SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-164
District Docket Nos. XIV-2012-0273E and XIV-2012-0328E

IN THE MATTER OF

WILLIAM J. RUSH

AN ATTORNEY AT LAW

Decision

Argued: October 15, 2015

Decided: December 29, 2015

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

Glenn R. Reiser 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 on a recommendation for a reprimand filed by the District XI Ethics Committee (DEC). The three-count formal ethics complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.15(b) (failure to promptly notify clients or third parties of receipt of funds in which they have an interest

and to promptly disburse those funds), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (count one); RPC 1.15(a) (negligent misappropriation), RPC 1.15(b), and RPC 8.4(c) (count two); and RPC 1.15(a) and RPC 1.15(d) and R. 1:21-6 (recordkeeping) (count three).

For the reasons detailed below, we determine to impose a reprimand on respondent.

Respondent was admitted to the New Jersey bar in 2002. He is currently engaged in the practice of law in Wayne, Passaic County, New Jersey. During the timeframe relevant to this matter, he practiced in Carlstadt, Bergen County. He has no disciplinary history.

During a pre-hearing conference, the Office of Attorney Ethics (OAE) withdrew the charge of negligent misappropriation alleged in count two of the formal ethics complaint. Further, the parties entered into a stipulation of facts dated October 22, 2014.

The Kosa/Switzer Transaction

In October 2011, Mark Kosa retained respondent to represent him in the purchase of real estate, located in Wood-Ridge, Bergen County, from sellers Stephen and Sarifa Switzer. The purchase price for the property was $370,000. Michael Urciuoli

represented the Switzers. As settlement agent for the transaction, respondent prepared the HUD-1 settlement sheet for the closing, which took place on November 1, 2011.

On October 31, 2011, Kosa's lender wired $293,899.98 into respondent's TD Bank trust account. The next day, Kosa wired $66,989.56 into the trust account, completing the buyer's funds necessary to consummate the purchase. As settlement agent, respondent was responsible, immediately after the closing, to pay off the sellers' mortgage of $273,458.08 with PNC Bank and their home equity loan of $37,650.05 with Wells Fargo. Respondent, however, failed to do so promptly. He did not pay off the Wells Fargo loan and the PNC mortgage until December 19 and December 20, 2011, respectively, only after the sellers notified him of his mistake. In an attempt to mitigate potential damage to their credit history, respondent wrote letters to the sellers' creditors, explaining that he was responsible for the delayed payoffs.

According to the HUD-1, respondent's fees and costs for representing the buyer were $1,185; the buyer paid $550 for recording the deed ($175) and mortgage ($375); and the sellers paid $150 for the fee to record the mortgage release. The fee for recording all of the documents associated with the transaction, however, was only $186. Further, respondent

received a fee of $1,675, $490 more than the sum listed on the HUD-1. He then disbursed an additional $24 to himself on November 9, 2011.

In total, respondent received $514 more than the amount shown on the HUD-1, representing the remainder of the inflated recording fees charged to the buyer and sellers at the closing, which should have been refunded to them, rather than disbursed to respondent. Nevertheless, respondent executed the HUD-1 for the closing, confirming that it was "a true and accurate account of this transaction . . . [and that respondent] caused or will cause the funds to be disbursed in accordance with this statement."

The Keller/Freeman Transaction

In February 2008, Brian Keller retained respondent to represent him in the purchase of real estate, located in Cape May Court House, Cape May County, from sellers William Freeman and Debra Jones-Freeman. A family court order, dated June 25, 2007, authorized Jones-Freeman to sign documents necessary to effectuate the sale to Keller. The purchase price for the property was $305,000. Respondent did not prepare the purchase and sale agreement for the transaction, but received a copy of it from East Coast Title Services prior to the closing.

As settlement agent, respondent prepared the HUD-1 settlement sheet for the closing. Respondent did not attend the "dry" closing,[1] which occurred on February 20, 2008. Instead, he sent a third-party notary to collect the documents necessary to consummate and fund the transaction.

Although the HUD-1 provided that the buyer had paid a deposit of $45,750, and the seller confirmed, via a separate certification, that they had received those funds, that amount was not deposited into respondent's trust account. On February 20, 2008, Keller's lender wired $252,193.12 into respondent's trust account. Keller was required to bring an additional $12,844.22 to complete the buyer's funds necessary to consummate the purchase.

According to the HUD-1, respondent's fees and costs for representing the buyer were $1,000; the buyer paid $500 for recording the deed ($150) and the mortgage ($350); and the sellers paid $75 for the fee to record the mortgage release. Because the fee for recording all of the documents associated with the transaction, however, was only $260, respondent received excess funds of $315. Further, respondent received a

[1] A dry closing is a real estate transaction where all closing requirements are satisfied but the disbursement of funds, recording of documents, and transfer of title does not occur until a later time, as agreed to by the involved parties.

fee of $1,250, $250 more than the sum listed as his costs and fee on the HUD-1. He also disbursed an additional $15 to himself on February 27, 2008. Keller was also charged a $150 courier fee.

In total, respondent received $265 more than the amount shown on the HUD-1, representing the balance of the inflated recording fees charged to the buyer and sellers at the closing, which should have been refunded to them, rather than disbursed to respondent.

The HUD-1 contained other inaccuracies. Although respondent disbursed $200 to Quality Closer LLC for the third-party notary charges, he did not include this item on the HUD-1. Additionally, the final HUD-1 provided that Keller had paid $12,844.22 at the closing. Yet, after respondent learned from the notary that the seller had agreed to lend that amount to the buyer to close the transaction, respondent did not make corresponding revisions to the HUD-1. Rather, he executed the existing HUD-1, confirming that it was "a true and accurate account of this transaction . . . [and that respondent] caused or will cause the funds to be disbursed in accordance with this statement."

Respondent testified that it was his practice, beginning in approximately 2007, to include anticipated "post-closing costs"

as part of estimated recording fees on HUD-1s and to keep the excess recording fees after each transaction closed. He explained that, after closings, lenders often sought multiple copies of his closing file as a loan was sold on the secondary market, and that the lender's closing instructions from the transaction prohibited him from assessing costs to the lenders in connection with these requests. According to respondent, he verbally informed clients about these post-closing costs when he reviewed the final HUD-1 with them at a closing. He conceded, however, that this explanation was not made in the Keller/Freeman transaction, as he neither attended the "dry" closing nor talked with the parties, but, instead, sent a third-party notary to the closing.

Respondent's Recordkeeping Violations

In the stipulation and at the DEC hearing, respondent admitted that, until directed to do so by the OAE, he had not performed three-way reconciliations of his attorney trust account; had maintained in his trust account personal funds in excess of the amount necessary to cover routine banking fees; and had maintained "old balances" of clients' funds in his trust account, disbursing those funds only when directed to do so by the OAE.

* * *

In the Kosa/Switzer matter, the DEC determined that respondent was not guilty of gross neglect with respect to the Switzer loan payoffs, but rather made a "clerical mistake." The DEC emphasized that, upon being notified of his oversight, respondent had rectified his errors by paying off the loans and writing letters to the Switzers' creditors.

However, the DEC did find that respondent lacked diligence by failing to pay off the sellers' loans as required, in violation of RPC 1.3.

The DEC also found that respondent violated RPC 1.15(b) twice by failing to promptly deliver funds to Switzer and to the appropriate third parties – the Switzers' lenders.

Finally, the DEC concluded that respondent engaged in no dishonesty, fraud, deceit or misrepresentation but, rather, was neglectful in his handling of the transaction.

In the Keller/Freeman matter, although the OAE had withdrawn the RPC 1.15(a) allegation before the hearing, the DEC determined that respondent violated this rule by keeping the balance of the inflated recording fees that had been paid by the buyer and seller to close the transaction.

The DEC determined that respondent also violated RPC 1.15(b) by failing to refund to the buyer and seller the balance of the recording fees that had been collected at closing.

The DEC concluded that respondent had not violated RPC 8.4(c) in either transaction, observing that the OAE had so conceded. The record, however, is bereft of evidence that the OAE conceded this point. Additionally, the OAE, in its post-hearing submissions and again during oral argument, disputed that any concession had been made as to these charges.

Finally, notwithstanding respondent's concession in the stipulation that he had improperly commingled personal and trust funds, and that he failed to comply with the recordkeeping rule, the DEC determined that no evidence was presented to support these violations and dismissed the RPC 1.15(a), RPC 1.15(d), and R. 1:21-6 charges.

The DEC found, in mitigation, that respondent admitted his mistakes, was "humble and genuine," conceded that the matter was a learning experience for him, and acknowledged that he needed to take measures to explain overpayments for recording costs to clients during closings. The DEC found credible that respondent had no intent to deceive in connection with these transactions and recognized his prompt actions to correct his errors,

especially in the Switzer transaction. The DEC found no aggravating factors.

In recommending a reprimand, the DEC took into account the OAE's recommendation for the imposition of that level of discipline.

* * *

Following a de novo review of the record, we are satisfied that the DEC's findings that respondent was guilty of violating RPC 1.3 and RPC 1.15(b) (twice, as to count one and once, as to count two) are supported by clear and convincing evidence. Additionally, despite the DEC's determinations to the contrary, the record also contains clear and convincing evidence that respondent violated RPC 8.4(c) (twice, as to both count one and two), RPC 1.15(a), with respect to commingling his personal funds, and RPC 1.15(d), twice, with respect to his improper recordkeeping practices.[2]

In both of the subject real estate transactions, respondent executed HUD-1s, as the closing agent, certifying that they were "a true and accurate account of this transaction" and that he had "caused or will cause the funds to be disbursed in

[2] In his post-hearing brief, submitted to the Disciplinary Review Board on August 5, 2015, respondent again conceded these violations.

accordance with this statement." In both cases, however, those statements were not true.

Specifically, in the Kosa/Switzer matter, respondent took $514 for himself, for costs and fees, in addition to his agreed fee, as buyer's attorney, listed on the HUD-1. Respondent had collected inflated recording fees from the buyer and the seller for the real estate closing. Rather than refunding those fees to the buyer and seller, respondent disbursed them to himself. Yet, he did not list those monies as fees on the HUD-1, and neither buyer nor seller had agreed to his taking those funds as additional costs and fees.

As to the Keller/Freeman transaction, prior to closing, respondent learned that the seller had agreed to lend the buyer the $12,844.22 required to close the transaction. Yet, respondent failed to revise the HUD-1 to reflect this development and the resulting change to the sale proceeds to be disbursed to the seller, thus, rendering the HUD-1 an inaccurate account of the transaction and the disbursements. Additionally, respondent disbursed $200 to the third-party notary outside of the HUD-1. Finally, respondent disbursed $265 to himself, for costs and fees, in addition to his agreed fee, as closing agent, listed on the HUD-1. As in the Switzer transaction, this money was disbursed from the inflated recording fees that respondent

collected from the buyer and seller for closing. Respondent should have refunded those fees to the buyer and the seller, rather than disbursing them to himself, as he had not listed them as fees on the HUD-1, and neither the buyer nor the seller had agreed to his taking those funds as additional costs and fees.

Based on the facts set forth in the stipulation, respondent's execution of the HUD-1s in these transactions, when those documents were inaccurate as to both accounting and disbursements, amounted to misrepresentations, in violation of RPC 8.4(c). Moreover, by keeping the excess recording fees for himself, instead of refunding those fees to the parties, respondent violated RPC 1.15(b).

Next, respondent admitted, in both the stipulation and by his testimony, that he commingled personal funds by leaving earned fees in his attorney trust account, in violation of RPC 1.15(a). He also admitted to violations of RPC 1.15(d) and R. 1:21-6 by maintaining client funds in his attorney trust account for old matters, and by failing to prepare monthly three-way reconciliations of his attorney trust account. We determine that these admitted facts adequately support the charged violations.

Additionally, respondent's failure to promptly disburse the closing proceeds to the Switzers' lender, thus jeopardizing his client's good title to the property, constituted a lack of diligence on his part, in violation of RPC 1.3.

Finally, we conclude that the facts do not support findings that respondent engaged in gross neglect or negligent misappropriation.

The discipline imposed for misrepresentations on closing documents ranges from a reprimand to a term of suspension, depending on the seriousness of the conduct, the presence of other ethics violations, the harm to the clients or third parties, the attorney's disciplinary history, and mitigating or aggravating factors. See, e.g., In re Barrett, 207 N.J. 34 (2011) (reprimand for attorney who falsely attested that the HUD-1 he signed was a complete and accurate account of the funds received and disbursed as part of the transaction); In re Agrait, 171 N.J. 1 (2002) (reprimand for attorney who, despite being obligated to escrow a $16,000 deposit shown on the HUD-1, failed to verify it and collect it; in granting the mortgage, the lender relied on the attorney's representation about the deposit; the attorney also failed to disclose the existence of a second mortgage prohibited by the lender; the attorney's misconduct included misrepresentation, gross neglect, and failure to

communicate to the client, in writing, the basis or rate of his fee); In re Spector, 157 N.J. 530 (1999) (reprimand imposed on attorney who concealed secondary financing to the lender through the use of dual HUD-1 statements, "Fannie Mae" affidavits, and certifications); In re Gahwyler, 208 N.J. 253 (2011) ("strong censure" imposed on attorney who made multiple misrepresentations on a HUD-1, including the amount of cash provided and received at closing; attorney also represented the putative buyers and sellers in the transaction, a violation of RPC 1.7(a)(1) and (b); mitigating factors included his unblemished disciplinary record of more than twenty years, his civic involvement, and the lack of personal gain); In re Gensib, 206 N.J. 140 (2011) (censure for attorney who failed to advise his clients that he was inflating the cost of their title insurance to cover possible later charges from the title insurance company, failed to convey his fee, in writing, to his clients, failed to safeguard client funds, and had a prior reprimand for improperly witnessing a document); In re Khorozian, 205 N.J. 5 (2011) (censure imposed on attorney who represented the buyer in a fraudulent transaction in which a "straw buyer" bought the seller's property in name only, with the understanding that the seller would continue to reside there and would buy back the property after one year; the attorney

prepared four distinct HUD-1s, two of which contained misrepresentations of some sort, such as concealing secondary financing or misstating the amount of funds that the buyer had contributed to the acquisition of the property; aggravating factors included the attorney's change of the entries on the forms after the parties had signed them); In re De La Carrera, 181 N.J. 296 (2004) (three-month suspension in a default case in which the attorney, in one real estate matter, failed to disclose to the lender or on the HUD-1 the existence of a secondary mortgage taken by the sellers from the buyers, a practice prohibited by the lender; in two other matters, the attorney disbursed funds prior to receiving wire transfers, resulting in the negligent invasion of clients' trust funds); In re Nowak, 159 N.J. 520 (1999) (three-month suspension for attorney who prepared two HUD-1s that failed to disclose secondary financing and misrepresented the sale price and other information; the attorney also engaged in a conflict of interest by arranging for a loan from one client to another and representing both the lender (holder of a second mortgage) and the buyers/borrowers); In re Fink, 141 N.J. 231 (1995) (six-month suspension for attorney who failed to disclose the existence of secondary financing in five residential real estate transactions, prepared and took the acknowledgment on false HUD-1 statements, affidavits of title,

and Fannie Mae affidavits and agreements, and failed to witness a power of attorney); In re Alum, 162 N.J. 313 (2000) (one-year (suspended) suspension for attorney who participated in five real estate transactions involving "silent seconds" and "fictitious credits;" the attorney either failed to disclose to the primary lender the existence of secondary financing or prepared and signed false HUD-1 statements showing repair credits allegedly due to the buyers; in this fashion, the clients were able to obtain one hundred percent financing from the lender; because the attorney's transgressions had occurred eleven years before and, in the intervening years, his record had remained unblemished, the one-year suspension was suspended); In re Newton, 157 N.J. 526 (1999) (one-year suspension for attorney who prepared false and misleading HUD-1 statements, took a false jurat, and engaged in multiple conflicts of interest in real estate transactions); and In re Frost, 156 N.J. 416 (1998) (two-year suspension for attorney who prepared misleading closing documents, including the note and mortgage, the Fannie Mae affidavit, the affidavit of title, and the settlement statement; the attorney also breached an escrow agreement and failed to honor closing instructions; the attorney's ethics history included two private reprimands, a three-month suspension, and a six-month suspension).

Generally, an admonition results for lack of diligence in the handling of a client's matter. See, e.g., In the Matter of Brian F. Fowler, DRB 11-234 (November 30, 2011) (attorney caused client's civil suit to be dismissed twice, first without prejudice and then with prejudice, for failing to provide discovery; the attorney's depression, which impeded his diligent representation of the client's interests, was considered in mitigation); In the Matter of Jonathan Lautman, DRB 11-107 (July 26, 2011) (attorney allowed a settlement to remain pending for three years; instead of promptly filing a motion to enforce the settlement, to deposit the funds with the court, and to distribute the funds, the attorney did so only three years later); and In the Matter of Michelle Joy Munsat, DRB 09-207 (July 29, 2009) (attorney failed to file an appellate brief, causing the client's appeal of a felony conviction to be dismissed; subsequent counsel succeeded in reinstating the appeal; substantial mitigation considered).

Likewise, admonitions have been imposed on attorneys who engage in commingling and commit recordkeeping violations. See, e.g., In the Matter of Richard Mario DeLuca, DRB 14-402 (March 9, 2015) (attorney commingled personal funds in his attorney trust account and committed recordkeeping violations); and In the Matter of Dan A. Druz, DRB 10-404 (March 3, 2011) (attorney

commingled personal funds in his attorney trust account and committed recordkeeping violations).

In isolation, cases involving an attorney's failure to promptly deliver funds to clients or third parties usually result in the imposition of an admonition or reprimand, depending on the circumstances. See, e.g., In the Matter of Jeffrey S. Lender, DRB 11-368 (January 30, 2012) (admonition; in a "South Jersey" style real estate closing in which both parties opted not to be represented by a personal attorney in the transaction, the attorney inadvertently over-disbursed a real estate commission to MLSDirect, neglecting to deduct from his payment an $18,500 deposit for the transaction; he then failed to rectify the error for over five months after the over-disbursement was brought to his attention; violations of RPC 1.3 and RPC 1.15(b); we considered that the attorney had no prior discipline); In the Matter of Raymond Armour, DRB 11-451, DRB 11-452, and DRB 11-453 (March 19, 2012) (admonition imposed on attorney who, in three personal injury matters, did not promptly notify his clients of his receipt of settlement funds and did not promptly disburse their share of the funds; the attorney also failed to communicate with the clients; we considered that the attorney had no prior discipline); and In re Dorian, 176 N.J. 124 (2003) (reprimand imposed on attorney who failed to use

escrowed funds to satisfy medical liens and failed to cooperate with disciplinary authorities; attorney previously admonished for gross neglect, failure to communicate, failure to withdraw, and failure to cooperate with disciplinary authorities, and reprimanded for gross neglect, lack of diligence, and failure to communicate).

Here, respondent's misrepresentations on the HUD-1 statements are similar to those made by the attorneys in Barrett and Gensib, since he both inflated recording charges and knowingly executed inaccurate HUD-1 statements, misrepresenting the accounting and disbursements for the transactions. His failure to modify the HUD-1 even after learning of the seller's loan in the Keller/Freeman transaction is very troubling, and arguably akin to the behavior of the attorneys in Spector, Sarsano, and Agrait, as it touched upon the interests of the lender providing financing for the transaction. Unlike the attorneys in those matters, however, there is no evidence that respondent had the intent to deceive the lender, but was simply reckless in his handling of the transaction.

Although respondent has asserted that charging his clients "reasonable fee[s] for settlement services" has been recognized by courts as an appropriate practice, pursuant to the Real Estate Settlement and Procedures Act (RESPA), 12 U.S.C. § 2607,

et. seq., his argument does not vitiate disciplinary cases we have cited. Our Court has concluded that, regardless of RESPA case law, a New Jersey attorney's knowing execution of inaccurate HUD-1 statements, with limited exceptions, constitutes a misrepresentation, in violation of RPC 8.4(c).

In support of a corollary defense against an RPC 8.4(c) finding, respondent cited In re Castiglia, 197 N.J. 465 (2009), for the proposition that certain inaccuracies on a HUD-1 are not in and of themselves a violation of RPC 8.4(c), so long as no parties to the transactions were misled. The Castiglia decision, however, was based on a unique fact pattern, whereby an existing tenant was purchasing a property from her landlord, who also resided in the property, via what was described as something less than an "arms-length" transaction. In that case, the buyer had actually been referred to the respondent by the lender, who had been involved in structuring the transaction, and was expressly aware of the key inaccuracy under scrutiny on the first HUD-1 executed for that closing – a $60,000 repair credit from the seller to the buyer. Moreover, in Castiglia, the attorney ultimately corrected that glaring inaccuracy, issuing a revised HUD-1 to all parties that correctly memorialized the repair credit. During oral argument in this matter, respondent's counsel conceded that respondent's attempted reliance on

Castiglia ignores two crucial facts: (1) that the lenders in the instant transaction were undoubtedly misled by the respective HUD-1, especially in the Keller/Freeman transaction, where the seller provided an eleventh hour loan to the buyer that was not disclosed on the face of the HUD-1; and (2) that, unlike the attorney in Castiglia, respondent never corrected either of the HUD-1s to reflect the true accounting and disbursements for each transaction.

Respondent has appropriately argued that his conduct was not as egregious as that of those attorneys who knowingly engaged in a scheme to deceive and defraud a lender. Thus, the discipline must match the offense. As illustrated by the above case law, respondent's misrepresentations, along with the additional RPC violations he committed, do not warrant discipline beyond a reprimand.

In reaching our determination, we have considered, in mitigation, that respondent readily admitted most of the violations, entered into the stipulation, and was found credible by the panel as to his testimony that he had learned from the mistakes he made in these matters and had modified his practices. There are no aggravating factors to consider.

Based on the foregoing, the proper quantum of discipline in this case is a reprimand.

Members Baugh, Singer, and Hoberman did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: Paula A. Franzese
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of William J. Rush
Docket No. DRB 15-164

Argued: October 15, 2015

Decided: December 29, 2015

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh						X
Clark			X			
Gallipoli			X			
Hoberman						X
Rivera			X			
Singer						X
Zmirich			X			
Total:			5			3

By: Ellen A. Brodsky
Chief Counsel