Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 18-398
District Docket No. XIV-2016-0128E

In the Matter of

James L. Bosworth

An Attorney at Law

Decision

Argued: February 21, 2019

Decided: August 5, 2019

Steven J. Zweig appeared on behalf of the Office of Attorney Ethics.

Robert E. Margulies 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 VC Ethics Committee (DEC). The three-count complaint charged respondent with violating RPC 1.5(a) (unreasonable fee); RPC 1.5(b) (failure to set forth, in writing, the basis or rate of the fee); RPC 1.8(a) (improper business transaction with a client); RPC 1.15(d) and R. 1:21-6 (recordkeeping); and RPC

8.1(b) (failure to cooperate with disciplinary authorities). We determine to impose a one-year suspension.

Respondent was admitted to the New Jersey bar in 1975. He has no history of discipline.

Respondent's client, Patrice Masucci, was the sole beneficiary of a testamentary trust (the Trust) through the estate of her aunt, Lucy Sinno, who passed away in 2007. Respondent was the executor, trustee, and attorney for the estate. The principal asset of the Trust was real estate in Hoboken, New Jersey, which sold, in July 2013, for $1,084,744.47. Respondent deposited the sale proceeds into his attorney trust account (ATA). The funds belonged to Masucci pursuant to the Trust. Respondent did not have a written fee agreement with Sinno or the estate.

Masucci was concerned that she would be frivolous with the money and eventually deplete the Trust. Therefore, on July 16, 2013, she retained respondent to handle all her financial matters, for an annual fee of $12,500. Respondent held Masucci's funds in trust and made necessary disbursements as requested. Masucci also asked respondent to make investments on her behalf using the Trust funds.

To that end, respondent invested some of her funds in his family business, Grillo Funeral Home, where he serves as funeral director. The alleged violations

of the complaint do not stem from this investment, but from a subsequent loan from Masucci to respondent.

In 2013, grievant, Sanford B. Klausner, established Cubicon Corporation (Cubicon) and sought investors to fund this start-up venture. Cubicon intended to fund, promote, and monetize certain intellectual property that Klausner possessed relating to the "Internet of Things."[1] In the fall of 2013, through introduction by a mutual friend, Klausner met with respondent in Monterey, California, to discuss Cubicon. Respondent understood Cubicon's technology to be a new architecture for the internet of things, which allowed machine-to-machine communication without human intervention. For example, an individual could use a "wearable" that could detect a medical emergency, and then notify a hospital, a personal physician, and an ambulance. It could be programmed to react automatically based on the circumstances it detects. Klausner assured respondent that a meeting with Cisco Systems, Inc. (Cisco) to license the technology was imminent.

Subsequently, respondent entered into an agreement with Klausner to become a member of both Cubicon's management team and its board of

[1] The internet of things, or "IoT", is a system of interrelated computing devices, mechanical and digital machines, objects, animals, or people that are provided with unique identifiers (UIDs) and the ability to transfer data over a network without requiring human-to-human or human-to-computer interaction. https://internetofthingsagenda.techtarget.com/definition/Internet-of-Things-IoT.

directors. Later, however, Cubicon's attorneys would argue that respondent had not been officially appointed to the board of directors. Nonetheless, the parties reached an agreement whereby respondent would invest $500,000 in Cubicon over a one-year span. The agreement characterized respondent's investment as a loan, with a convertible promissory note (CPN) issued to respondent after each investment. Respondent retained the right to modify the CPNs into qualifying shares of Cubicon if the company were to go public, but no mention of this right is contained within the CPNs themselves. Respondent's investment had a five-year term with interest of 12% per annum (seven percent accumulating and five percent paid monthly.)

To facilitate his loan to Cubicon, respondent borrowed $500,000 from Masucci, whose funds he still held in his ATA. On December 20, 2013, respondent prepared a letter memorializing his and Masucci's conversations about the $500,000 loan, which provided, in part:

> I have negotiated an ongoing interest payment of 5%. The interest payment from the notes I will receive from the start-up company may not always be in a timely fashion but I'll turn over the 5% interest payments if and when they are received by me.
>
> The series of notes will be secured by a mortgage on 313 Willow Avenue, Hoboken. This will be a second mortgage on the premises and will have a principal due date of five years.

> I strongly suggest that you seek independent counsel from an attorney regarding this proposal. Please acknowledge the terms of this agreement and my suggestion by signing on the space provided below.

Respondent did not disclose to Masucci that his $500,000 investment with Cubicon would earn total interest of 12% per annum, with seven percent accumulating and five percent paid monthly. Respondent argues that he was under no obligation to do so. He believes the terms of his investment with Cubicon relative to the terms of the loan from Masucci are fair and reasonable because he was taking all the risk.

Specifically, respondent testified that, once he borrowed the $500,000, it became his money and was equivalent to obtaining a mortgage on his home. Respondent contends that Masucci's loan was guaranteed, and therefore, the risk was all his. In turn, the Office of Attorney Ethics (OAE) argues that, because he used none of his own money, respondent bore none of the risk; rather, Masucci assumed all the risk. The loan principal, plus interest, was due, in full, by December 31, 2018. Masucci testified unequivocally that respondent never asked to borrow money from her. Instead, she asked him to make investments for her.

