SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-406
District Docket No. IV-2013-0048E

IN THE MATTER OF

FRANK A. LAULETTA, III

AN ATTORNEY AT LAW

Decision

Argued: March 17, 2016

Decided: September 8, 2016

William B. Hildebrand appeared on behalf of the District IV Ethics Committee.

Carl D. Poplar appeared on behalf of respondent.

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

On November 19, 2015, this matter was before us on a recommendation for an admonition, filed by the District IV Ethics Committee (DEC), which we determined to treat as a presentment and bring on for oral argument.

The three-count complaint charged respondent with violations of RPC 1.8(a) (engaging in an improper business transaction with a client or improperly acquiring a possessory, security, or other pecuniary interest adverse to the client); RPC 1.8(b) (using information relating to the representation of a client to the disadvantage of the client, without full disclosure and informed consent); RPC 4.1(a) (knowingly making a false statement of material fact or law to a third person, or failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client); and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). For the reasons expressed below, we determine that a censure is warranted.

Respondent was admitted to the New Jersey bar in 1996. He practices law with the firm of Lauletta Birnbaum, LLC in Sewell, New Jersey. He has no history of discipline.

Respondent and Tennessee businessman John Harvey have been friends since high school. In 2007, respondent began providing legal services to Harvey and his business entities.

In January 2007, grievant Dennis Young and Harvey formed Optimal Interiors, LLC (Optimal) as equal partners. According to Young, Harvey had an unsigned employment agreement with Optimal, setting forth his monthly salary. In addition to his salary, Harvey was to receive benefits and itemized expense reimbursements. In contrast, Young never received any compensation as a result of his partnership in Optimal.

Optimal was formed to provide furniture consulting services to educational institutions and to market software. Harvey provided the expertise in the related furniture business and the "sweat equity," or "rainmaking" through his contacts. Young managed the financial end of the business. He also provided the working capital to Optimal, a $231,740 loan, through his company, Wm. B. Ittner, a St. Louis, Missouri architectural firm (Ittner). The loan was documented by e-mails between Harvey and Young, and a promissory note. Young was Ittner's sole shareholder. Ittner specialized in the planning and designing of schools as well as higher education structures.

On August 18, 2008, respondent's law firm was retained to "assist" Optimal in connection with a licensing and distribution agreement with the HON Company (HON), a furniture manufacturer. Thereafter, in March 2009, HON requested that Optimal agree to terminate the licensing and distribution partnership agreement. Optimal refused.

On March 12, 2009, HON breached its agreement with Optimal. Thus, on May 20, 2009, Optimal retained respondent's law firm and, because respondent was not a litigator, the law firm of Cozen and O'Connor, on a contingent fee basis, to pursue a breach of contract claim against HON.[1] Although Harvey was the primary contact with the legal team and the person who signed necessary documents in connection with the litigation, Young maintained that he, too, was involved in the case by engaging in multiple conference calls throughout the proceedings. Young understood that respondent represented him in connection with the creation of Optimal as well as in the HON litigation.

In January 2009, prior to filing the lawsuit against HON, respondent represented Harvey in connection with the formation of another company OI, Inc., (OI). OI licensed software and procured furniture for new school buildings. Harvey maintained that he formed OI to purchase the rights for a contract from another company, Synergy Business Environments, with whom he was previously partnered. Respondent prepared OI's by-laws and other pertinent formation documents.

Harvey offered Young the opportunity to participate in OI. Although respondent had drafted the papers for Young's participation, after Young and his attorney reviewed the various

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[1] Respondent, who previously worked for Cozen and O'Conner recommended the firm. According to respondent, Cozen and O'Connor asked him to remain involved in the case because of the extensive documentation, and "thousands of pages of discovery." A Cozen and O'Conner attorney handled the litigation. According to respondent, he "played a supporting role, helped out with the discovery process . . . reviewing documents" and the like.

documents, and Young's attorney negotiated with respondent over the terms of Young's participation, Young declined to engage in the venture.

Thereafter, Harvey offered respondent a ten percent interest in OI in return for respondent's waiving past legal fees. Respondent agreed to the arrangement. OI adopted a corporate resolution appointing respondent as its secretary.[2]

Respondent remarked that it is not uncommon for an attorney to be a secretary of a client's company, because a secretary merely performs ministerial functions, such as attesting to signatures and taking minutes at meetings. The document titled "Action by Unanimous Written Consent in Lieu of Organization Meeting of the Board of Directors" of OI, otherwise known as the organizational minutes, identified respondent as OI's secretary and as holding 200 shares of stock or ten percent of the company.

Respondent denied receiving any stock certificates, maintaining OI's books or minutes, attending any board of director meetings, or receiving from OI any income or benefits, financial or otherwise. Harvey did not recall issuing any stock

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[2] Harvey sold OI in November 2014. He explained that the assets of the company — the trucks and equipment — were sold to a partnership of which he is a one-third partner. None of the money from the sale was paid to respondent.

certificates to respondent and maintained that respondent did not perform "any kind of ministerial work" as OI's secretary.

