therefore, subsequently deleted Miller's name from it.

As noted earlier, respondent contended that Miller knew that her name would not be included in the deed at first, but inserted post-closing, with Chase's consent:

> Well, the conversation as I recall was that in order to – if [Miller] wanted to be on the deed, then post closing, after the closing occurred, maybe three, four, five, six months later, we could add her as a party, we could add her as a grantee to the deed.
>
> [T217.]

Respondent stated that, in his seventeen years of private practice, his clients have often requested to insert a name on a deed post-closing, a request that the mortgagees have invariably granted. Respondent was confident that, in this case, the same could be accomplished. He testified that he contacted Chase after the closing and was told that the bank would not object to adding Miller as a grantee. Respondent recalled that, after the closing, DeAngelis called him numerous times to tell him that he wanted Miller included in the deed and to schedule an appointment to have a new deed prepared.

Following the closing, the deed that was sent for recording listed both Miller and DeAngelis as grantees. Seemingly, neither respondent nor the sellers' attorney noticed that Miller's name remained on the deed.

In June 2000, the County Clerk's Office returned the deed to respondent because the sellers' signatures had not been formally acknowledged by their attorney. The deed had not yet been recorded. According to respondent, he called Newman to confirm that the sellers had

signed the closing papers, including the deed, and then acknowledged the sellers' signatures. Asked by the presenter if he had seen the sellers sign the deed, respondent replied, "To the best of my knowledge, yes, I thought they were there and they signed the deed."

In reviewing the deed on that occasion, respondent noted that it listed Miller as a grantee. He, therefore, "whited out" her name, initialed this change, and sent the deed back to the County Clerk's Office. The deed was finally recorded almost a year after the closing, on May 10, 2001.[2] Respondent explained that, although he could have obtained a corrected deed or crossed Miller's name and stamped "void", he used "white-out" because "[t]his was a really big typo." Respondent did not inform Miller that he had corrected the deed. When the deed was returned recorded, respondent did not send it to DeAngelis or Miller because DeAngelis had called him, after the closing, to discuss the preparation of a new deed with Miller's name. According to respondent, Miller, too, had called him several times to "ascertain the status of the deed." DeAngelis, however, had failed to show up for several appointments.

Eventually, Miller and DeAngelis' relationship ended. According to Miller, she discovered at that time that her name was not on the deed. That discovery led to the filing of her grievance against respondent.

Although DeAngelis and Miller are currently residing in the house, it is in the midst of foreclosure proceedings. DeAngelis acknowledged that Miller has an interest in the house and is willing to include her name on the deed, if other disputes between them may be resolved.

At the conclusion of the hearing below, the DEC found that respondent violated RPC 1.7 for his representation of two clients with conflicting interests. The DEC noted that a conflict of interest arose when Chase did not approve Miller for the mortgage loan. According to the DEC,

[2] Respondent testified that part of the delay was caused by the County Clerk's Office's mistaken contention that the realty transfer tax and the recording fees had not been paid.

by structuring the transaction to exclude Miller's name from the closing documents, respondent failed to protect her equitable or legal interests in the property. The DEC found that respondent's offer to add Miller's name to the deed, following the closing, was "a solution he could not guarantee." The DEC concluded that, at a minimum, respondent should have insisted that Miller consult with separate counsel, who might have been able to prepare an agreement to protect her rights.

The DEC also found that respondent violated RPC 1.4, by failing to disclose to Miller that her name had been "whited out" from the deed.

Finally, the DEC found that respondent violated RPC 4.1(a)(1) (a lawyer shall not knowingly make a false statement of material fact or law to a third person), and RPC 8.4(c) (misrepresentation), when he affixed his jurat to a deed that had been signed outside of his presence. The DEC found no other violations of RPC 8.4(c), as alleged in the complaint.

Presumably, the DEC dismissed the charges of violations of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), and RPC 3.2 (failure to expedite litigation and to treat with courtesy and consideration all persons involved in the legal process).