Because respondent believed the risk was all his, he did not inform Masucci that this was a high-risk investment. He claims that, because her investment was in him and not Cubicon, and because she had "perfect security,"

her investment was not risky. Accordingly, respondent argues that he met his ethics obligations by fully disclosing to Masucci the value of the property that secured her loan to him. Masucci agreed with respondent, testifying that he assumed all the risks. She also indicated, however, that respondent had assured her that she would not lose her initial investment. When asked how she was protected in the transaction, she simply replied, "I trust him implicitly."

As noted, in his December 20, 2013 letter to Masucci, respondent suggested that she seek independent counsel regarding his proposal for the loan. Respondent contends that his letter complied with the requirements of RPC 1.8(a)(1). Although the letter does not explicitly state that respondent was not Masucci's attorney in the transaction, respondent argues that it is implied by way of the suggestion that Masucci seek independent counsel.

Masucci and respondent signed the letter the same day. Masucci testified that she did not seek independent counsel because she completely trusted respondent. She also told the OAE that respondent fully explained the terms of the transaction to her prior to her signing the documents and that he insisted, on numerous occasions, that she seek the assistance of another attorney. Masucci refused to do so because she trusted respondent.

Between December 30, 2013 and August 21, 2014, respondent invested $500,000 in Cubicon in five transactions as follows. On December 30, 2013, ten days after the letter agreement with Masucci, respondent wire transferred

$150,000 from his ATA; on January 14, 2014, he issued an ATA check for $200,000; on February 27, 2014, he made another wire transfer from his ATA for $100,000; on May 19, 2014, he issued an ATA check for $100,000; and, finally, on August 21, 2014, he sent Cubicon an ATA check for $50,000.

Each time respondent borrowed funds from Masucci to facilitate those transactions, he issued a separate promissory note, which respondent and Masucci signed on the same day the funds were disbursed. Each note, however, contains terms that differ from the provisions in the December 20, 2013 letter to Masucci. Specifically, according to the terms of the promissory notes, Masucci's loan to respondent would not accrue any interest unless he failed to repay the loan by December 30, 2018. The "no interest" provisions in the notes conflict with the terms of the December 20, 2013 letter, which provided for the payment of five percent interest. Respondent explained, however, that the notes contained a drafting error and that Masucci was entitled to five percent interest.

In respect of security for Masucci's loan to respondent, each note stated:

> [t]his Note shall be secured by a Mortgage Deed to real property commonly known as 311 Willow Avenue, Hoboken, New Jersey 07030. The Lender is not required to rely on the above security instrument and the assets secured therein for the payment of this Note in the case of default, but may proceed directly against the Borrower.

To that end, on December 30, 2013, respondent and Masucci entered into a corresponding mortgage agreement. The mortgage note was for $575,000, plus

interest. Although both parties signed the agreement, it was not notarized. Respondent acknowledged in his testimony that the New Jersey recording statute provides that, for a mortgage to be recorded, it must be notarized. He insisted that Masucci did not want to record the mortgage, but never explained why. He asserted that he had allowed Masucci to keep physical possession of the original mortgage in case anything happened to him, so that she could move forward with it on her own. He could not explain how Masucci could do so without a notarized and recorded mortgage. Masucci testified that she had not instructed respondent to refrain from recording the mortgage. It is evident from her testimony, however, that she believed that recording a mortgage simply means to put it in writing.

Meanwhile, Cubicon did not make the monthly interest payments on any of the CPNs and, at first, respondent did not request those payments. However, in February 2015, six months after the final disbursement of funds from respondent to Cubicon, the relationship between respondent and Klausner soured, resulting in respondent's removal from his position on the Cubicon Board of Directors. At this point, respondent finally demanded that Cubicon make the agreed on monthly interest payments. Cubicon refused.

Five months later, on July 1, 2015, respondent filed an arbitration demand, seeking a determination that Cubicon was in default of the CPNs and that he was entitled to the return of his $500,000 investment, plus the accrued interest.

During the arbitration, Klausner filed the ethics grievance against respondent. He testified that, because respondent had treated him poorly, he assumed that respondent probably was treating his client in the same way.

After the arbitration hearing, in San Francisco, California, respondent received an arbitration award of $745,125.65, and a security interest in all of Cubicon's intellectual property. Four days after the Court confirmed the arbitration award, Cubicon filed a Chapter 7 bankruptcy petition.

On September 15, 2016, respondent provided Masucci a re-executed promissory note and mortgage to remove "potentially ambiguous language." He did not advise Masucci to seek independent counsel. The note clarified that respondent's obligation to Masucci "was aggregated into one note and [that] the mortgage interest was calculated to the date of execution and folded into the note and mortgage."

In the re-executed mortgage note, the Borrower's Promise to Pay Principal and Interest was updated to provide:

> [i]n return for a loan I received, I promise to pay $550,000 (called the "current principal"), plus interest to the Lender. Interest at a yearly rate of 5% on the original principal of $500,000 and will be charged on that part of the principal which has not been paid from the date of this Note until all principal has been paid.