OI's stockholders' agreement, at Section 5.14, contained an "Acknowledgment of Representation," which provided as follows:

> The Stockholders acknowledge that the law firm of LAULETTA BIRNBAUM, LLC (the "Firm") drafted this Agreement on behalf of the Company and the Stockholders understand and hereby acknowledge that: (i) the Firm did not and does not represent the respective interest of the Stockholders under this Agreement; (ii) a conflict may exist among them with regard to their respective individual interests under this Agreement; and (iii) each such Stockholder should confer with separate counsel with regard to their individual interests. Each Stockholder further acknowledge [sic] that with respect to such Stockholder (i) he or she entered this Agreement after having had the opportunity to consult with separate counsel, and (ii) he or she has not relied on any advice of the Firm in entering into this Agreement.
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> [Ex.R12-10.][3]

After Optimal filed the lawsuit against HON, OI, a small business, had cash-flow problems and needed an immediate cash infusion to pay furniture manufacturers for purchase orders it had received. Harvey claimed that he did not have the time to seek conventional financing and, therefore, asked respondent for

[3] Respondent signed the agreement as a stockholder.

a loan, making him an offer that he believed would be worth respondent's while. Harvey remarked that he had "100 percent concocted the plan."

Specifically, in a June 21, 2010 e-mail to respondent, Harvey wrote "Hey, we [OI] need $69k for 60days [sic]. See attached. We will pay you back $79k by Sept 1." Respondent agreed to loan OI/Harvey the money. Harvey remarked that it would have been devastating to OI if respondent had not done so. Harvey realized that $10,000 was a large amount of interest, but believed it was reasonable under the circumstances. He did not feel the need to have another attorney represent him in connection with the loan from respondent.

On June 24, 2010, OI and Harvey, jointly and severally as the borrowers, and respondent as the "Holder," executed a promissory note for the loan that called for $10,000 as the "minimum interest" due and payable by September 1, 2010. The note was secured by the proceeds of the Optimal/HON litigation. Respondent explained that he was not "worried" about Harvey repaying the loan, but drafted the promissory note for his own protection in the event Harvey "got hit by a bus," or filed for bankruptcy, not because he was "adverse" to Harvey.

Respondent maintained that he did not view his conduct as a conflict of interest with Harvey because their relationship was amicable. According to respondent, if Harvey "needed something and me as a friend, a trusted advisor, an attorney, agreed to do it, and he'd thank me, and still thanks me to this day," it was not a conflict.

Paragraph four of the note, the "Mandatory Prepayment" provision, stated that Harvey owned "at least a 50% membership interest" in Optimal and that, within three days of Harvey's receipt of any payment from the HON lawsuit, Harvey "shall prepay the outstanding principal and business interest and any other sums due hereunder plus any amount necessary for Maker to have paid at least the Guaranteed Interest." Respondent conceded that the note was not properly drafted in this regard. Harvey did not realize that the note subjected Optimal and the proceeds of the lawsuit as a guaranty.

Respondent claimed that, at the time the note was drafted, respondent and Harvey anticipated a sufficient recovery such that OI would no longer need the loaned funds. Optimal's expert had valued the contract with HON at $20 million and, thus, the settlement demand was for "millions." However, an unanticipated adverse ruling by the court on a "summary judgment motion on a consequential damages issue," significantly decreased the value of Optimal's claim.

Respondent admitted that Harvey did not have independent counsel in the loan transaction, but believed that RPC 1.8 was not applicable to their circumstances. He, thus, neither provided Harvey with a written disclosure nor obtained Harvey's informed written consent to the transaction.

Respondent never disclosed to Young that he had obtained a security interest in the proceeds of the HON litigation and, therefore, did not obtain Young's consent thereto. Respondent asserted that there was no need to disclose it or obtain Young's consent, because neither Young nor OI was a party to the loan. Young confirmed that neither Harvey nor respondent had discussed the note with him or had sought his permission for the OI loan to be secured by the proceeds of the HON litigation.

On September 14, 2010, before the HON litigation settled, OI/Harvey repaid respondent the $69,000 loan, together with the guaranteed interest, for a total payment of $79,000.

Subsequently, Harvey again needed funds, purportedly to expand OI's software business. He requested another loan from respondent, asserting that it would be a good opportunity for respondent. On December 8, 2010, respondent agreed to lend OI $100,000, at an interest rate of fifteen percent per annum. OI and respondent executed another promissory note, guaranteed by John and Sondra Harvey. This note also referenced the HON litigation. It stated that "in the event that [Optimal], an entity in which [Harvey] owns at least a 50% membership interest, receives any payment in respect of [the HON litigation]," within three business days after the receipt of funds from the lawsuit, OI, Inc., "shall prepay the outstanding principal and interest and any other sums due hereunder plus any amount necessary for [OI] to have paid at least the Guaranteed Interest." Harvey did not view Optimal as an obligor under the note.

As with the prior loan, respondent conceded that OI had no direct involvement in the HON litigation, but that everyone anticipated a "multimillion-dollar settlement" and, thus, once the case settled, Harvey would no longer need the loaned funds. Harvey maintained that he never intended to use the settlement proceeds to pay respondent directly. Rather, he believed that he would realize sufficient cash from his portions of the settlement to do so.

Neither OI nor Harvey had independent legal counsel for this second loan transaction and neither Harvey nor respondent obtained Young's permission to secure OI's loan with the proceeds of the HON litigation. Respondent, again, did not comply with the requirements of RPC 1.8.

Following the aforementioned adverse ruling by the court in the Optimal/HON litigation, on March 17, 2011, the case settled for $637,500, an amount significantly less than anticipated. On April 11, 2011, Cozen and O'Connor sent to both Harvey and respondent a settlement disbursement sheet, containing a net distribution of $307,320.98. Cozen and O'Connor did not send Young copies of the settlement disbursement sheet, the release, or the settlement agreement. The settlement distribution sheet did not reference the money that respondent had loaned OI. On April 18, 2011, OI repaid respondent the $100,000 loan, together with accrued interest.

