SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 02-034 and 02-152

IN THE MATTER OF

ELLIOTT D. MOORMAN

AN ATTORNEY AT LAW

Decision

Argued: June 20, 2002

Decided: October 16, 2002

Denzil R. Dunkley appeared on behalf of the District VB Ethics Committee.

Respondent appeared pro se.

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

These matters were before us based on two separate recommendations for discipline filed by the District VB Ethics Committee ("DEC"). The complaint in docket number DRB 02-034 charged respondent with two violations of *RPC* 8.4(d) (conduct

prejudicial to the administration of justice). The complaint in docket number DRB 02-152 charged respondent with violations of *RPC* 1.5(b) (failure to prepare a written fee agreement); *RPC* 1.7(a) and (b) (conflict of interest; simultaneous multiple representation of buyer and seller in a real estate transaction); *RPC* 1.15 (release of escrow funds without consent of one of the parties) and *RPC* 1.15(b) (withdrawal of fee without first obtaining client's consent).[1]

Respondent was admitted to the New Jersey bar in 1977. He maintains a law office in East Orange, New Jersey. He was publicly reprimanded in 1990 for failure to maintain proper time records and to preserve the identity of client funds. *In re Moorman*, 118 *N.J.* 422 (1990). In 1994 respondent was suspended for three months for gross neglect, lack of diligence, failure to keep a client informed about the status of a matter and failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions. *In re Moorman*, 135 *N.J.* 1 (1994). In 1999 he received another reprimand for lack of diligence, failure to provide a written retainer agreement, failure to comply with bookkeeping requirements and failure to cooperate with disciplinary authorities. *In re Moorman*, 159 *N.J.* 523 (1999).

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[1] More properly, a violation of *RPC* 1.15(a).

The Stanzione Matter – Docket No. DRB 02-034 (District Docket No. VB-00-030E)

On January 4, 1999 respondent represented his son, Rafiq, in traffic matters before the Honorable Ralph Stanzione, Jr., the presiding municipal court judge in New Brunswick. Judge Stanzione held respondent in contempt for continuing to talk in court after being instructed to remain silent, displaying arrogance and lying to and threatening the court. The judge assessed a $500 fine, set bail at $500 and stayed the sentence for five days. The contempt citation indicated that, upon the filing of an appeal, the sentence would be stayed, pending the outcome of the appeal. Respondent represented to the court that he would pay his client's motor vehicle fines, post his own $500 bail and file an appeal of the contempt order.

On January 28, 1999 Judge Stanzione "faxed" a letter to respondent indicating that, to that date, there was no record that an appeal had been filed or that the fines or bail had been paid. He cautioned respondent that the failure to provide proof of payment or proof of a timely-filed appeal by February 1, 1999 would result in the issuance of a bench warrant for his arrest.

On February 3, 1999 Judge Stanzione informed respondent that he had issued a bench warrant for his arrest, based on his failure to file an appeal and to post bail. According to Judge Stanzione's letter, he received a copy of a notice of appeal that was deficient because (1) it was not signed, (2) it was not filed with the Superior Court Clerk,

(3) it did not contain a transcript request and (4) it did not include a transcript deposit. On that basis, the judge made a determination that respondent had not appealed the contempt order and had not posted bail, contrary to respondent's representations to the court on January 4, 1999.

Respondent, in turn, testified that on January 5, 1999, the day after his appearance before Judge Stanzione, he had filed the notice of appeal with the Middlesex County Clerk and had served a copy on the New Brunswick Municipal Court clerk. He conceded that he could not produce proof of service and that his appeal had not been filed properly.

In a March 9, 1999 letter to the Honorable Robert A. Longhi, the Middlesex County Assignment Judge, respondent asserted that he had filed a notice of appeal and complained that Judge Stanzione was "pursuing a vendetta against me personally." On March 23, 1999 Judge Longhi replied that the criminal division had no record of respondent's appeal and asked him to send a copy of the notice of appeal. Respondent sent the copy on April 29, 1999 and asked Judge Longhi to schedule the matter for a hearing. Respondent represented that he would order a copy of the transcript "forthwith." He never did so, however.

On January 5, 1999, the same day that respondent allegedly filed a notice of appeal, he filed a grievance with the Advisory Committee on Judicial Conduct ("ACJC"), complaining that Judge Stanzione's conduct was "unbecoming a judicial official" and

that he had gone through a "humiliating and embarrassing experience in the New Brunswick Municipal Court." Respondent's letter stated as follows:

> I have appealed the fine. I am at this time filing this complaint because in my opinion the judicial conduct of Mr. Stanzione was deplorable, reflected poorly on the judiciary, gave the appearance of impropriety and was otherwise outrageous, humiliating and demeaning.
>
> I look forward to your processing and docketing this complaint and to appropriate proceedings being initiated against the judge in question.