Under the paragraph, "Payments," the mortgage note states:

> I will pay principal and interest based on my receipt of interest of my investment with Cubicon. All payments will be made to the "lender" at the address above. I will pay all amounts owed under this Note no later than December 31, 2018.

In the re-executed mortgage note, respondent disclosed neither that he had negotiated initially with Cubicon to receive an additional seven percent interest that was awarded in arbitration, nor that Cubicon had filed for bankruptcy. When the note was re-executed in September 2016, respondent was aware that, because Cubicon had filed for bankruptcy, repayment of the loan was questionable. Respondent argues, however, that the re-executed note does not require that he pay Masucci only when the Cubicon investment pays off. Yet, in his brief to us, counsel for respondent asserted that respondent "continues to enforce his rights as to the intellectual property of Cubicon. When it is sold, Masucci will receive the interest owed consistent with their agreement."

The re-executed documents also changed the security for respondent's loan, from his property located at 311 Willow Avenue, Hoboken, New Jersey, to his property located at 18 West Avenue, Gladstone, New Jersey. Once again, the mortgage was not recorded. Masucci testified that she understood that the property securing the mortgage had changed. It was not until April 6, 2018, four days before the disciplinary hearing began, that respondent, after consulting with Masucci's new counsel, properly executed and recorded a mortgage as security for Masucci.

By September 12, 2016, respondent held $39,677.45 in trust on behalf of Masucci. Her annual expenses in 2015 were $55,000. Therefore, respondent did not have sufficient funds in trust to support Masucci.

Count one of the complaint alleged that the terms of the loan from Masucci to respondent were not fair and reasonable, and were not fully disclosed or transmitted in writing to Masucci, in violation of RPC 1.8(a)(1); that respondent did not fully advise Masucci in writing to seek the advice of independent legal counsel or provide her a reasonable opportunity to do so, in violation of RPC 1.8(a)(2); and that Masucci did not give informed consent to the essential terms of the loan documents. According to the complaint, the terms were ambiguous and contradictory, and respondent's role in the transaction, including whether he was representing Masucci, was not clear, all in violation of RPC 1.8(a)(3).

In his brief to us, respondent's counsel argues that the transaction between Masucci and respondent was fair and reasonable; that respondent fully disclosed the terms in writing; that respondent clearly disclosed to Masucci that he would be using her funds to make the investment in Cubicon; that Masucci admitted in her testimony that she was fully aware of the terms of the loan agreement; that the loan from Masucci was independent of respondent's business transaction with Klausner, and, therefore, respondent was not required to disclose those terms to Masucci in writing; and that the seven percent return respondent earned was neither adverse to, nor undermined, Masucci's five percent.

Additionally, respondent argues that he had informed Masucci both verbally and in writing of her right to obtain independent counsel. Masucci told the OAE that, even though she signed the letter agreement the same day it was presented to her, respondent previously had advised her, on numerous occasions, to seek counsel, but she refused because she trusted him.

Finally, respondent denies that Masucci could not give informed consent to the business transaction, due to her history of mental problems. Masucci attended an interview at the OAE unaided by counsel and testified competently at the hearing. He contends that the OAE presented no evidence that Masucci was not of sound mind or fully aware of the terms of the business transaction with respondent.

The complaint further alleged that respondent charged Masucci an unreasonable fee. On July 16, 2013, the Masucci subaccount in respondent's ATA had a balance of $1,078,794. The next day, respondent paid himself $130,000 for executor, trustee, attorney, and management fees, in connection with the Estate of Lucy Sinno. Thereafter, he collected $12,000 in legal fees in 2014, and $7,500 in legal fees in 2015. By September 12, 2016, he had disbursed $149,500 to himself from the Masucci subaccount. The rest of the original funds were disbursed as follows: $500,000 to Cubicon, $200,000 invested in Grillo Funeral Home, and $196,800 to Masucci for her personal use. Thus, the balance in Masucci's subaccount was $39,677.45.

At the time of the hearing, however, Masucci's trust account balance was $0. She testified that she was not shocked by the balance, because she believes she overspends on frivolous things. She acknowledged that respondent has spent $16,000 of his own money to continue to support her. In his brief to us, counsel for respondent claims that the total amount respondent has paid on behalf of Masucci from his own funds has since risen to $38,388.61, and that he has not taken counsel fees since 2015. By letter dated June 26, 2019, after oral argument before us, respondent certified that the total amount paid from his own funds has risen to $48,521.27. Yet, he refers to this amount as "total paid on account of interest."

On July 7, 2016, Masucci signed an acknowledgement that respondent had drafted, stating that she was advised of (1) respondent's $130,000 fee as the executor of the Sinno Estate; (2) the services that respondent had performed to earn that fee; and (3) the fees he took for managing her affairs in 2014 ($12,000) and 2015 ($7,500). Masucci also acknowledged that respondent always obtained her approval prior to disbursing any of these funds to himself and that he managed her affairs at her request.

Respondent's handling of Masucci's affairs comprised writing monthly utility checks and disbursing funds to her for personal expenses, at her request. In 2014, respondent made eighty-two transactions, or fewer than seven monthly

disbursements to, or on behalf of, Masucci. In 2015, he made 101 such disbursements, fewer than nine financial transactions per month.