Also on April 18, 2011, Harvey sent an e-mail to Young, attaching a copy of an altered settlement distribution sheet from the HON litigation. Respondent did not receive a copy of the e-mail or the altered distribution sheet. Harvey admitted that he "revised" the distribution sheet to include a line item for "OI Expenses Advanced by Lauletta" in the amount of $107,500, the amount that OI had repaid respondent. Harvey also altered the net distribution from $307,320.98 to $199,820.98 (the original net distribution minus the amount of the loan repaid to OI). Harvey admitted making these changes to the distribution sheet. Harvey's e-mail to Young stated, in relevant part:

> We came out of this thing . . . certainly not in the financial position we wanted to leave with. We are left as 50/50 partners in [Optimal] with $199,820.98 to distribute.
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> For OI . . . I was planning on much more of a cash infusion to run this company . . . . For you, I would think that a minimum of $212,000 (repayment for the Ittner loan) was desired and expected.
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> [Ex.R-22.]

Thus, Harvey proposed, among other things, that (1) OI sign a note to Ittner for $212,000 plus four percent interest to be paid quarterly, beginning March 2011; (2) they close out Optimal; and (3) Ittner/OI projects would bill through Ittner while OI would bill Ittner fifty percent of the furniture-related fees, plus the software license. Harvey offered to personally guarantee the note against the value of his assets and software.

When Young reviewed the settlement distribution sheet, he believed that "OI" referred to Optimal Interiors, the company that they jointly owed. He, therefore, did not question the "OI Expenses Advanced by Lauletta" entry. Moreover, he believed that the document had been prepared by Optimal's legal team. From 2011 to 2012, Young was not aware that another distribution sheet existed.

As to Harvey's proposal, Young agreed that he would not take any of the HON distribution because he trusted Harvey, regarding Harvey as his mentee. In addition, Harvey had pleaded with him to accept the offer because Harvey needed the money and he convinced Young that he would repay Young by the end of the year. Young decided to help him out "in good faith." Harvey never informed Young that he had altered the settlement distribution sheet. Young did not understand that the entry for "OI expenses advanced by Lauletta" referred to Harvey's loan repayment to respondent. He was, nevertheless, surprised that the net distribution amount was so low because, at one point, he understood that a settlement would result in a $2.7 million payout.

In contrast, respondent claimed that Young was "fully aware" of the amount of the actual settlement and that the altered document "was the commencement of a negotiation between [Harvey and Young]." According to respondent, Harvey and Young agreed that Young would lend Harvey the entire amount of the net distribution, for which Young would receive a note.[4]

Even though the loan from respondent was to have been used to launch OI's software line, Harvey explained that the purpose

[4] Exhibit 23 is a May 1, 2011 promissory note in the amount of $231,640.86 from OI to Ittner, signed only by Harvey. Payments were to have been made in four installments, the first due on or before June 30, 2011, the last payment due on or before March 30, 2012.

of the loan "morphed." Harvey claimed that he used it to defray the expenses he had incurred in connection with the HON litigation. Harvey maintained that he had had many conversations with Young about those expenses and that Optimal had not paid his salary. As a result of their numerous conversations, they agreed that $107,500 was a "good representative number" of the amount he deserved, even though Optimal owed him significantly more for lost wages.

Young denied that he and Harvey had discussed paying Harvey for the time he spent preparing for the HON litigation, or that he knew that Harvey was using the settlement to repay the loan to OI. In contrast, Harvey claimed that Young was always aware of the loan from respondent to OI and that, when the HON suit settled, the loan was to be repaid from the settlement. Harvey maintained that the loan amount would not have appeared on the distribution sheet prepared by Cozen and O'Conner because the agreement was between him and Young. Harvey asserted further that Young's acceptance of the May 11, 2011 $230,000 promissory note (the amount Young/Ittner originally loaned Optimal) and the "filed UCC" memorialized Young's acquiescence to the transaction.

According to Young, the promissory note was to have been paid in four installments, but Harvey missed making the first payment that was due approximately six weeks after the note was executed. Harvey claimed that, after Ittner obtained the note from him, Young stopped using OI's services, making it difficult for OI/Harvey to repay the note to Ittner.

In January 2012, respondent assisted Harvey in forming a new corporation, Draw2Spec, LLC (Draw2Spec), a "spinoff" of OI's software business. Respondent was also a "member" or shareholder of this company. Respondent asserted that he fulfilled the requirements of RPC 1.8 by virtue of Section 15.7 of Draw2Spec's operating agreement, the "Acknowledgement of No Representation" section. That section provides:

> The undersigned each for himself, acknowledges that (1) as counsel to the Company, Lauletta Birnbaum, LLC (the "Firm"), prepared this Agreement for, on behalf of and in the course of its representation of the Company, as directed by its Members: (2) the Firm does not represent his individual interests with respect to the transactions contemplated by this Agreement; (3) the Firm has not given him any advice or rendered any opinions to him with respect to the transactions contemplated by this Agreement, the consequences to him thereof, or his individual rights duties or obligations under this Agreement; and (4) the Firm has not engaged or participated in any negotiations of the terms and conditions of this Agreement on his behalf.
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> THE UNDERSIGNED FURTHER UNDERSTAND AND ACKNOWLEDGE THAT: (i) A CONFLICT MAY EXIST BETWEEN HIS INTERESTS AND THOSE OF THE COMPANY AND THE OTHER MEMBERS; (ii) THIS

> AGREEMENT AND THE TRANSACTIONS CONTEMPLATED HEREBY HAVE SIGNIFICANT LEGAL, TAX AND FINANCIAL CONSEQUENCES; (iii) IT IS IN HIS BEST INTEREST TO SEEK THE ADVICE OF INDEPENDENT COUNSEL; AND (iv) HE HAS HAD THE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT COUNSEL.
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> [Ex.1,Att.F,p.29.]