On March 9, 1999 respondent supplemented the grievance with a letter indicating that Judge Stanzione had issued a bench warrant for his arrest, thereby continuing his "personal vendetta against me and my son." On April 1, 1999 the ACJC investigator asked respondent to comment on both the January 28, 1999 and February 3, 1999 letters from Judge Stanzione and to include any other information he wanted the ACJC to consider. On April 29, 1999 respondent asked the investigator to "advance your file one week to permit me to prepare a detailed response".

On June 28, 1999, noting that the ACJC had received no response, the investigator asked for a reply within three weeks. The investigator also mentioned that respondent's April 29, 1999 letter was postmarked May 14, 1999. On November 15, 1999 the investigator advised respondent that the ACJC still had received no reply, that the ACJC would be considering the matter at its December meeting and that any additional information had to be received by November 30, 1999.

Finally, the investigator sent the following letter to respondent on January 3, 2000:

> The Advisory Committee on Judicial Conduct has directed me to inform you of its decision in this matter, which was opened in response to your complaint concerning Municipal Court Judge Ralph Stanzione. After reviewing your complaint, the tape recording of the underlying proceeding, and remarks from the judge, the Committee requested that you provide it with further information regarding your complaint. You have not responded to repeated requests by the Committee and it has decided to close its file as dismissed.

Respondent testified that, at some point, he had determined not to pursue the ACJC grievance against Judge Stanzione. According to respondent, he did not notify the ACJC of his decision to abandon the grievance because he believed that it would be dismissed if he did not reply to the ACJC's request for information. Respondent conceded that, although he interpreted the ACJC's correspondence to mean that the grievance would be dismissed if he did not provide the requested information, the letters did not specifically so indicate. He stated that dismissal of the grievance would "facilitate the accomplishment of my primary objective which was to get this case resolved against the defendant in the underlying matter."

The formal ethics complaint alleged that respondent's failure to cooperate with the ACJC, after he had filed the grievance against Judge Stanzione, was prejudicial to the administration of justice.

On May 16, 2000, more than five months after the ACJC dismissed the grievance against Judge Stanzione, respondent sent a letter to the New Brunswick Municipal Court

clerk complaining that the bail posted in his son's behalf in East Orange Municipal Court had not been returned to him. According to respondent's letter, on December 16, 1996 he posted $950 in East Orange Municipal Court that should have been forwarded to the New Brunswick Municipal Court. Respondent further stated that, because the fines imposed amounted to $660, he should have received a refund of $290. Respondent concluded his letter as follows:

> As you know, it was necessary for me to file a complaint before the Supreme Court of New Jersey Advisory Committee on Judicial Conduct in order to get any response from the New Brunswick Municipal Court. I hope it will not be necessary for me to re-open that complaint against Judge Ralph Stanzione, and that this time you will promptly process the discharge of any warrant issued for Rafiq Moorman's arrest, your receipt of the bail sums from the City of East Orange and your remission to me of the net balance together with disposition for the defendant so that he might have his license restored.

On June 5, 2000 the court clerk informed respondent that there was no record of the $950 bail and recommended that he contact the East Orange Municipal Court. After respondent sent a June 9, 2000 letter to the East Orange Municipal Court, the bail was transmitted to the New Brunswick Municipal Court and applied to respondent's son's fines. The balance was returned to respondent.

Respondent testified that, before he had sent the May 16, 2000 letter to the court clerk, he had called and written to the clerk's office on several occasions, requesting the release of the bail posted in his son's behalf, without success. He added that, at about the

same time that his son had received motor vehicle summonses in New Brunswick, he had also received tickets in two other municipalities. According to respondent, those other matters were resolved without any problems. Respondent claimed, thus, that the delay in having his bail released was prompted by the contempt finding by Judge Stanzione. Specifically, respondent contended that, because he had been held in contempt by Judge Stanzione, the judge was intentionally refusing to release the bail. Respondent asserted that Judge Stanzione had control over the release of the bail, as presiding judge of the municipal court.