Masucci told the OAE, during her July 17, 2016, interview, that when respondent was in California, his office assistant, who was also his son-in-law, would issue checks to her, or on her behalf, from respondent's trust account. At the hearing, she testified that respondent's son-in-law had issued her a check on only one occasion. Respondent's office assistant is neither an attorney licensed in New Jersey nor an authorized signatory on the trust account. Respondent denied having known of his office assistant's actions until he read the allegation in the ethics complaint. According to respondent, he had not anticipated that his son-in-law would issue trust account checks and has since instructed him to refrain from doing so.

Count two of the complaint charged that respondent's annual $12,500 fee to handle Masucci's financial affairs was excessive, in violation of RPC 1.5(a); that respondent failed to have a written fee agreement for Sinno, or the Estate of Sinno, in violation of RPC 1.5(b); and that respondent permitted a non-attorney to sign trust account checks, a violation of RPC 1.15(d) and R. 1:21-6.

Finally, the complaint charged respondent with additional recordkeeping violations and failure to cooperate with the OAE investigation. Specifically, by letter dated October 14, 2016, the OAE informed respondent that the records produced in connection with the OAE's previous request for documents were

insufficient. The OAE had requested all ledger cards for clients whose funds were maintained in respondent's trust account from January 2013 to the date of the request. Additionally, the OAE provided a balance summary showing outstanding client balances, some of which dated back to 1989. The OAE requested the identity of, and contact information for, each client; an explanation for respondent's having maintained the balances for so long; and an explanation of the efforts that respondent had made to resolve the issue.

On November 1, 2016, respondent informed the OAE that twenty-one of the outstanding balances had been successfully resolved, and that he was still working to resolve the other eight. Nonetheless, the OAE alleged that, pursuant to its October 14, 2016 letter, respondent provided neither the requested contact information for those clients nor an explanation for the retention of those funds in his attorney trust account for so long.

At the outset of the hearing, respondent's counsel assumed responsibility for respondent's failure to produce requested information, pointing out that the OAE had sent letters directly to him, and that respondent had been unaware of the shortfall in production. Counsel claimed that the failure to produce the clients' contact information had been an oversight, that respondent intended to fully cooperate, and that respondent had produced all the other requested information. According to counsel, all the outstanding balances were resolved

and distributed to the proper owners, except for $787 of the $17,000 total, which was paid into the Superior Court Trust Fund Unit.

OAE Investigator Jasmin Razanica explained that, because respondent had provided some information, the OAE continued its investigation based on respondent's partial compliance with the OAE's request. According to Razanica, if an attorney completely fails to reply to the OAE's request, the OAE will send a follow-up letter. However, if an attorney partially complies, the OAE does not usually request further compliance.

Count three of the complaint alleged that respondent failed to resolve old outstanding client balances and old outstanding checks, in violation of RPC 1.15(d) and R. 1:21-6, and failed to produce requested client files and contact information to the OAE, in violation of RPC 8.1(b).

In its January 28, 2019 letter brief to us, the OAE argued that it has satisfied its burden of proof on all counts, and that a one-year suspension is appropriate. The OAE advanced, as an aggravating factor, that, despite vociferous promises during the hearing that he would satisfy the entire loan to Masucci, by December 30, 2018, respondent had failed to repay her. Therefore, the OAE requested that reinstatement be conditioned on full repayment of the loan, plus interest. In his brief to us in opposition to the DEC recommendation, counsel for respondent confirmed that respondent had not repaid Masucci by

December 31, 2018 and is still attempting to secure funds to do so. As seen below, after oral argument, respondent paid a sizeable sum to Masucci.

The DEC concluded that the terms of the business transaction between respondent and Masucci were not fair or reasonable to her. Respondent failed to fully disclose the terms of the transaction with Masucci and failed to explain the terms to her in a manner that she could understand. Specifically, the terms of the CPNs that respondent entered into with Cubicon entitled him to receive a far greater return than the terms he provided to Masucci.

Although respondent provided Masucci security for her loan by way of mortgage notes, the DEC found those notes internally inconsistent, and possibly unenforceable. The mortgages (except for the last mortgage dated April 6, 2018) were neither executed by respondent's spouse, nor notarized, rendering them unrecordable. Indeed, except for the April 6, 2018 mortgage, the mortgages were not recorded, leaving the notes unsecured and Masucci unprotected.

Additionally, the DEC concluded that respondent failed to provide Masucci a reasonable opportunity to seek the advice of independent legal counsel of her own choosing concerning the transaction. Although respondent's December 20, 2013 letter agreement suggested that Masucci seek independent counsel, in light of Masucci's total dependence on respondent, the panel determined that she would not have sought independent counsel without

respondent's assistance. The panel noted that Masucci signed the letter agreement the same day it was presented to her.

The DEC determined that, given Masucci's history of anxiety and her reliance on respondent for all her personal and legal matters, she was incapable of giving written informed consent to the terms of the transaction. Moreover, she did not understand that respondent was not representing her interests in his dealings with Cubicon.