According to respondent, the document was signed by all of the members and clearly explained respondent's involvement in the transaction.

As noted above, Harvey did not make any payments on the promissory note to Young/Ittner. Young and Harvey discussed Harvey's inability to pay the note, which Young believed respondent had drafted. In 2012, Harvey asked Young for a new payment plan. Thereafter, in early August 2012, Young retained Tennessee attorney David Canas to help him collect the money that he had "been pursuing since 08."

Canas engaged in a string of e-mails with respondent in an effort to collect on the unpaid promissory note. Respondent advised Harvey to give Canas all of the information he had requested to try to resolve the matter to avoid the costs of a lawsuit. At that time, respondent had no knowledge of the altered distribution sheet. It was not until later, in August 2012, when Canas sent him a copy of Harvey's version of the document, that respondent first learned it had been altered.

In an August 22, 2012 e-mail to respondent, Canas requested "an itemization of the 'OI Expenses Advanced by Lauletta.'" Initially, Young believed that the entry reflected amounts owed to respondent as part of the litigation. On that same date, respondent replied that he would speak to Harvey and "start gathering the information." He attached a list of his firm's expenses from the HON litigation, information that had previously been provided to Canas.

Canas asked respondent in another August 22, 2012 e-mail whether the line item on the disbursement sheet regarding OI expenses advanced by respondent represented "litigation expenses as well." Respondent replied "yes, they were funds advanced to OI during the litigation for the expenses it incurred directly." Thereafter, on August 23, 2012, Canas sought clarification of respondent's reply:

> Also, on the OI expenses paid by you to OI, were these litigation expenses or operational expenses of OI that were paid by you during the litigation? Your response isn't clear. Either way, Mr. Young requests a more detailed breakdown and documentation to support the advances made and reimbursed through the settlement proceeds.
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> [1T134;Ex.1,Att.J.][5]

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5 "1T" refers to the transcript of the February 17, 2015 DEC hearing.

Canas' subsequent September 6, 2012 e-mail to respondent, which attached a copy of a draft complaint that Young intended to file against Harvey, accused Harvey of transferring his assets in OI, including the proprietary software used by OI, to Draw2Spec to remove his "assets from the reach of creditors, primarily Ittner."

Respondent claimed that, although he had tried to obtain information from Harvey, he did not have an opportunity to provide anything to Canas before Canas sent him the "draft complaint and basically said that they weren't willing to negotiate at all," on the repayment of the Ittner loan.

Canas' September 6, 2012 e-mail also stated:

> As a counter, Ittner demands payment in full of the amount due on the Note between Ittner and OI, Inc. As of 8/31/2012 that amount, including principle [sic] and interest was $247,284.24 (we would update the amount of the note to include all interest up to the date that the new note is executed). The debt would be evidenced by a new note signed by OI, Inc. and Draw2Spec, LLC and would be secured by the assets of both entities, including the proprietary Software. . . .
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> Please discuss this proposal with Mr. Harvey. I have instructions to file the lawsuit tomorrow afternoon if we do not hear from you with an acceptance of this proposal by noon tomorrow.
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> [Ex.R-25.]

Respondent, thereafter, wrote to Canas, presumably on the same date, alleging that Canas was not acting pursuant to the terms they had discussed. Respondent accused Canas of violating the Tennessee Rules of Professional Conduct regarding confidentiality. In a subsequent telephone conversation, Canas denied violating any such rules, asserting that he already had access to the information that respondent claimed was confidential.

The two attorneys had no further contact. On September 7, 2012, Canas filed a lawsuit on Young's behalf against Harvey and his companies to collect on the $231,000 promissory note. Harvey maintained that, thereafter, he never had to provide an accounting of the "expenses" because he and Young settled the litigation, which resulted in a $200,000 payment to Young.

Respondent presented testimony from six character witnesses, including a certified public accountant with whom he conducts business, friends, clients, a business partner, a law partner, and his wife. All of these witnesses variously described respondent as trustworthy, honest, ethical, and caring. In addition, respondent submitted eleven character letters, which similarly described him, some adding that respondent was a man of integrity who exhibited good judgment and excellent moral character, was involved in local charities, and was a dedicated father and husband.

The ethics complaint alleged that respondent neither replied to Canas' e-mail nor informed Canas or Young that Harvey had altered the distribution sheet to conceal the fact that he had repaid respondent's loan from the Optimal settlement proceeds of the HON litigation. In this regard, the complaint charged that respondent had knowingly made a false statement of material fact to Canas by failing to explain the meaning of the line item, stating instead that it represented litigation expenses, and by failing to disclose that Harvey had altered the distribution sheet to make it appear as if the proceeds from the HON litigation were substantially less than they actually were, in violation of RPC 4.1(a). The complaint also alleged that, by his failure to disclose to Canas the true amount of the settlement proceeds from the HON litigation, respondent perpetuated Harvey's fraud and, thus, violated RPC 8.4(c).

In addition, the complaint alleged that the provision requiring the proceeds from the HON litigation to be applied first to the repayment of the promissory notes in respondent's favor created a conflict of interest between respondent, on the one hand, and Harvey, Young, and Optimal, on the other hand, in violation of RPC 1.8(b). The complaint further alleged that respondent did not comply with the requirements of RPC 1.8(a).