Respondent denied that his letter of May 16, 2000 constituted a threat to revive the grievance filed with the ACJC:

> It is frustrating to an attorney to be ignored and to not get results for the client. We have an obligation to get results. . . .
>
> Now – and it has been my experience that – well, when you get ignored repeatedly by a clerk, you have to do something. You have to use language or you have to use – take steps that kind of wake them up, that alert them to the urgency of what you're trying to do.
>
> That was what I was doing in the final paragraph of my May 16th letter to the Clerk of the Court. I wasn't threatening. First of all, it was not a threat. A threat, to me, implies the taking of illegal action or coercive action or action to [sic] which I'm not entitled to take under the law.
>
> I am entitled to take action under the law against judges that abuse their authority. That's the whole purpose of the Advisory Committee on Judicial Conduct, so I did not perceive it as a threat.

> However, having voluntarily dismissed the Complaint in an effort to diffuse the obviously heightened emotional atmosphere, if that dismissal didn't result in results for my client, then I'm going to – then I would reopen the Complaint. . . .
>
> [A]fter sixteen months, I had not gotten response [sic] for my client and I needed to do something to shake that bail money loose, and that's what I did. [Emphasis added].

Finally, respondent testified that, in his view, the May 16, 2000 letter was not prejudicial to the administration of justice and that, in fact, it had facilitated "the efficient administration of justice" because it had brought his client's matter to a close.

The Mutiva Matter – Docket No. DRB 02-152 (District Docket No. VB-98-076E)

On April 23, 1997 respondent was the settlement agent for a commercial real estate transaction in which Daryl F. Spivey was the seller and Cum Paul Mutiva was the buyer. The subject of the transaction was real property located at 474 Avon Avenue, Newark, on which a tavern was operated. It is undisputed that respondent represented Spivey at the closing. At issue is whether respondent also represented Mutiva, the buyer. Another attorney, S.L., had initially represented Mutiva. When S.L. insisted that the closing could not proceed unless the City of Newark issued a certificate of occupancy, Mutiva became dissatisfied with S.L. Mutiva testified that, after he told Spivey that a certificate of occupancy was required, Spivey suggested that he contact respondent directly. Mutiva stated that, in a telephone conversation with respondent sometime before

April 23, 1997, respondent had advised him that the ordinance requiring a certificate of occupancy did not apply to commercial property. Mutiva then determined to disregard S.L.'s advice and to proceed with the real estate transaction. Although he decided to attend the real estate closing without S.L., he did not notify S.L. that he had been discharged. On April 23, 1997 Mutiva appeared at respondent's office to buy the property. According to Mutiva, respondent told him that he would be representing both Mutiva and Spivey at the closing. Mutiva and Spivey each paid respondent a legal fee of $250, as reflected on the HUD-1 settlement statement. Despite Mutiva's testimony that respondent represented both Mutiva and Spivey, Mutiva testified as follows, on cross-examination, "I think that I wanted the business so bad, that if it meant I take a chance on it, without representation, I will do that."

The HUD-1 settlement statement reflected a $500 tax escrow. Mutiva explained that this sum had been set aside for any liens that might be discovered after the closing. At the closing, Spivey signed a handwritten agreement stating that he would pay taxes, water and sewer bills for charges incurred between October 3, 1996 and April 23, 1997 and authorizing respondent to escrow $500 for this purpose. Shortly after the closing, Mutiva learned that there was an outstanding $1,520 water bill that had to be paid before the water could be turned on. He also discovered that there was a $308.48 tax lien. According to Mutiva, although respondent was aware of these liens, he disbursed the

$500 escrow to Spivey without notifying Mutiva or obtaining his consent to the disbursement. Mutiva had to pay the water and tax bills with his own funds.

After the real estate closing, Mutiva retained respondent to represent him in other matters. In June or July 1997, two or three months after the closing, respondent prepared a will and a power-of-attorney for Mutiva, dated July 3 and July 10, 1997, respectively. Mutiva also retained respondent to draft an agreement for the purchase of the liquor license for the tavern. Respondent drafted a contract of sale dated October 20, 1997, in which Larry Lyons agreed to sell the liquor license to Mutiva for $42,959.06. The agreement provided that Lyons would be responsible for satisfying all debts, judgments and tax liens, as well as any other obligations affecting the transfer of the liquor license. The agreement further stated that Mutiva would pay respondent a $2,500 counsel fee upon consummation of the sale and transfer of the liquor license. Respondent did not prepare a retainer agreement for this matter. According to Mutiva, respondent orally stated that his fee was $2,500. Mutiva testified that, although he had attempted to obtain Lyons' agreement to pay all or a part of respondent's fee, Lyons had refused.

Mutiva later discovered that the purchases of the Avon Avenue property and of the liquor license were fraught with problems. It turned out that the tavern comprised two contiguous lots, 474 and 476 Avon Avenue, and that Mutiva had purchased only one of them. To remedy this problem, respondent prepared a corrective deed by which Spivey

conveyed 474-476 Avon Avenue to Mutiva. Although Mutiva and respondent believed that the corrective deed would resolve the problem, Mutiva later discovered that Spivey did not own the lot at 476 Avon Avenue. It was owned by the City of Newark. Later, on May 28, 1998, Mutiva bought that property at an auction. According to Mutiva, although he expected that respondent would be paid for his services in resolving these problems, he was not aware of respondent's hourly rate.

In addition to the above title problems, after Mutiva obtained the liquor license and began operating the tavern, the New Jersey Division of Alcoholic Beverage Control seized the license because there was a $300,000 sales tax lien encumbering it. Mutiva could not operate the tavern until May 28, 1998 (the same day that he bought the lot at 476 Avon Avenue), when he re-acquired the liquor license for $10,000 at an auction.

At some point, Mutiva discharged respondent and hired another attorney, B.G., to represent him and to attend the auctions for the Avon Avenue property and the liquor license. The date of the termination of respondent's services was disputed at the hearing. According to Mutiva, B.G. contacted respondent before May 28, 1998, the date of the auctions, and notified him that Mutiva had retained her. Respondent, however, contended that he was not notified of the discharge until he received a May 29, 1998 letter from B.G., advising him that Mutiva had retained her to resolve the property and liquor license issues. B.G.'s letter was stamped "received" by respondent's office on June 5, 1998. The

letter did not refer to a prior conversation with respondent. Enclosed with the letter was a statement dated May 29, 1998, signed by Mutiva, indicating that he had retained B.G.

In June 1998, after respondent was discharged, he sent Mutiva a bill for services performed between July 1, 1997 and May 28, 1998. Although respondent billed Mutiva for forty hours at $150 per hour, for a total of $6,000, the statement reflected a reduced fee of $4,500. According to the client ledger attached to the fee statement, respondent was holding $43,709.06 in his trust account to Mutiva's credit. The client ledger further indicated that respondent had withheld a $4,500 fee from the trust account funds and had refunded the $8,459.06 balance to Mutiva. Mutiva complained that respondent should not have deducted his legal fees from the trust account funds without notice to him. Mutiva also disputed respondent's fee for attending the auctions on May 28, 1998, claiming that he had discharged respondent before that date. It is undisputed that, while respondent represented Mutiva, he did not issue periodic or interim bills. His practice was to await the outcome of the matter and then issue a final bill.

For his part, respondent denied that he had represented Mutiva at the April 23, 1997 real estate closing. According to respondent, prior to that transaction he had represented Spivey for at least ten years. Although he had not represented Spivey in the purchase of the property, respondent knew that Spivey had acquired it from the City of Newark. On April 15, 1997 respondent "faxed" to S.L., Mutiva's attorney, a copy of the

ordinance pertaining to certificates of occupancy. On April 23 1997 S.L. "faxed" the following communication to respondent:

> I have been advised by my client, Paul Mutiva, that you are attempting to close this property today at 2:00. p.m. I will not be available at said time. Furthermore, no contract has been signed, advise as to status of same.[2]

Respondent testified that Spivey contacted him on April 23, 1997, requesting to close the transaction that afternoon. Respondent then left a telephone message for S.L., notifying him that the closing would occur that day. According to respondent, Mutiva appeared at the closing and announced that he was proceeding by himself, without S.L. Respondent contended that Mutiva wanted very much to obtain the property and that both parties insisted that the closing take place on April 23, 1997. Respondent denied having agreed to represent Mutiva and having rendered any legal advice to him about the applicability of the certificate of occupancy ordinance on the transaction. Respondent introduced into evidence a letter to him from S.L., dated April 24, 1997, the day after the closing:

> In regard to the above captioned matter, in response to your phone message of April 23, 1997 this is to advise that this office has performed the requisite tax search and said property has been exempt from taxes for at least the past two years.

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2 No contract for the sale of the property was ever prepared.

> Furthermore, since your client is the one selling the property, it would seem to be his responsibility to obtain the prior tax bills for the establishment of an escrow.
>
> Finally, when a tax figure is ascertained, contact this office to discuss the requisite escrow and the scheduling of closing date and establishment of a contract of sale.

Respondent contended that the letter demonstrated that (1) even after the closing, S.L. still believed that he continued to represent Mutiva and (2) S.L. had been unaware that the closing had taken place on the previous day.

According to respondent, the parties notified him that they had agreed that each would pay one-half of his $500 fee. He denied that Mutiva's payment of part of his fee established that he had represented Mutiva, asserting that it is not unusual for the parties to negotiate responsibility for the payment of legal fees, particularly in commercial transactions.

Respondent acknowledged that, at the closing, Mutiva retained him to "straighten out" the water and sewer issue affecting the property. Because the water bills had not been paid, the city had placed concrete over the water main. Mutiva retained respondent to resolve that issue with the city. Respondent claimed that his representation of Mutiva did not create a conflict-of-interest situation, inasmuch as the real estate transaction had been completed and the matters were of a different nature.

According to respondent, at the time of the closing he had prepared a deed conveying lot 8, block 2643, commonly known as 474 Avon Avenue, from Spivey to Mutiva and had based the property description on the deed granting title to Spivey. Respondent contended that in October 1997, about six months after the closing, Mutiva had informed him that there was an outstanding water bill. Respondent asked a friend, who was an attorney for the City of Newark, to investigate why Mutiva was receiving tax and water dunning letters, when there had been no water service and the property was tax-exempt. On October 8, 1997 respondent notified Spivey that he was holding $500 in escrow funds and that Spivey was responsible for paying the remainder of the water bill.

At some later time, the city attorney notified respondent that the tavern was located on two separate contiguous lots, lot 7 and lot 8. As mentioned above, Spivey owned only lot 8; the City of Newark owned lot 7. Respondent determined that the water and tax obligations related only to lot 7 and that Spivey was not responsible for those liens. Because Spivey owned and conveyed only lot 8, respondent concluded that the escrow funds could be released to Spivey, as he had no obligation for the liens against lot 7. Respondent claimed that he had orally communicated with Mutiva before the release of the escrow funds and that Mutiva had not objected to their disbursement. Respondent conceded that, in retrospect, he should have obtained Mutiva's written consent.

Respondent testified that he released the escrow funds to Spivey in October 1998, about five months after Mutiva had terminated his services.

According to respondent, the city attorney had informed him that, although the back taxes on lot 7 exceeded $30,000, Mutiva would be able to acquire the property for the minimum bid of $7,500 and save $22,500 in back taxes. Respondent testified that Mutiva bought the property at an auction for $7,500. He stated that Mutiva was "happy to pay the $7,500" and that Mutiva did not express dissatisfaction about either the release of the escrow funds to Spivey or the fact that he was required to purchase another property.[3]

With respect to the purchase of the liquor license from Larry Lyons, respondent testified that, at the time of the contract of sale, October 20, 1997, neither he nor Mutiva was aware that Lyons owed $300,000 in sales taxes to the State of New Jersey. According to respondent, in July 1997 he contacted the city agency that regulates liquor licenses and was told that there were no outstanding sales taxes. After the liquor license had been renewed, the state filed the lien against the liquor license. Respondent testified that the state seized the license and prevented its transfer until the resolution of the sales tax liability. Respondent contended that he arranged for Mutiva to be the successful

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[3] Respondent's client ledger attached to his fee statement contained an entry showing that $750 was paid to the City of Newark on May 28, 1998, the day of the auction. This discrepancy was not mentioned in the record. It is, thus, unclear whether Mutiva paid $750 or $7,500 for the property.

bidder at the liquor license auction and that Mutiva had paid either $10,000 or $15,000 for the license. Respondent's client ledger contained an entry dated May 28, 1998, the date of the liquor license auction, indicating that $10,000 was paid to the state.

The contract of sale for the liquor license provided that $10,000 was payable upon the signing of the agreement. Respondent's client ledger showed a $10,000 payment to Lyons on October 21, 1997. In addition, on February 1, 1998 Mutiva and Lyons entered into an agreement for Mutiva to lease the liquor license from Lyons for $10,000, which would be deducted from the purchase price of the license. Respondent's client ledger reflected a $10,000 payment to Lyons on February 20, 1998, presumably representing the payment contemplated in the lease agreement.

According to respondent, he did not prepare written fee agreements for Mutiva because he believed that his prior representation of Mutiva dispensed with that requirement, pursuant to *RPC* 1.5(b). Respondent conceded that he did not always prepare a bill for Mutiva. He agreed with Mutiva's testimony that, in the course of their dealings, he had not issued periodic bills in connection with Mutiva's matters.

With respect to the liquor license transaction, respondent recalled that he had quoted to Mutiva a fee of approximately $2,500. When the tax lien was discovered, Mutiva authorized respondent to perform additional services and acknowledged that an

additional fee would be required. Respondent indicated to Mutiva that, because of their relationship, he would charge something less than his usual hourly fee of $250.

Respondent denied that he had been notified of his discharge before he received B.G.'s May 29, 1998 letter. Respondent recalled that, when he received the letter, it occurred to him that, just as Mutiva had failed to notify S.L. that his services had been terminated, Mutiva had failed to notify him of his discharge. According to respondent, when he received the letter from B.G., he had not yet prepared a bill for either the Avon Avenue property or the liquor license transfer. He claimed that, after sending the bill to Mutiva, he kept his fee in his trust account for a reasonable period of time before withdrawing it. Respondent pointed out that he never received a complaint from either Mutiva or B.G. about the amount of his fee.

* * *

In the *Stanzione* matter, the DEC declined to find that respondent's failure to cooperate with the ACJC constituted conduct prejudicial to the administration of justice. The DEC determined that, although it was discourteous for respondent to ignore the ACJC's request for information and not to communicate his intention to abandon the grievance, it was not unethical. The DEC found, however, that respondent's reference to

reopening the grievance against Judge Stanzione was a threat designed to obtain a desired result, in violation of *RPC* 8.4(d). The DEC relied on the following language in *In re Vincenti*, 114 *N.J.* 275, 281 (1989): "conduct calculated to intimidate or distract those who, though in an adversarial position, have independent responsibilities and important roles in the effective administration of justice cannot be countenanced." The DEC recommended a reprimand and a fine not in excess of $2,000.

In the *Mutiva* matter, the DEC found that respondent violated: *RPC* 1.7(a) and (b), both by representing Mutiva and Spivey at the real estate closing and by continuing to represent Mutiva in a matter directly related to the real estate transaction; *RPC* 1.15(c), by withdrawing fees against Mutiva's funds, without Mutiva's consent; and *RPC* 1.5(b), by failing to disclose the amount of his fee before or within a reasonable amount of time after beginning the representation. The DEC declined to find a violation of *RPC* 1.15(b) for respondent's failure to obtain Mutiva's consent before releasing the $500 escrow funds to Spivey.[4] In the DEC's opinion, although an attorney must notify a party upon receipt of funds in which that party has an interest, there is no duty to notify a party upon delivery of those funds to another party. The DEC again recommended a reprimand and a fine not in excess of $2,000, or not in excess of $4,000 for both matters.

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[4] The complaint charged a violation of *RPC* 1.15, without specifying a subsection. The DEC assumed that the applicable subsection was (b).

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

In the *Stanzione* matter, respondent was charged with engaging in conduct prejudicial to the administration of justice by failing to cooperate with the ACJC and by threatening to reinstate the complaint against Judge Stanzione. Although we agreed with the DEC that the threat to reinstate the complaint violated *RPC* 8.4(c), we also found that the initial filing of the grievance against Judge Stanzione was prejudicial to the administration of justice. On several occasions, respondent revealed that his actual motive in filing the grievance was not to bring Judge Stanzione's allegedly objectionable behavior to the attention of the ACJC, but to obtain the release of his client's bail and the resolution of the underlying traffic tickets, which respondent claimed were still outstanding. In his May 16, 2000 letter to the municipal court clerk, respondent stated as follows: "As you know, it was necessary for me to file a complaint before the Supreme Court of New Jersey Advisory Committee on Judicial Conduct in order to get any response from the New Brunswick Municipal Court." In addition, respondent asserted that, sometime after receiving the June 28, 1999 letter from the ACJC requesting

additional information, he determined not to proceed with the grievance. He testified that "I thought that [not replying to the ACJC and having the grievance dismissed] would facilitate the accomplishment of my primary objective which was to get this case resolved against the defendant in the underlying matter." Respondent's purpose in filing an ethics grievance against Judge Stanzione, thus, was not to bring to the ACJC's attention misconduct of a judge, but to bring pressure on the judge and/or municipal court clerk to take action on behalf of respondent's son. Such misuse of the judicial disciplinary system for personal gain was prejudicial to the administration of justice.

In addition, the record shows clearly and convincingly that respondent violated *RPC* 8.4(d) in another respect, that is, when he threatened to revive the grievance against Judge Stanzione. Despite respondent's denial that his behavior was a threat, his actions were calculated to intimidate the judge and/or his staff to release Rafiq's bail money. Respondent testified that, after being repeatedly ignored by the municipal court clerk, he had to "take steps that kind of wake them up." He asserted that, if his client's matter were not resolved, he would refile the grievance. Again, such misuse of the system, including the waste of resources and effort by the ACJC investigator, ACJC counsel and the ACJC itself, prejudiced the administration of justice.

In the *Mutiva* matter, because the record does not contain clear and convincing evidence that respondent represented Mutiva at the real estate closing, we determined to

dismiss the conflict-of-interest charge. The evidence that respondent represented Mutiva at the closing consisted of Mutiva's testimony and his payment of one-half of respondent's legal fee. Mutiva's testimony was equivocal, however. Although Mutiva stated that respondent represented him at the closing, he also testified that he "wanted the business so bad" that he would have proceeded without representation. Moreover, the fact that Mutiva paid a portion of respondent's fee is not dispositive of the issue. The DEC questioned why Mutiva would pay one-half of respondent's fee, unless he received services from respondent. Mutiva conceded that he was "desperate" to buy the property; it is undisputed that both parties insisted on closing the sale that day; and Mutiva admitted that he had not notified S.L. that his services were terminated. Respondent testified that he left a telephone message for S.L. on April 23, 1997 to inform him that the closing would be proceeding on that day.[5] If respondent had agreed to represent Mutiva, he would have had no reason to contact S.L. on the day of the closing.

The DEC also relied on the lack of a waiver from Mutiva to support its finding that respondent represented Mutiva. A waiver would be required, however, only if respondent had represented both parties. Because a client can decide to represent himself, Mutiva's decision to proceed without counsel would not have required the execution of a

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[5] S.L.'s April 24, 1997 letter to respondent confirmed that respondent had left a message for him the previous day, thus supporting respondent's version of events.

waiver. The absence of a waiver, thus, does not necessarily support a finding that respondent engaged in dual representation.

In short, although there is some evidence, particularly Mutiva's testimony, that respondent represented both parties at the closing, we were unable to find clear and convincing evidence that he did so.

On the other hand, respondent's subsequent representation of Mutiva constituted a conflict of interest, in violation of *RPC* 1.7(b). We rejected respondent's argument that the matters were distinct. Respondent represented Spivey, the seller of property to Mutiva. He then represented Mutiva in his subsequent attempts to "straighten out" title problems and liens that were discovered after the closing. The potential for a conflict of interest was great and should have been apparent to respondent from the outset. Both parties had an interest in the escrow funds. As it turned out, eventually respondent determined that the water and sewer charges did not apply to the lot that Mutiva had acquired and released the monies to Spivey without Mutiva's consent. Another more serious conflict arose when Mutiva discovered that he had not received all of the property that he thought he had bought. Instead, he obtained title to only one of the two lots on which the tavern was located. Mutiva was required to expend additional funds to buy the second lot from the City of Newark. In addition, Mutiva used his own funds to satisfy prior sewer and tax liens encumbering the property. If Mutiva had retained independent

counsel, he might have sought recourse against Spivey for these additional costs. Respondent's loyalties, thus, were divided between his two clients, Mutiva (the buyer) and Spivey (the seller).

As soon as respondent learned of the title problem, he should have withdrawn from representation of both clients. Because respondent had represented each of them in this matter, once the conflict developed, he was precluded from representing either of them against the other. We were confronted with a similar situation in *In the Matter of Mercedes De La Reza*, Docket No. DRB 99-024 (1999).[6] In that case, the attorney represented both the buyer and the seller in a real estate transaction. After she unsuccessfully tried to persuade them to retain separate counsel, she obtained their consent to the dual representation. Later, serious disputes between the buyer and the seller developed. For example, the buyer took possession of the property without the seller's consent before closing of title had occurred; the buyer refused to pay rent to the seller; and the buyer loaned money to the seller, in essence, permitting the seller to use the escrow deposit before the closing. The buyer then refused to proceed with the transaction. The attorney's attempt to negotiate a resolution between the buyer and seller was not fruitful. We determined that, until the conflict arose, the attorney had not engaged in unethical conduct because she had obtained the consent of both parties to the

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6 The Court's order is reported at 163 *N.J.* 399 (2000).

multiple representation. We found, however, that, once the dispute developed between the parties, their interests were adverse and the attorney should have withdrawn from the representation of both.

As stated above, the DEC found that respondent's release of the $500 escrow funds to Spivey without notice to Mutiva did not violate *RPC* 1.15(b). That subsection, however, is applicable to situations where the attorney does not promptly notify the client or a third person of the receipt of funds or does not promptly deliver the funds to the client or third person. Here, respondent disbursed the $500 escrow without first obtaining Mutiva's consent. Unquestionably, thus, he failed to safeguard the escrow funds. In our view, (a) is the more appropriate subsection ("A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges, may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. . . .")

With respect to respondent's withdrawal of his fee from Mutiva's trust account funds, the DEC found that respondent violated *RPC* 1.15(c) by failing to give Mutiva notice of the withdrawal. It is undisputed that, before sending the client ledger to Mutiva, respondent did not notify Mutiva that he was disbursing his $4,500 legal fee from

Mutiva's funds. Respondent testified that he had retained the fees in his trust account and disbursed them only after a "reasonable period of time" had elapsed, without any objection from Mutiva. Respondent, however, had not notified Mutiva that he was retaining his fee in his trust account. Based on a review of the client ledger, Mutiva would have reasonably believed that respondent had already taken his fee and that any objection to that action would have been futile. Respondent's failure to obtain Mutiva's authorization to the removal of his legal fee, thus, violated *RPC* 1.15(c).

Finally, respondent failed to prepare a written fee agreement or to communicate the basis of his fee to Mutiva. Respondent claimed that, because of his prior relationship with Mutiva, he was not required to do so. *RPC* 1.5(b), however, requires an attorney to prepare a written fee agreement or to communicate the rate or basis of the fee, unless the attorney has "regularly represented" the client. Here, if respondent's version of events is accepted, he had not represented Mutiva at all before he undertook to resolve the water and sewer liens affecting the property. Therefore, he should have prepared a written fee agreement. His failure to do so violated *RPC* 1.5(b).

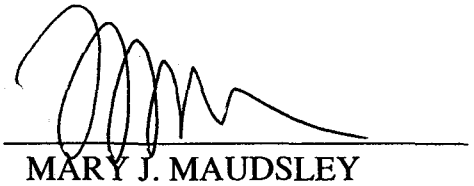
In sum, in the *Stanzione* matter, respondent violated *RPC* 8.4(d) on two occasions: when he initially filed the complaint against Judge Stanzione and when he threatened to revive the complaint. In *Mutiva*, respondent violated *RPC* 1.5(b), *RPC* 1.7(b), *RPC* 1.15(a) and *RPC* 1.15(c).

There remains the issue of the quantum of discipline. At oral argument before us, the presenter agreed with the DEC's recommendation for a reprimand. Violations of *RPC* 8.4(d) have resulted in a reprimand or a short-term suspension. *See, e.g., In re Kubiak*, 162 *N.J.* 543 (2000) (three-month suspension where attorney threatened to reveal privileged information about the grievants' deceased son in at attempt to persuade them to withdraw their grievance; attorney also failed to safeguard trust funds and was guilty of recordkeeping violations); *In re Mella*, 153 *N.J.* 35 (1998) (reprimand where, in one matter, the attorney offered to pay a former client in settlement of a malpractice action filed against him, in exchange for her agreement not to testify at the ethics hearing; attorney also failed to communicate with the client; in a second matter, the attorney lacked diligence and offered to refund a fee and perform legal services in exchange for the client's agreement to withdraw the grievance). Similarly, in conflict-of-interest cases, a reprimand is the appropriate discipline in the absence of economic harm or egregious circumstances. *In re Berkowitz*, 136 *N.J.* 134 (1994). Here, it is possible, even likely, that Mutiva suffered economic harm resulting from the conflict of interest. Respondent never advised Mutiva that he could pursue Spivey for his expenses in obtaining clear title to the property. In addition, respondent breached an escrow agreement, failed to prepare a written fee agreement and withdrew his fees without notice to his client. Lastly, and

contrary to the previously unblemished records of Berkowitz, Kubiak and Mella, respondent's ethics history includes two public reprimands and a three-month suspension.

Based on the foregoing, we unanimously voted to impose a three-month suspension. One member recused himself. Two members did not participate.

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

By: 

MARY J. MAUDSLEY
Vice-Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Elliott D. Moorman
Docket No. DRB 02-034 and 02-152

Argued: June 20, 2002

Decided: October 16, 2002

Disposition: Three-month suspension

Members	*Disbar*	*Three-month 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:		6				1	2

Robyn M. Hill 10/30/02
Robyn M. Hill
Chief Counsel