The DEC recommended dismissal of the remaining allegations for lack of clear and convincing evidence. Specifically, the DEC determined that respondent's fees were reasonable for the volume of work he performed; that he was not required to have a written fee agreement to pay himself for the handling of the Sinno Estate, as he was the executor of the estate; that, although respondent's office assistant issued and signed a trust account check to Masucci, respondent has taken steps to prevent a reoccurrence, and the conduct amounted to simple negligence that resulted in no harm; that respondent has taken reasonable steps to resolve the outstanding balances in his trust account; and that he acted diligently in cooperation with the OAE during the investigation of this matter.

In sum, the DEC found that respondent violated only RPC 1.8(a) and recommended a reprimand. The DEC found no violation of RPC 1.5(a), RPC

1.5(b), RPC 1.15(d), or RPC 8.1(b), and recommended dismissal of those charges.

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

We agree with the DEC's finding that respondent violated RPC 1.8(a), and that most of the remaining violations should be dismissed for lack of clear and convincing evidence. We do not agree, however, with the DEC's recommended dismissal of the RPC 1.15(d) charge because respondent retained outstanding balances in his trust account, a violation of that Rule.

We dismiss the alleged violation of RPC 1.5(a). Respondent and Masucci both detailed the extensive amount of time respondent dedicated to her on a monthly, weekly, and, often, daily basis. Additionally, respondent collected $12,500 in 2014, $7,500 in 2015, and has not charged Masucci a fee since, despite continuing to work on her behalf.

Further, to prove an attorney charged unreasonable fees in violation of RPC 1.5(a), the presenter must demonstrate why the amount charged is unreasonable in relation to the results achieved, the amount of work performed, and the usual and customary fee in the locality for similar services, among other factors. See RPC 1.5(a)(1-8). The presenter introduced no evidence of respondent's excessive fee vis-à-vis these factors.

In connection with this allegation, the OAE merely suggested that respondent's services were not legal in nature. Previously, the Court has not made such a distinction in determining the reasonableness of an attorney's fees. In In re Halligan, D-44, September Term, 2003 (unpublished), the attorney represented, from 1986 through her death in 2001, Elsie Finninger, a wealthy, elderly widow who suffered from "mild to moderate dementia, depression, and physical ailments, including vision and hearing problems." In the Matter of Francis X. Halligan, Jr., DRB 03-144 (November 5, 2003) (slip op. at 2-4). After the Ocean County Board of Social Services questioned some of the expenditures that Halligan had made in behalf of Finninger, the OAE charged him with violations of RPC 1.5(a), RPC 1.7(a) and (b) (conflict of interest), and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation). Id. at 1-2.

Pursuant to a March 1992 will, power of attorney, and revocable living trust that independent counsel had prepared for Finninger, Halligan served as her personal attorney, attorney-in-fact, trustee, and attorney for the trust. He was also the executor, and a beneficiary, under the client's will. Id. at 2-3.

Halligan received trustee commissions of $147,780 from 1996 to 2000 (Id. at 7). Additionally, in respondent's capacity as Finninger's personal attorney, he charged her $225,363.64 in legal fees over that same period. Id. at 7. The legal fees included: between April 1996 and December 1999, $60,000 for

"sending 840 identical letters to charities that had solicited contributions from Finninger;" from 1996 to 1998, $4,600 to attend the Heisman Trophy Award dinner, as Finninger's guest; $1,000 for buying Finninger a new couch, which cost $889; and $500 for purchasing a $29.95 electric fan. Id. at 7-9.

Halligan denied having committed misconduct, noting that neither Finninger nor her family had challenged his legal fees, and that he had agreed to reimburse $50,000 to Finninger's estate in an acknowledgement of unintentionally charging excessive legal fees in connection with the 840 identical charity letters. Id. at 26-27.

Our five-member majority determined to dismiss the charges and impose no discipline. Id. at 32. The majority explained:

> we believe that the client has the right to employ and compensate an attorney for both legal and non-legal services, provided that there is no overreaching. In this case, we found no evidence that respondent unduly influenced Finninger or took advantage of her, or that she had become incompetent.
>
> [slip op. at 34.]

Three members filed a dissenting decision, asserting that Halligan "abused his close relationship with [Finninger] and unfairly profited from her unconditional trust in him," thereby violating RPC 1.5(a). They would have imposed a reprimand on Halligan.

The Court agreed with our majority and dismissed the charges. In its order, the Court announced:

> in future cases the Disciplinary Review Board and the Court will apply an objective conduct standard to evaluate and determine whether the actions of attorneys who deal with elderly and infirm clients have been consistent with the requirements and obligations of the Rules of Professional Conduct, including, but not limited to, RPC 1.5 (fees), RPCs 1.7 and 1.8 (conflict of interest), and RPC 8.4 (misconduct); and is further
>
> ORDERED that the Court will subject attorneys to the imposition of discipline when, after application of the objective standard, they are found to have violated the Rules of Professional Conduct.

Here, Masucci is not mentally incapacitated. Nothing in the record suggests that respondent abused his close relationship with her or unfairly profited from her unconditional trust. Moreover, as in Halligan, the record contains no evidence that respondent's fees for the non-legal services that he provided to his client, such as paying her bills or disbursing funds to her, were unreasonable. Therefore, we determined to dismiss the alleged violation of RPC 1.5(a).