At the DEC hearing, respondent's counsel argued that the law does not require people to engage in acts that are futile and that, presumably, compliance with the requirements of RPC 1.8 would have been futile because Harvey needed funds to complete his business transactions within three days and would have lost the deal if he sought out another lawyer. Counsel argued further that RPC 1.8 did not specifically refer to loans and that the loans respondent made, therefore, were not prohibited transactions. There was no conflict of interest, no exploitation, and no adversity.

Counsel denied that respondent had made misrepresentations to Canas. He contended that respondent's good character, as reported by his character witnesses, should be considered and should exonerate respondent of any wrongdoing. Counsel further argued that the law permitted an adverse interest to be drawn from Canas' failure to appear at the DEC hearing.

The presenter asserted that he had not called Canas as a witness, believing his testimony was not necessary, as the e-mails spoke for themselves, and the parties had entered into a very detailed stipulation of facts. He further underscored that respondent had not been truthful in his dealing with Canas. Specifically, when Canas inquired whether the "OI Expenses Advanced by Lauletta" on the altered distribution sheet were litigation costs, respondent replied "yes, they were funds advanced to OI during the litigation for the expenses it incurred directly," when, in fact, they were not. Rather, the funds identified as advanced expenses were used by Harvey to repay the loan that respondent had made to him. Thus, the presenter argued, respondent's reply was a misleading and incorrect statement, which he knew had the effect of hiding Harvey's fraud, in violation of both RPC 4.1(a) and RPC 8.4(c).

* * *

The DEC found clear and convincing evidence that respondent violated RPC 1.8(a) because he admitted that he did not advise Harvey, in writing, of the desirability of consulting independent counsel about the two loans he made to OI and he did not obtain Harvey's written informed consent to the representation. The panel made no findings in respect of the charged violation of RPC 1.8(b).

As to the RPC 4.1(a) and RPC 8.4(c) charges, the DEC did not find clear and convincing evidence that respondent knowingly made false statements or failed to disclose a material fact to Canas about the revised disbursement sheet and collection of the $231,000 that Harvey owed Young.

Based on respondent's lack of an ethics history, and the relevant case law, the DEC determined that an admonition was the appropriate discipline for respondent's violation of RPC 1.8(a) for the two loans.

* * *

In his brief to us, respondent's counsel argued that the loans respondent made to Harvey were not within the purview of RPC 1.8 because: (1) the loans were made to a high school friend for whom he performed only isolated and occasional legal services; (2) respondent was not acting as an attorney in matters that related to the loans; (3) there was no real or actual conflict between respondent and Harvey/OI; (4) Harvey solicited the loans and was the borrower, not the lender; (5) the loans were of significant benefit to Harvey/OI and their creditors; (6) there was no adverse or potentially adverse consequence or impact to any client or anyone else; (7) Harvey was a sophisticated businessman; (8) Harvey understood and was familiar with loan transactions; (9) the loans were exigent and, if not consummated, could have resulted in the collapse of OI; (10) Harvey was not the grievant; (11) respondent would presumptively have had a greater understanding of the loans and the terms of the notes than a newly engaged attorney; (12) Harvey would not have had sufficient time to seek and consult with a new attorney; and (13) the cost, fees, and expenditures of time for retaining new counsel would have presented an undue burden for Harvey and his business.

Counsel further observed that (1) respondent was involved in the HON litigation only in a "secondary role;" (2) as a result of the "modified" settlement distribution sheet, Young received a lesser amount of money than he anticipated; (3) respondent was not involved in Young's 2012 lawsuit against Harvey; (4) the record confirmed that at no time did respondent make any misstatements or misrepresentations to Canas; and (5) Canas failed and declined to "participate" in the DEC hearing.

Counsel further argued that the Court could have proscribed attorneys from making loans to friends who happen to be occasional clients, but it did not do so. He stated

> If a loan and the specific terms were solicited by a sophisticated client from an attorney who was not involved in a transaction in which the proceeds of the loan was going to be used, it was not and could not have been the circumstances that would have been envisioned by the RPCs or its salutary purpose. Any ambiguity should be resolved in favor of respondent.
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> [RB8.][6]

Counsel posits that RPC 1.8(a) specifically presupposes that, if an attorney makes a loan to a client, there must be a pecuniary interest adverse to the client to trigger the requirement that the client give informed consent, in a signed writing, to the terms and conditions of the transaction and that

[6] RB refers to respondent's February 10, 2016 brief to us.

the client be given a reasonable opportunity to seek independent legal counsel. Thus, in all respects, he argues RPC 1.8 is not applicable to the circumstances of this case.

In sum, counsel argued that the complaint should be dismissed in its entirety because there are no known cases prohibiting a loan from an attorney to a client; at the time of the loans, respondent was not acting as the attorney for Harvey, who was a personal friend; the borrower was not the grievant; and the loans were beneficial, not adverse.

In his memorandum of law, the presenter argued that RPC 1.8(a) makes no exception for a client-initiated business transaction with counsel and that a loan may be viewed as a business transaction or the acquisition of an interest adverse to the client, within the meaning of the rule.

The presenter, thus, contended that respondent engaged in conflicts of interest, not only by loaning money to his friend and long-time client, but also by acquiring an ownership interest in two of Harvey's companies – OI and Draw2Spec. The presenter emphasized that, even if the transactions' terms were considered fair and reasonable, respondent violated RPC 1.8(a)(2) and (3) by failing to advise Harvey, in writing, of the desirability of seeking the advice of independent counsel of his choice and by failing to obtain Harvey's written consent to his role in the transactions.

