

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-237

IN THE MATTER OF :
 :
JOEL M. KESSLER :
 :
AN ATTORNEY AT LAW :
 :

Decision

Argued: October 16, 1997

Decided: December 16, 1997

Maureen Bauman appeared on behalf of the District IX Ethics Committee.

Respondent waived appearance for oral argument.

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 IX Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 1.7(c) (representation creating an appearance of impropriety) and RPC 1.9 (representation of a client in a substantially related matter in which the client's interests are materially adverse to the interests of a former client).

Respondent was admitted to the New Jersey bar in 1979. In 1994 he received a private reprimand for failure to advise a client of a conflict of interest, in violation of RPC 1.7.

* * *

In 1984 grievant Tina Mastroeni (then known as Tina Neal) retained August Landi to represent her in a divorce proceeding. At the same time the final judgment for divorce was entered in February 1986, respondent became associated with Landi. After respondent became a partner, the firm practiced as "Landi & Kessler." Landi continued to represent Mastroeni in a post-judgment motion, in which a final order was entered on November 21, 1988, following a plenary hearing. Robert Abrams of the law firm of Abrams & Gatta, P.A., later known as Abrams, Gatta, Falvo & Sevrin ("the Abrams firm") represented Mastroeni's husband, Merrel Neal, in the divorce proceedings. On October 14, 1986 Neal executed a mortgage in favor of the Abrams firm for \$11,505.20, encumbering the marital home jointly owned by the parties at that time. After a post-judgment order granted Mastroeni sole title to the former marital home, the Abrams firm continued to hold a mortgage on the property.

In November 1989, about one year after the entry of the post-judgment order, Mastroeni and Landi entered into a stipulation settling the fee arbitration proceeding that she had filed against Landi. The stipulation provided that Mastroeni would pay Landi \$25,000 of the \$43,500 he had charged for the matrimonial representation. Furthermore, the stipulation called for Mastroeni to execute a mortgage in Landi's favor for \$25,000, with no interest. The debt was to be paid at the rate of \$100 per month, with the entire balance due upon sale of the property.

On October 1, 1992 respondent withdrew from Landi & Kessler. Respondent and Landi reached an agreement to allocate the accounts receivable, including the fees owed by Mastroeni. In March 1996 respondent and Landi modified their agreement; the balance of the fee owed by Mastroeni was now due to respondent. On July 23, 1996 respondent notified Mastroeni that all payments for fees should be sent to him. Respondent further informed Mastroeni that, if after reviewing her record of payments for the prior year, he determined that she had missed any payment, he would accelerate the mortgage, declaring the entire amount due.

Meanwhile, on January 26, 1996 Mastroeni filed a *pro se* motion against her former husband, Neal, seeking, among other forms of relief, the removal of the Abrams mortgage lien from the former marital home. Although Mastroeni served notice of the motion on Neal, who did not answer it, she did not serve the Abrams firm. On April 19, 1996 the Court signed an order providing, in part, that "[t]he Plaintiff [Mastroeni] therefore now owes no money to the Defendant [Neal] or to the Defendant's attorney" (Exhibit P-5).

In the interim, in July 1993, after respondent withdrew from Landi & Kessler, he undertook the representation of the Abrams firm to collect the fees due from Neal. Before respondent agreed to represent the Abrams firm, he made it clear that, although he would take appropriate action to collect the fee from Neal, he would have to withdraw from such representation if any litigation involving Mastroeni became necessary, including a mortgage foreclosure proceeding. According to respondent, when the Abrams firm first approached him about collecting the fee from Neal, he thought "it looked a little strange," but after he,

Landi and Abrams researched the issue, they all determined that there was no conflict of interest (T56)¹. Respondent reasoned that, because his collection of the Abrams firm's fee from Mastroeni did not materially affect her, there was no need to notify Mastroeni that he was representing the Abrams firm. It was not until August 1, 1996 that respondent notified Mastroeni of that representation. Obviously, respondent had not obtained Mastroeni's consent to represent the Abrams firm. Respondent's letter of August 1, 1996 to Mastroeni is significant:

As you may or may not be aware, I have also been representing the Abrams firm in their attempt to recover their fee from your former husband. I have had the opportunity to review both the Mortgage that Mr. Neal signed in favor of the Abrams firm, the Order that was granted in 1988 and your recent Order. It is my opinion that your Order neither binds the Abrams firm nor has any effect on their mortgage interest in the property.

First of all and very importantly, you failed to give the Abrams firm any notice of the motion that you filed against Mr. Neal which violated their right of due process. As the Abrams firm was not served with any notice, the decision of the Family Court is not binding.

Secondly, the mere fact that Mr. Neal may have lost his title in the property does not extinguish **our** mortgage. If he had transferred his interest by deed rather than by court order, **our** mortgage would have remained in place. Although by law, his obligation to pay child support constitutes a lien on his interest in the property, that lien arises only when the obligation to pay child support comes to fruition, i.e., when the child support actually becomes due and payable. Therefore, any lien that arose as a result of Mr. Neal's failure to pay child support arose after the Abrams mortgage and is subordinate to the Abrams mortgage. Therefore, the Abrams mortgage is still superior and we will not remove it. [Emphasis added].