We further determined to dismiss the alleged violation of RPC 1.5(b). Respondent served as both executor of the Sinno Estate and as attorney for the executor. Essentially, the OAE charged respondent with failing to set forth in writing, to himself as executor, the basis or rate of his fee, as attorney for the executor. The OAE introduced no evidence as to why respondent was required

to have a written fee agreement for Sinno, or the Estate of Sinno. The OAE cited no caselaw or other authority in support of the proposition that the executor of an estate is required to have a fee agreement with himself or herself as the attorney. The beneficiaries of the estate, who may have an interest in the amount that the executor or attorney is charging, may demand an accounting at any time, and often do. Further, testamentary documents often establish a fee schedule. The burden is on the presenter to show how respondent was required to have such a fee agreement. The OAE failed to meet that burden.

We find that respondent violated RPC 1.15(d) in two ways. It is undisputed that respondent's office manager, a non-attorney, signed at least one trust account check on respondent's behalf when respondent was out of state. Respondent testified that he had not been aware of his office manager's unauthorized conduct until respondent read the allegation in the complaint. He has since addressed this issue with his office manager.

In further violation of RPC 1.15(d), respondent carried relatively old outstanding balances in his trust account. The OAE notified respondent of these balances on October 14, 2016. Two weeks later, respondent notified the OAE that all but eight balances had been resolved, and that he was working on the remaining balances. At the hearing below, respondent testified, without dispute from the OAE, that all the balances had been resolved except $712, which had since been transferred to the Superior Court Trust Fund Unit. Nonetheless, there

is no disputing the existence of these balances, which constitute a violation of RPC 1.15(d) for his failure to comply with R. 1:21-6.

Respondent's most serious misconduct is his violation of RPC 1.8(a). The OAE alleged that the terms of the loan from Masucci to respondent were not fair or reasonable, and were not fully disclosed or transmitted in writing to Masucci, in violation of RPC 1.8(a)(1). Respondent and Masucci both testified that they had agreed to the terms of the loan. In her interview with the OAE, and in her testimony before the DEC, Masucci asserted that she understood the documents she signed, that she was satisfied with the terms of the loan, and that she trusted respondent. At the hearing, Masucci testified that she was fully aware of the terms of the loan, as well as the terms of the investment respondent made with Cubicon.

The presenter and the panel both put great weight on two facts that are not supported by the record. First, both seem to believe that Masucci is not of sound mind. Although she suffers from anxiety, and admittedly hired respondent to handle her day-to-day affairs to protect her from frivolous spending, nothing in the record indicates that she is incompetent or otherwise lacks capacity to enter into a contract.

Second, the OAE argued, and the DEC agreed, that, because respondent did not disclose to Masucci in writing that he potentially would receive 12% interest per annum on the Cubicon investment, he did not fully disclose to

Masucci the terms of the loan. In so doing, the OAE and the DEC combined two separate transactions. The terms of the transaction between Masucci and respondent are separate from the terms of the transaction between respondent and Klausner, the latter having no bearing on whether the first is ethical. Respondent accurately asserts that, once the loan from Masucci was executed, the funds belonged to him, and he was not under any professional obligation to disclose his use of those funds to her. Nonetheless, there is evidence in the record that he may have done so, at least verbally. Therefore, we do not find a violation of RPC 1.8(a)(1).

The OAE further alleged that Masucci was not fully advised in writing of the desirability of seeking the advice of independent legal counsel and was not provided a reasonable opportunity to seek such advice concerning the loan to respondent, in violation of RPC 1.8(a)(2). The DEC, too, found that respondent did not provide a reasonable time for Masucci to decide whether to seek independent counsel, noting that she signed the document on the same day it was presented to her. This determination overlooks Masucci's unrebutted testimony that respondent repeatedly urged her to seek counsel many times prior to reducing the agreement to writing and that she refused. She repeated several times that she did not want another attorney because she trusted respondent implicitly and that it was she who requested that respondent invest her money. In her mind, the loan was an extension of these investments. Therefore, the

December 20, 2013 letter that respondent prepared memorializing his and Masucci's several conversations about the $500,000 loan satisfied the requirements of RPC 1.8(a)(2).

However, after the December 20, 2013 letter, respondent and Masucci entered into additional transactions that required respondent to fulfill his obligations under this subsection. Each time respondent transferred money to Cubicon, he executed a promissory note that both he and Masucci signed. He did not advise her to seek counsel in any of those instances.

On September 15, 2016, respondent provided to Masucci a re-executed promissory note and mortgage, which clarified inconsistencies in the previous note. He promised to repay all principal and interest by December 31, 2018. The re-executed note also changed the property that respondent used to secure the note. These were significant changes that required respondent to further advise Masucci to seek independent counsel. He did not. Although Masucci likely would have ignored that advice, based on her prior pattern, respondent violated RPC 1.8(a)(2) by failing to advise her to seek counsel for the promissory notes and the re-executed mortgage note. The need for respondent to have been more consistent and, more insistent, in this advice, is highlighted in the facts underlying further violations.

Specifically, the OAE alleged that Masucci did not give informed consent to the essential terms of the loan documents, which were ambiguous and

contradictory, and that respondent's role, including whether he was representing Masucci in the transaction, was not clear, all in violation of RPC 1.8(a)(3).