The presenter maintained that respondent violated RPC 1.8(a) not only as to Harvey, but also as to Young and Optimal: (1) by requiring, in connection with the $69,000 loan, that the proceeds from the HON litigation first be applied toward the repayment of the note before being distributed to OI or Harvey, and (2) by requiring that any sums due in connection with the $100,000 loan be paid within three days of Optimal's receipt of any payment in connection with the HON litigation, regardless of other competing uses for the money.

Thus, according to the presenter, there was a clear conflict between respondent and his clients with respect to the application of the HON proceeds. The presenter underscored that RPC 1.8(b) prohibits a lawyer from using information relating to his client's representation to his client's disadvantage, unless the rule provisions are followed. Here, respondent used his knowledge to structure repayment terms to benefit himself, to the detriment of his clients.

As to the RPC 8.4(c) and RPC 4.1 charges, the presenter acknowledged that there was no proof that respondent was aware, before August 2012, that Harvey had altered the settlement distribution sheet. The presenter noted, however, that respondent's reply to Canas about the meaning of the entry for Optimal expenses advanced by him was not truthful, and that, when respondent was asked to clarify his response, he failed to do so.

The presenter urged us to find that respondent knowingly made a false statement of material fact to a third person and failed to disclose material facts necessary to avoid assisting a fraudulent act by his client, violations of RPC 4.1(a)(1) and (2). The presenter further argued that, by failing to disclose to Canas the actual amount of the net proceeds from the HON settlement, respondent perpetrated the fraud, deceit, and misrepresentations of his client and thereby violated RPC 8.4(c).

The presenter acknowledged that the conflicts of interest with Harvey were not egregious and did not result in economic harm to him, but, nevertheless, noted the impact of his conduct on his other clients, Optimal and Young. The presenter argued that respondent engaged in self-dealing by requiring repayment of his loan before disbursements could be made to Optimal and Young, thus putting his financial interests before those of clients Optimal, Young, and Harvey. The presenter pointed out that Young ultimately suffered economic harm because of Harvey's delay in repaying his obligation, as well as the litigation that ensued when Harvey defaulted on the renegotiated loan. Young was forced to hire an attorney to collect on the Ittner loan.

Based on the economic harm, the repeated nature of respondent's violations, and his failure to clarify the meaning of the entry on the distribution sheet when he had the opportunity to do so, the presenter recommended a censure.

* * *

Following a de novo review of the record, we are satisfied that the conclusion of the DEC, that respondent was guilty of unethical conduct, is fully supported by clear and convincing evidence.

First, we address some of respondent's counsel's comments. Counsel accused Canas of declining to appear and testify at the DEC hearing and asked the hearing panel to draw an adverse inference from that failure. However, the presenter informed the panel that he had not called Canas to appear simply because he did not consider it necessary since the parties had stipulated to the e-mails between Canas and respondent and to the facts that formed the subject of those e-mails. In that context, the presenter noted, Canas' testimony simply was not necessary. We agree and, thus, draw no adverse inference from Canas' failure to testify.

Counsel also suggested that Young realized "a lesser amount" from the HON settlement as the result of the modified/altered settlement distribution sheet. This, too, is inaccurate because Young received no funds from the settlement. Rather, he received only a worthless promissory note. Under false pretenses, Harvey convinced Young to permit Harvey to take the entire settlement distribution – that is, the amount that remained after he surreptitiously repaid respondent's loan from the settlement proceeds – and to execute a second promissory note for the loan Ittner had made.

Next, counsel claimed that respondent did not participate in the HON litigation; rather, he took a "secondary role" in it. Respondent himself testified, unequivocally, that he is not a litigator and, therefore, recommended that Cozen and O'Conner, the firm by which he was previously employed, handle that litigation. Respondent testified, however, that Cozen and O'Conner asked him to assist in the litigation. Moreover, for respondent's "secondary role" in the litigation, his firm received $74,682 as its share of the contingent fee.

Finally, counsel asserted that respondent did not represent Harvey in the lawsuit filed by Young. However, respondent negotiated with Canas, on Harvey's behalf. The case settled, thereby obviating the necessity of a trial.

We now turn to the specific charges in the ethics complaint. The complaint charged respondent with engaging in four improper business transactions with his client, John Harvey.

RPC 1.8 states, in relevant part:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> > (1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;
> >
> > (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and
> >
> > (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
>
> (b) Except as permitted or required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client after full disclosure and consultation, gives informed consent.

Clearly, respondent was familiar with RPC 1.8, evidenced by his inclusion of the conflict language in OI's stockholder's agreement and Draw2Spec's operating agreement, under which documents respondent acquired interests in both companies. Although respondent did not fully and completely follow the requirements of the rules, he substantially complied, such that we do not find a violation of RPC 1.8 as to these transactions.

Respondent, however, failed to comply with RPC 1.8 with respect to the loans he made to OI/Harvey. By entering into promissory notes with his client, he protected only himself. As he acknowledged in his testimony, he created the promissory notes in the event that a future circumstance affected Harvey's ability to repay the loans.

At the time the loans were made, and as the promissory notes memorialize, the HON litigation was still ongoing. Respondent's own testimony and the documentation in this case support a finding that he was actively involved in his clients' representation in that litigation. Not only did he represent Harvey, but he also represented Optimal, in which Harvey and Young were equal partners. Clearly, respondent used his knowledge about the litigation to the disadvantage of his clients when he drafted the promissory notes. He knew that a recovery was anticipated from the litigation and gave himself priority over the distribution of the proceeds.

Respondent's counsel advanced numerous arguments for the proposition that the conflict rules should not apply. For example, he claimed that he and Harvey were friends, Harvey was a sophisticated businessman, no one was adversely impacted by the loans, and Harvey simply did not have the time to engage new counsel because his need for funds was exigent. However, the <u>Rule</u> does not carve out exceptions for these circumstances. Respondent's conduct in respect of the loans was a clear violation of <u>RPC</u> 1.8(a) and (b). We can reach no other conclusion.