According to the DEC, a number of mitigating circumstances were factored into its decision to recommend only an admonition: respondent was cooperative and candid with the presenter and the hearing panel; he acknowledged the problem caused by his actions and has altered his practice to prevent any reoccurrence; "the opportunity for dispassionate analysis of conflict situations does not readily exist in the cauldron of a closing where everyone wants to get the deal done quickly and at the lowest possible cost;" respondent has no disciplinary history; and several members of the bar attested to his reputation for honesty.

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

Unquestionably, respondent violated the conflict-of-interest rules by failing to urge Miller to retain an attorney. The conflict of interest arose as soon as respondent discovered that Chase had not approved Miller for the mortgage loan and that, consequently, her name could not appear on the closing documents, including the deed. At that point, respondent had a duty to advise Miller to seek independent legal counsel. Had Miller declined to obtain an attorney, at a minimum respondent should have prepared an agreement spelling out the nature and extent of Miller's and DeAngelis' respective interests in the property. Without her name on the deed or an agreement evidencing her ownership rights to the property, Miller's interests were left unprotected. Therefore, by placing DeAngelis' interests above Miller's, respondent violated RPC 1.7(a).

There is no clear and convincing evidence, however, that respondent misrepresented to Miller, before the closing, that her name would be either on the contract or on the deed. As to the contract, although Miller initially testified that she did not know, in advance of the closing date, that her name would be removed from the contract, her later testimony was to the contrary. As to the deed, although Miller denied being told that it would not list her name, respondent testified that, at the closing, Miller was clearly informed that she would not be named a grantee and that, at a later point, her name could be added to the deed. DeAngelis confirmed respondent's testimony. The DEC found no impropriety in this regard, believing respondent's and DeAngelis' testimony. Since the DEC had the opportunity to observe the demeanor of the witnesses, we defer to its assessment of their credibility. Dolson v. Anastasia, 55 N.J. 2, 7 (1969). We find, thus, that respondent did inform Miller that her name would not be on the deed

initially and that it could be inserted in it at a later time, with Chase's consent. Under these circumstances, we also dismiss the charge that respondent intended to deceive Chase by adding Miller's name to the deed after the closing.

As the DEC properly pointed out, however, respondent's offer to modify the deed post-closing was "a solution he could not guarantee." Although, as a matter of practice, lending institutions do not object to the addition of a name to the deed if the borrower has established a history of prompt mortgage payments and if the leading institutions hold a first lien on the property, it is always possible that they may withhold their consent. In that case, if respondent were to insert Miller's name, Chase could invoke the "due on sale" clause. Indeed, paragraph 9 of the Chase mortgage provided as follows:

> 9. Grounds for Acceleration of Debt.
>
> . . . .
>
> (b) Sale Without Credit Approval. Lender shall, if permitted by applicable law . . . and with prior approval of the Secretary, require immediate payment in full of all sums secured by this Security Instrument if:
>
> (i) All or part of the Property, or a beneficial interest in a trust owning all or part of the Property, is sold or otherwise transferred (other than by devise or descent) . . . .

Respondent's assurance to Miller that her name could be subsequently added to the deed highlights the perils presented by conflict-of-interest situations. By failing to advise Miller that she should seek the advice of separate counsel, respondent caused her rights to be left unprotected, to her financial detriment. Furthermore, by continuing to represent DeAngelis in the same transaction, respondent violated RPC 1.9 (a lawyer shall not represent a client in the same matter in which that client's interests are materially adverse to the interests of a former

client, unless there is consent and disclosure). Although the complaint did not charge respondent with a violation of that RPC, the conduct that gave rise to a finding of this violation is the same conduct that formed the basis for the charge of a violation of RPC 1.7.

Respondent's conduct in connection with the acknowledgement of the deed, too, was unethical. It is undisputed that he did not witness the sellers sign the deed. Nevertheless, when the deed was returned to him for the proper acknowledgement, he affixed his jurat to it. His conduct was improper and in violation of RPC 8.4(c), in that he misrepresented that the sellers personally appeared before him for the execution of the deed.

The DEC found that respondent violated RPC 1.4 when he "whited out" Miller's name from the deed without first informing her of this action. Although respondent's conduct in this context seems reprehensible, it is possible that he thought that Miller's authorization was unnecessary because of the addendum and his explanations to her. While prudence might have dictated that respondent apprise Miller of his intent to delete her name from the deed, there is no clear and convincing evidence of nefarious motives on his part; he believed that he was merely correcting an error. We, therefore, dismiss the charges that respondent violated RPC 1.4(a) and RPC 8.4(c) when he "whited out" Miller's name from the deed.

Finally, like the DEC, we find no clear and convincing evidence that respondent violated RPC 1.1(a), RPC 1.1(b), RPC 3.2, and RPC 4.1(a)(1).

It is well-settled that a reprimand is the appropriate level of discipline for conflict of interest, absent egregious circumstances or serious economic injury to the clients. In re Berkowitz, 136 N.J. 134, 148 (1994). But see In the Matter of Anton Muschal, DRB 99-381 (February 4, 2000) (admonition imposed on attorney who represented a client in the incorporation of a business and renewal of a liquor license and then filed a suit against her on

behalf of another client); In the Matter of Jeffrey E. Jenkins, DRB 97-384 (December 2, 1997) (admonition for attorney who engaged in a conflict-of-interest situation by continuing to represent husband and wife in a bankruptcy matter, although the parties had developed marital problems and had retained their own matrimonial lawyers; it was found that, at times, the attorney advanced the interests of one client, while compromising the interests of the other).

Here, the circumstances were not egregious and the extent of the financial detriment to Miller is unknown. Hence, respondent's conflict of interest does not call for a suspension. Reprimands have been imposed on attorneys who, in addition to engaging in conflict-of-interest situations, displayed other forms of unethical behavior. See, e.g., In re Kennedy, 174 N.J. 374 (2002) (reprimand for attorney found guilty of conflict of interest for representing buyers of real property in two transactions also involving his wife as the real estate broker or agent; in one of the matters, the attorney was also found guilty of RPC 8.4(c) (misrepresentation by silence), when he closed title without sufficient funds from the buyers, failed to inform the sellers' attorney of this circumstance, and gave the sellers' attorney an inaccurate RESPA statements reflecting sufficient settlement funds at hand to close title; aggravating factors were respondent's refusal to acknowledge any wrongdoing and the personal benefit he derived through his wife's receipt of the real estate commissions; in mitigation, it was considered that, prior to these incidents, respondent's career of thirty-seven years had been unblemished); In re Kraft, 167 N.J. 615 (2001) (reprimand for attorney who failed to communicate with clients in four separate matters: in one matter, the attorney violated RPC 1.4(b) by failing to clearly explain to the client his legal strategy, thereby precluding her from making an informed decision about the course of the representation and the pursuit of her claims; in all four matters, the attorney exhibited lack of diligence; in one of the matters, he failed to prepare a written fee agreement with the client ; and

in one of the matters he was found guilty of a conflict of interest by failing to explain to the client the advantages or disadvantages of pursuing her case jointly or independently of the client's co-worker, who was also represented by the attorney); and In re Castiglia, 158 N.J. 145 (1999) (on a motion for discipline by consent, the Court agreed that a reprimand was the appropriate discipline for attorney who repeatedly failed to communicate to his clients, in writing, the basis or rate of his legal fee, engaged in a conflict of interest by simultaneously representing various parties with adverse interests, and witnessed the signature on a deed and affidavit of title, even though the documents had been signed outside of his presence).

As the DEC properly noted, there are several compelling mitigating circumstances in this matter: respondent was candid with the presenter and the hearing panel; he recognized the problem caused by his actions and has taken steps to prevent any reocurrences; his conduct was not motivated by self-gain; several attorneys attested to his reputation for honesty; and this is the first blemish in his seventeen-year legal career. In addition, although respondent's conduct in connection with the jurat should not be condoned, it is mitigated by his knowledge that the signatures on the deed were, in fact, the sellers'.

In light of the foregoing, we determine that a reprimand is the appropriate level of discipline for respondent's ethics transgressions. 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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Edward C. Delaney
Docket No. DRB 03-409

Argued: January 29, 2004

Decided: March 10, 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
Julianne K. DeCore
Chief Counsel