We agree that the documents creating this loan and its subsequent iterations are inconsistent. The letter agreement of December 20, 2013 purports to grant Masucci five percent interest, but only when respondent is paid his seven percent interest from Cubicon. The promissory notes provide that Masucci receives no interest, except on unpaid principal after the December 30, 2018 due date. Meanwhile, the second mortgage note, dated September 15, 2016, states that the current principal is $550,000 and that Masucci is entitled to interest at five percent per year on the original $500,000 to accrue "from the date of this Note." The note further provides that payments are based on respondent's receipt of interest from Cubicon, but that all payments would be made no later than December 31, 2018.

Respondent claims that these inconsistencies resulted from drafting errors and that it is an unfair reading of the terms to conclude that Masucci's interest is dependent on his interest collected from Cubicon. He states unequivocally that Masucci always was entitled to interest from the date of execution of the loans, that full principal and interest would be paid by the end of 2018, and that he would secure that payment by whatever means possible. Respondent's counsel's brief to us states, however, that Masucci will be paid interest when the Cubicon intellectual property is sold.

In his June 26, 2019 post-hearing certification to us, respondent states that he has repaid Masucci her $500,000 principal. Once again, respondent states that Masucci will be paid the balance of interest once he "recovers" on his Cubicon investment.

This payment has only further confused the matter and highlights respondent's lack of clarity and consistency throughout the disciplinary process. The original note required respondent to pay interest at five percent upon receipt from Cubicon, but all principal and interest were due by December 31, 2018. Subsequent notes muddied the water with provisions that interest would not accrue until December 30, 2018, if the full balance of principal had not been paid. As noted, respondent refers to this term as a drafting error and admits that Masucci was always entitled to five percent interest. Nonetheless, on December 30, 2013, a new mortgage agreement was created, but neither notarized nor recorded. That agreement was for $575,000, plus interest. The previously accrued interest was added to the principal in this iteration of the loan.

Moreover, respondent also seems deliberately vague about interest payments in the Grillo Funeral Home investment. He testified that this investment pays Masucci $10,000 per year and that those payments are current. The record indicates, however, that respondent paid Masucci $9,500 in interest in 2015 and nothing since. Yet, in his brief to us, counsel states that the Grillo interest is not due until 2019, at the end of the term of the loan.

Respondent also ran afoul of RPC 1.8(a)(3) for failing to inform Masucci that, not only should she seek independent counsel in connection with the loan transaction, but that respondent was not her attorney for that transaction. Respondent satisfied his obligation to advise Masucci to seek counsel, but he did not explain to her that he did not represent her in the loan transaction. His explanation that the fact that he was not her attorney for the loan was inherent in his insistence that she seek independent counsel does not pass muster. It is highly unlikely that Masucci would presume as such. Arguably, many clients would not, let alone Masucci, who so deeply relied on and trusted respondent.

Respondent executed three different mortgage notes as security for the loan from Masucci. Two of the notes were neither notarized nor recorded. This failure is a complete dereliction of his duties under RPC 1.8(a)(2)-(3). Despite his insistence that Masucci had "perfect security," at no point until Masucci's independent counsel was engaged, and a note was properly executed and recorded, did Masucci have security at all. Respondent should have opposed Masucci's desire not to record the mortgage and insisted that the mortgage be recorded. His failure to record the mortgage undermined the enforceability of the terms, which are unclear, contradictory, and ambiguous. Therefore, we find that, in this instance, Masucci did not give informed consent, and, therefore, respondent violated RPC 1.8(a)(3).

Finally, in connection with the old outstanding balances discussed above, the OAE alleged that respondent failed to produce requested client files or contact information to the OAE, in violation of RPC 8.1(b). In its October 14, 2016 letter, the OAE requested that respondent provide the contact information for each of the clients connected to the outstanding balances identified in the investigation. Respondent failed to do so, but otherwise cooperated with every other aspect of the investigation.

Counsel for respondent noted during his opening statement at the hearing below that the failure to produce the contact information was an oversight on his part alone, as respondent never saw the October letter. Counsel and respondent were shocked to see this allegation in the complaint, and provided the requested contact information in respondent's answer to the complaint. Counsel then questioned the OAE investigator, who confirmed that no follow-up request was sent for the contact information because it is the OAE's policy to send a follow-up letter only when a respondent has not complied with requests at all. In the case where a respondent has substantially complied, the OAE assumes a respondent has provided all documents or information in that attorney's possession, and the OAE proceeds with its investigation based on the attorney's submission.

Consequently, the first communication respondent received regarding the failure-to-cooperate charge was the complaint itself. The allegation merited one

sentence from the hearing panel in its report, which states that respondent acted diligently in addressing the requests of the OAE. We agree and dismiss the alleged violation of RPC 8.1(b).

In sum, we find that respondent violated RPC 1.8(a)(2)-(3) and RPC 1.15(d). We dismiss the alleged violations of RPC 1.5(a), RPC 1.5(b), RPC 1.8(a)(1), and RPC 8.1(b).

When an attorney enters into a loan transaction with a client without observing the safeguards of RPC 1.8(a), the ordinary measure of discipline is an admonition. See, e.g., In the Matter of David M. Beckerman, DRB 14-118 (July 22, 2014) (during the course of the attorney's representation of a financially-strapped client in a matrimonial matter, he loaned the client $16,000, in monthly increments of $1,000, to enable him to comply with the terms of a pendente lite order for spousal support; further, to secure repayment for the loan, the attorney obtained a note and mortgage from the client on his share of the marital home, but the mortgage turned out to be invalid; 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, the attorney violated RPC 1.8(a); by providing financial assistance to the client, he violated RPC 1.8(e)); In the Matter of John W. Hargrave, DRB 12-227

(October 25, 2012) (attorney obtained from his clients a promissory note in his favor secured by a mortgage on the clients' house, in the amount of $137,000, representing the amount of legal fees owed to him; the attorney did not advise his clients to consult with independent counsel before they signed the promissory note and mortgage in his favor); and In the Matter of April L. Katz, DRB 06-190 (October 5, 2006) (attorney solicited and received a loan from a matrimonial client; the attorney did not comply with the mandates of RPC 1.8(a)).

The existence of aggravating factors, or additional ethics infractions, often results in the imposition of greater discipline. See, e.g., 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; violation of RPC 1.8(a); 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 received a prior admonition for failure to communicate with a client, and that he had never acknowledged any wrongdoing or shown remorse for his conduct); In re Botcheos, 217 N.J. 147 (2014) (reprimand imposed on attorney whose client had loaned him $425,000 and $750,000, respectively, for the

purchase of two properties, 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 transactions, the terms of which, the parties stipulated, were fair and reasonable to the client; violation of RPC 1.8(a); the attorney had prepared mortgages, but failed to record them, and defaulted on one of them, resulting in a foreclosure action against him; a reprimand was imposed because the attorney had exposed his client to a $1,175,000 risk of loss by failing to record the mortgages and because the client did not get the benefit of his bargain with respect to the property that went into foreclosure); and 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), did not 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, consisting of a one-year suspension and a reprimand).

As discussed above, the attorney in Botcheos borrowed over one million dollars to purchase properties and secured the loan with mortgage notes that he failed to record. One of the properties went into foreclosure and the client lost the benefit of his bargain on that property. That very same result could have happened to Masucci. Botcheos received a reprimand.

Respondent's violations of RPC 1.8(a) and RPC 1.15(d) would normally be met with a reprimand. That discipline should be significantly enhanced based on respondent's failure to satisfy Masucci's loan, in full, by the end of 2018, despite vociferously testifying that he would do so. Respondent's submissions to us, before and after our February 21, 2019 hearing, evidence a disturbing pattern of behavior. From questionable business transactions and nebulous drafting errors, to his continued lack of clarity regarding when interest is due on the loan or when it will be paid, respondent has shown a lack of remorse or accountability. In our view, he continues to take advantage of his client.

For us, that is the crux of the matter. The balance of power in this relationship is far too skewed to ignore. Respondent's machinations, while on their own may seem minor or simple oversights, add up to the conclusion that he has abused, and continues to abuse, his relationship with Masucci and, thus, discipline should be further enhanced.

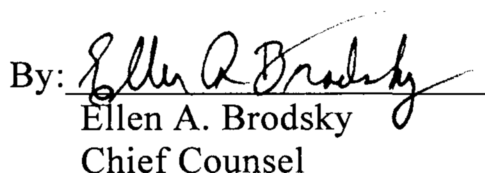
Finally, a further increase in discipline is required because, as of the date of this decision, respondent still owes his client money. Although he paid the principal, albeit six months late, respondent has reverted to the position that the interest he owes will not be paid until he monetizes the intellectual property he purchased from Cubicon. Yet, respondent testified that Masucci was always entitled to interest from the inception of the loan. It is troublesome that at this late date, he is still waffling in his explanation of the loan terms.

We acknowledge that respondent's forty-five years as an attorney with an otherwise unblemished record serves as mitigation. His career in this regard, however, cuts both ways. As an experienced attorney, and as a business owner with acumen, he knew or should have known that he was taking advantage of Masucci's trust and reliance. Hence, that mitigation does not serve to offset the enhancement of discipline. Therefore, based on the totality of circumstances, we determine that the appropriate quantum of discipline for respondent's misconduct is a one-year suspension.

Vice-Chair Clark and Members Boyer and Singer voted for a censure. Members Gallipoli and Joseph 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
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

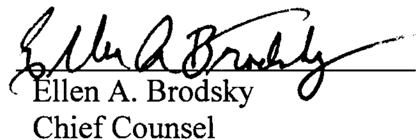
In the Matter of James L. Bosworth
Docket No. DRB 18-398

Argued: February 21, 2019

Decided: August 5, 2019

Disposition: One-Year Suspension

Members	One-Year Suspension	Censure	Recused	Did Not Participate
Frost	X			
Clark		X		
Boyer		X		
Gallipoli				X
Hoberman	X			
Joseph				X
Rivera	X			
Singer		X		
Zmirich	X			
Total:	4	3	0	2



Ellen A. Brodsky
Chief Counsel