Respondent might have been able to loan Harvey the money if he had simply complied with the rule's requirements of obtaining a writing from Harvey, Young, and Optimal, consenting to (fair and reasonable) essential terms of the transaction and respondent's role in it. Respondent also was required to advise those clients, in writing, of the desirability of seeking independent counsel. Respondent, however, failed in all respects. The interest rates on the loans clearly were not favorable to Harvey, but rather generous to respondent. Perhaps if the promissory notes had been reviewed by independent counsel, Harvey would have been so advised and could have negotiated more favorable terms. Indeed, as the presenter argued, Harvey did not read the provisions of the promissory notes he signed in respondent's favor. Rather, he relied on respondent, his attorney and his trusted advisor. An independent review certainly would have brought the terms into focus. The repayment terms were, likewise, unfavorable to Young and to Optimal. The note made Young and Optimal, who were not parties to the loans, obligors by requiring that respondent be paid first once the HON litigation was resolved. Respondent, therefore, engaged in multiple conflicts of interest with Harvey, Young, and Optimal.

The second promissory note might be viewed as paving the way for the fraud Harvey perpetrated on Young. Because of Harvey's obligation under the note, he altered the settlement distribution sheet to give the appearance that the loan he repaid to respondent represented litigation expenses relative to the HON lawsuit. He then reduced the net distribution sum by the amount of that phony litigation expense, which actually represented the amount he had taken to repay the loan. Harvey then convinced Young to allow him to keep the remainder of the settlement proceeds. Young, ignorant of the fact that Harvey had already used $107,000 for his own purposes, acquiesced to Harvey's entreaties. There is no evidence, however, that respondent was an accomplice to this fraud.

Respondent did, however, perpetuate his client's fraud by his subsequent failure to disclose the actual amount of the HON settlement and by confirming to Canas the accuracy of the description of the line item Harvey inserted as advanced litigation expenses. Respondent's testimony at the DEC hearing, that Young was "fully aware" of the amount of the actual settlement and that Harvey's alteration of the document "was the commencement of a negotiation between the two of them [Harvey and Young]," is nothing less than disingenuous. Rather, the statement appears to be either an attempt to mask his client's fraudulent conduct, or to hide respondent's own cover-up of that conduct. By his conduct in this respect, respondent clearly violated RPC 4.1(a).

Young was the real loser in all of this. Not only did he fail to realize any of the HON settlement proceeds, but he had to sue Harvey to obtain a reduced payment of the original loan he had made to Optimal. In connection with that lawsuit, respondent misrepresented to Canas that the line item on the HON settlement distribution sheet, indeed, represented litigation expenses. Respondent then failed to reply to Canas' request for further information in that regard. We view respondent's failure to reply to Canas' request for additional information about the "litigation expenses" on the settlement distribution as a misrepresentation by silence, a violation of RPC 8.4(c), as was charged in the complaint.[7] Crispen v. Volkswagenwerk, A.G. 96 N.J. 336, 347 (1984).

The only issue left for our determination is the proper quantum of discipline for respondent's multiple conflicts of interest and misrepresentations to Canas. Although respondent's counsel argued before us that a loan to a client is not a business transaction and that a conflict of interest does not arise if the attorney is the lender, the cases cited below establish otherwise.

When an attorney enters into a loan or other business transaction with a client, without observing the safeguards of RPC 1.8(a), the discipline has ranged from an admonition to a short suspension, depending on the existence of mitigating or aggravating factors. See, e.g., In the Matter of David M. Beckerman, DRB 14-118 (July 22, 2014) (admonition for attorney who, during the course of the attorney's representation of a financially-strapped client in a matrimonial matter, loaned the client $16,000, in monthly increments of $1,000, to enable the client to comply with the terms of a pendente lite order for spousal support; further, to secure repayment for the loan, the

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[7] Although respondent clearly also made an affirmative misrepresentation to Canas regarding the nature of the line item "litigation expenses," the complaint did not charge him with a violation of RPC 8.4(c) on that basis.

