SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-417

IN THE MATTER OF

KRYZSZTOF L. NOWAK,

AN ATTORNEY AT LAW

Decision

Argued: December 17, 1998

Decided: April 5, 1999

Louise Elizabeth Xifo appeared on behalf of the District XIII 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 the Board based on a recommendation for discipline filed by the District XIII Ethics Committee ("DEC"). An amended complaint charged respondent with violations of RPC 8.4(c) (dishonesty, fraud, deceit or misrepresentation); RPC 3.3(a)(5) (failure to disclose to a tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure); RPC 1.7(a) (conflict of interest - a lawyer shall not represent a

client if the representation of that client will be directly adverse to another client); and RPC 4.1, presumably (a)(1) (in representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person).

Respondent was admitted to the New Jersey bar in 1978. He maintains a law office in Old Bridge, New Jersey. He has no history of discipline.

The charges in this matter stem from respondent's participation in a real estate closing, his preparation of the closing documents and his actions in arranging for secondary financing between two of his clients.

The first hearing day generated some confusion in the panel's mind. After considering the evidence presented, including respondent's testimony, two settlement statements, canceled check stubs and the ledger sheet for the transaction, the DEC was unable to determine what had happened to the funds entrusted to respondent for the closing. The DEC concluded that there was a serious issue as to whether respondent was a "sloppy bookkeeper" or whether he had misappropriated trust funds. The DEC believed that further investigation was warranted and that the OAE should conduct an audit of respondent's trust and business accounts from 1990 to determine exactly what had transpired with regard to the transaction in question. The matter was subsequently forwarded to the OAE for further investigation. It is, therefore, unnecessary to consider at this juncture whether respondent properly safeguarded funds entrusted to him.

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Respondent represented Wladyslaw and Janina Wajszczyk, husband and wife, in connection with several real estate transactions in which the Wajszczyks acted as mortgagees in real estate closings by lending money to purchasers. Additionally, in 1990, respondent represented Andrew Sudylo and Julia Rodriguez as buyers of real property from Orest Fedun. At the time of the closing, there was an existing first mortgage held by the Polish and Slavic Credit Union and a second mortgage held by the Wajszczyks. Fedun was not represented at the closing. Respondent prepared all of the closing documents in connection with the transaction. The contract listed the purchase price for the two-family residence in Union, New Jersey as $295,000. The closing occurred on March 12, 1990.

Prior to the closing, in December 1989, respondent had filed a foreclosure action against Fedun on behalf of the Wajszczyks because of Fedun's failure to satisfy the Wajszczyk mortgage on the property. The Fedun to Sudylo/Rodriguez transaction, however, stayed the foreclosure proceedings.

As noted above, respondent contemporaneously represented Sudylo and Rodriguez in the purchase from Fedun, as well as the Wajszczyks in the foreclosure action against Fedun. According to respondent, initially neither client was aware that respondent represented the other. At some unknown point, it was determined that Rodriguez and Sudylo had insufficient funds to close. Respondent, therefore, arranged for a loan to them from the Wajszczyks (as second mortgagees) in the amount of $28,033.14. Respondent represented both the mortgagors and mortgagees in this second mortgage transaction.

Respondent admitted that at first he had not advised either the Wajszczyks or Rodriguez and Sudylo of the conflict of interest inherent in the dual representation. It was not until the actual closing that respondent explained to his clients the conflict of interest and obtained their consent to his simultaneous representation of their interests.

In addition to the foregoing, respondent had prepared two different settlement statements for the transaction, Exhibits P-1 and R-1. Both statements showed a different sale price. P-1 listed the original $295,000 price, while R-1 cited a $260,000 contract sale price. According to respondent, although he claimed that R-1 accurately represented the terms of the transaction, he forwarded P-1 to the mortgage company, Travelers Mortgage Services ("Travelers"), the first mortgagee for Rodriguez and Sudylo's transaction.

Other discrepancies on the settlement statement included the amount of "cash from borrower": P-1 reflected it as $49,711.53 and R-1 as $34,711.53. Neither settlement statement revealed the second mortgage given by the Wajszczyks to Rodriguez and Sudylo. The "cash to seller" amount also differed on both statements. P-1 reflected $56,521.02, while R-1 listed it as $42,771.02. Neither figure was accurate. The seller, Fedun, did not receive any money because of the amounts he owed on his first and second mortgages. Moreover, respondent admitted that the amounts listed on the settlement statements were inaccurate because of the second mortgage given by the Wajszczyks to complete the transaction. Respondent explained that the mortgage was a separate agreement between the purchasers and the Wajszczyks and seemed to believe that it was, therefore, unnecessary to

include it on the settlement statement. Respondent admitted that the settlement statement did not accurately reflect the terms of the transaction and that Exhibit R-1 was used solely for closing purposes.

Respondent's explanation for failing to notify Travelers of the secondary financing was his alleged belief that Travelers would not have permitted the closing to take place. Respondent reasoned that, if the house was not sold, the Wajszczyks would not have received any money from the transaction and the purchasers, seller and second mortgagee would have all sued one another.

Due to the condition of the property, the sale price was reduced by $35,000. Respondent stated that, because that was a separate agreement between the buyer and the seller, it was unnecessary to list the reduced price on the settlement statement. Respondent testified that, since Travelers had conducted its own appraisal of the property, he did not believe that he was misleading it by failing to reflect the reduced sale price on the settlement statement.

* * *

The DEC found that respondent violated RPC 8.4(c) by failing to disclose the secondary financing to Travelers, by reflecting a false sale price and by the other false entries on the settlement statement that misrepresented the financial terms of the transaction.

The DEC did not find a violation of RPC 3.3(a)(5), which states that a lawyer shall not knowingly fail to disclose to a tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure. The DEC reasoned that, although Travelers might have been misled by respondent's representations, it was not a "tribunal" within the meaning of the rule.

The DEC found a violation of RPC 1.7(a) for respondent's representation of the buyers and the second mortgagee in the same transaction and, furthermore, for his representation of the second mortgagee (the Wajszczyks) in a foreclosure action against the seller. The DEC also found that, because the seller was not represented at the closing, respondent was performing services ordinarily performed by the seller's attorney. Moreover, the DEC found that, because respondent failed to disclose the conflict until the actual closing, the parties were under duress to complete the transaction. Finally, the DEC found that respondent's conduct violated RPC 4.1(knowingly making a false statement of material fact or law to a third person) due to the false entry on the settlement statement submitted to Travelers.

The DEC recommended the imposition of a reprimand.

* * *

Following a de novo review of the record the Board is satisfied that the DEC's finding of unethical conduct is clearly and convincingly supported by the record.

In this transaction, respondent represented clients with adverse interests: the second mortgagees (Wajszczyks) in the foreclosure of the property, the buyers of the property and, again, the second mortgagees (Wajszczyks) in the mortgage loan that enabled the buyers to purchase the property under foreclosure. To compound matters, it was not until the closing that respondent told his clients of the multiple representation and of the conflict of interest associated with such representation. Apprised at the last minute of respondent's simultaneous representation, his clients had little choice but to proceed with the closing with respondent as their attorney. In fact, what loyalty could the buyers expect of respondent when respondent was also the attorney for the Wajszczyks in the foreclosure action and, as such, presumably wanted the sale to go through at all costs to avoid a foreclosure? It is well-settled that a mortgagee abhors a foreclosure, as the mortgagee runs the risk of not recouping the full amount of the mortgage in a sheriff's sale. This risk is especially great when the mortgagee in question, as here, is behind a first mortgage that must be satisfied before the second mortgagee is entitled to any proceeds from the forced sale. All in all, respondent's conduct was fraught with conflict-of-interest improprieties, in violation of RPC 1.7(a).

Generally, in cases involving a conflict of interest, without more, and absent egregious circumstances or serious economic injury to clients, a reprimand is the appropriate discipline. In re Berkowitz, 136 N.J. 134 (1994). This matter was, however, compounded by respondent's violation of RPC 8.4(c) and RPC 4.1(a)(1) for his preparation of two settlement

statements, both of which contained misrepresentations. The settlement statements failed to disclose secondary financing, misrepresented the sale price and misrepresented the amount of cash to the seller and from the borrowers. These misrepresentations were made specifically to mislead the first mortgagee as to the true terms of the transaction.

Where an attorney has failed to disclose secondary financing in a real estate transaction, the discipline has ranged generally from a reprimand to a term of suspension. See In re Sarsano, 153 N.J. 364 (1998) (reprimand for concealing secondary financing from primary lender in a real estate transaction and preparing two different RESPAs, in violation of RPC 8.4(c)) and In re Fink, 141 N.J. 231 (1995) (six-month suspension for failure to disclose secondary financing in five matters by using dual RESPAs and false affidavits; the attorney also violated RPC 8.4(b) (commission of a criminal act), RPC 8.4(d) (conduct prejudicial to the administration of justice), RPC 1.1(a) (gross neglect) and RPC 8.4(c) (taking a false jurat)).

Had respondent's conduct involved either a conflict of interest or making misrepresentations in a settlement statement, a reprimand would have been proper discipline, particularly in light of the passage of time since respondent's misconduct, eight years. However, respondent's actions involved multiple conflict-of-interest situations and the omission of secondary financing and other misstatements on the settlement statement to mislead the first mortgagee. It also appears from respondent's testimony that either he did not understand that the misrepresentations in the settlement statement were improper or he would not admit the impropriety of his conduct. The Board, therefore, unanimously

determined that the appropriate discipline for respondent's ethics offenses is a three-month suspension.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 4/5/99

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Krzysztof L. Nowak
Docket No. 98-417

Argued: December 17, 1998

Decided: April 5, 1999

Disposition: Three-Month Suspension

Members	Disbar	Three-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		X					
Zazzali		X					
Brody		X					
Cole		X					
Lolla		X					
Maudsley		X					
Peterson		X					
Schwartz		X					
Thompson		X					
Total:		9					

By Robyn M. Hill 5/4/99
Robyn M. Hill
Chief Counsel