[Exhibit P-6]

¹ T refers to the transcript of the March 21, 1997 hearing before the DEC.

On March 10, 1995 respondent obtained a judgment against Neal on behalf of the Abrams firm for \$12,548.39 plus costs. Neal filed a bankruptcy petition in 1996. As a result, respondent collected none of the fees due and owing to the Abrams firm.

Respondent testified as follows with regard to his August 1, 1996 letter to Mastroeni:

My intention was not to represent them. They wanted me to communicate what their position was. They wanted me to go into the Family Part and try to undo that. I said, 'I'll send her a letter communicating just what your position is and that's it. I'm done. I'm out.'

I couldn't represent them against her. I couldn't do it in the civil proceeding. I couldn't do it in any kind of foreclosure. I couldn't do it in the Family Part.

[T50-51]

Respondent withdrew from the Abrams representation after sending the August 1, 1996 letter to Mastroeni. At the ethics hearing, respondent characterized that letter as "poorly written," particularly his use of the term "our" in referring to the Abrams mortgage. Respondent conceded that he should not have sent the letter and acknowledged that a person reading the letter could form the impression that respondent's interests were adverse to Mastroeni's. However, respondent contended, because he had no intention of representing the Abrams firm in any litigation against Mastroeni and because he communicated that information to her in a telephone conversation, there was no conflict of interest.

* * *

The DEC concluded that respondent violated RPC 1.7(c)(2) and RPC 1.9(a) because his representation of the Abrams firm against Mastroeni's former husband created an appearance of impropriety. The DEC found that this appearance of impropriety was illustrated by respondent's remark that his representation of the Abrams firm initially appeared to him as "a little strange" and respondent's acknowledgment that his August 1, 1996 letter to Mastroeni could have created the impression that he was taking a position adverse to hers. The DEC specifically ruled that respondent's conduct did not constitute an actual conflict of interest, finding that the interests of the Abrams firm were not materially adverse to Mastroeni's interests, so long as no foreclosure proceedings were filed. The DEC noted that foreclosure proceedings had not been filed.

The DEC recommended that respondent be reprimanded for his misconduct, reasoning that an admonition would have been appropriate if not for respondent's prior private reprimand for similar misconduct.

* * *

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 evidence. In this matter, respondent's law firm, Landi & Kessler, represented Tina Mastroeni in a matrimonial proceeding against Merrel Neal, who was represented by the Abrams firm. After the Landi & Kessler firm dissolved, respondent undertook the representation of the Abrams firm

against Neal, Mastroeni's former husband. To secure payment of his legal fees, Neal had granted a mortgage to the Abrams firm, encumbering the marital property. As a result of the entry of a post-judgment order, Mastroeni received sole title to the former marital property. She subsequently obtained an order, without notice to the Abrams firm, removing the Abrams mortgage lien from the property.

Recognizing at least a potential conflict of interest, respondent cautioned the Abrams firm that he would not participate in any litigation involving Mastroeni. Respondent specifically informed the Abrams firm that, if a mortgage foreclosure against property owned by Mastroeni became necessary, he would withdraw from the matter. Respondent testified that, because the matter "looked a little strange," he, his former partner Landi and Abrams all researched the issue and determined that respondent's representation of the Abrams firm against Neal would not create a conflict of interest. Unfortunately, they were mistaken.

RPC 1.7(c) provides as follows:

This Rule shall not alter the effect of case law or ethics opinions to the effect that:

(2) in certain cases or situations creating an appearance of impropriety rather than an actual conflict, multiple representation is not permissible, that is, on those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients.

By sending the August 1, 1996 letter to Mastroeni, respondent created not only an appearance of impropriety, but also an actual conflict of interest situation, in violation of RPC 1.9(a)(1). In his letter, respondent clearly took a position in favor of the Abrams firm,

contrary to Mastroeni's interests. Respondent's use of the term "our" in referring to the Abrams mortgage only served to enhance the impression that he was siding with Abrams in a potential dispute with Mastroeni.

Respondent's subsequent withdrawal from representing the Abrams firm did not cure the conflict. He admitted that he should not have sent the August 1, 1996 letter to Mastroeni, who could have formed the impression that respondent's interests were adverse to hers.

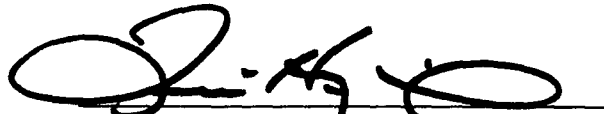
Fortunately, no actual harm resulted to the client.

It is well-established that, in cases involving a conflict of interest, without more, and absent egregious circumstances or serious economic injury to clients, a reprimand constitutes appropriate discipline. *In re Berkowitz*, 136 N.J. 134 (1994); *In re Guidone*, 139 N.J. 272 (1994).

In light of the foregoing, the Board unanimously determined that a reprimand is sufficient discipline for respondent's infractions.

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

Dated: 12/16/97



LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

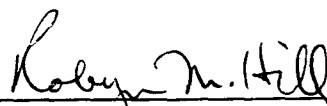
In the Matter of Joel M. Kessler
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Disposition: Reprimand

Members	Disbar	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				


Robyn M. Hill 1/7/98
Chief Counsel