attorney obtained a note and mortgage from the client on his share of the marital home; the attorney also paid for the replacement of a broken furnace in the client's marital home; by failing to advise the client to consult with independent counsel, failing to provide the client with written disclosure of the terms of the transactions, and failing to obtain his informed written consent to the transactions and to the attorney's role in them, he violated RPC 1.8(a); by providing financial assistance to the client, he also violated RPC 1.8(e)); In the Matter of John W. Hargrave, DRB 12-227 (October 25, 2012) (admonition for attorney who obtained from his clients a promissory note in his favor, in the amount of $137,000, representing the amount of legal fees owed to him, and secured the payment by a mortgage on the clients' house; the attorney did not advise his clients to consult with independent counsel, before they signed the promissory note and mortgage in his favor); In the Matter of Damon Anthony Vespi, DRB 12-214 (October 2, 2012) (admonition for attorney who secured payment of his $30,000 legal fee by obtaining from the client a promissory note for that same amount, an assignment of payments owed to the client under certain contracts due, and a personal guaranty; the attorney failed to advise his client, in writing, of the advisability of obtaining the legal advice of independent counsel regarding the transaction and to obtain the client's informed consent, in writing, to the terms of the transaction and to the attorney's role or roles in the transaction; in mitigation, we considered that no ethics infractions had been sustained against the attorney since his 1998 admission to the bar); In re Futterweit, 217 N.J. 362 (2014) (reprimand imposed on attorney who agreed to share in the profits of his client's business, in lieu of legal fees, without first advising the client, in writing, of the desirability of seeking the advice of independent counsel and obtaining the client's written consent to the transaction; the attorney also violated RPC 1.5(b) by failing to provide the client with a writing setting forth the basis or rate of his fee; in aggravation, we noted that the attorney had given inconsistent statements to the district ethics committee, that he had previously received an admonition for failure to communicate with a client, and that he had never acknowledged any wrongdoing or showed remorse for his conduct); In re Monzo, 216 N.J. 331 (2013) (reprimand for attorney who purchased a parcel of unimproved real estate from a client whom he had represented in various personal and business matters; the attorney and the client also entered into a construction agreement whereby the client's construction company would perform preliminary work on the site where the attorney intended to build his house; ultimately, disputes arising out of these transactions led to "acrimonious, time-consuming and expensive" litigation between the attorney and the client; the client subsequently was made whole by way of a settlement agreement with the attorney; no prior discipline); In re Kazer, 189 N.J. 299 (2007) (reprimand for attorney who made nineteen loans to eleven clients; although he charged interest on only two of the loans, he neither requested nor received it in one case and received only $20 of interest in the other case; we considered that the loans were made for altruistic reasons for the clients' living expenses, medical costs or funeral expenses); In re Rinaldo, 165 N.J. 579 (2000) (reprimand for attorney who provided financial assistance to a client to enable the client to pay his rent; and improperly obtained liens in the client's litigation matters; prior public and private reprimands); In re Beran, 224 N.J. 388 (2016) (censure for attorney who made loans to clients in connection with pending litigation and whose records were so deficient that he negligently misappropriated funds and failed to properly disburse funds to clients; prior admonition and reprimand); In re Weinberg, 200 N.J. 432 (2009) (censure for attorney who loaned money to a client, and to an investor of the client, failed to memorialize the basis or rate of his fee, and commingled funds; prior reprimand); In re Moeller, 201 N.J. 11 (2009) (three-month suspension for attorney who borrowed $3,000 from a client without observing the safeguards of RPC 1.8(a);

attorney also failed to memorialize the basis or rate of his fee, and did not adequately communicate with the client; aggravating factors were the attorney's failure to take reasonable steps to protect his client when he withdrew from the matter and his disciplinary record (a one-year suspension and a reprimand)); In re Giorgi, 180 N.J 525 (2004) (three-month suspension for attorney who made loans to his client where the terms of the transactions were neither fair nor reasonable; charged an excessive fee; made misrepresentations to his adversary and the court and counseled his client to testify falsely; engaged in a conflict of interest by arranging loans between clients, and made a misrepresentation to the OAE).

A reprimand is the typical discipline for a failure to disclose a material fact to a third person, absent other serious ethics infractions or an ethics history,. See, e.g., In re Walcott, 217 N.J. 367 (2014) (attorney misrepresented to a third party, in writing, that he was holding $2,000 in escrow from his client as collateral for a settlement agreement; attorney was found guilty of RPC 4.1(a)(1), RPC 8.4(c), and RPC 8.4(d)); In re Chatterjee, 217 N.J. 55 (2014) (for a five-year period, the attorney misrepresented to her employer that she had passed the Pennsylvania bar examination, a condition of her employment; she also requested, received, but ultimately returned, reimbursement for payment of the annual fee required of Pennsylvania attorneys; compelling mitigation); In re Liptak, 217 N.J. 18 (2014) (attorney misrepresented to a mortgage broker the source of the funds she was holding in her trust account; attorney also committed recordkeeping violations; compelling mitigation considered); In re Lowenstein, 190 N.J. 58 (2007) (attorney failed to notify an insurance company of the existence of a lien that had to be satisfied out of the settlement proceeds; the attorney's intent was to avoid the satisfaction of the lien); In re Agrait, 171 N.J. 1 (2002) (despite being obligated to escrow a $16,000 deposit in a real estate transaction, the attorney failed to collect it but, nevertheless, caused it to be listed on the RESPA as a deposit; the attorney also failed to disclose a prohibited second mortgage to the lender; the attorney was found guilty of gross neglect, failure to memorialize a fee, and conduct involving dishonesty, fraud, deceit or misrepresentation); and In re Egenberg, 211 N.J. 604 (2012) (attorney was guilty of engaging in a conflict of interest in a real estate transaction and making misrepresentations on a RESPA statement, in violation of RPC 4.1(a) and RPC 8.4(c); we found as significant mitigating factors the attorney's unblemished twenty-three year career at the time of his misconduct, and the thirteen years that had passed, without incident, before the grievance was filed).

We consider the mitigating factors in this case: respondent's unblemished ethics history in his twenty years of practicing law and the glowing character testimony and letters from his friends, colleagues, and wife. We also consider the aggravating factors: respondent's lack of remorse, contrition, or understanding of his violation of the RPCs, and his less than forthright testimony relating to his client's alteration of the settlement distribution sheet in the HON litigation.

Thus, under the totality of the circumstances, we determine that a censure is warranted.

Member Singer voted to impose a reprimand. Vice-Chair Baugh 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: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Frank A. Lauletta, III
Docket No. DRB 15-406

Argued: March 17, 2016

Decided: September 8, 2016

Disposition: Censure

Members	Disbar	Suspension	Reprimand	Censure	Disqualified	Did not participate
Frost				X		
Baugh						X
Boyer				X		
Clark				X		
Gallipoli				X		
Hoberman				X		
Rivera				X		
Singer			X			
Zmirich				X		
Total:			1	7		1

Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel