

Supreme Court of New Jersey  
Disciplinary Review Board  
Docket No. DRB 19-113  
District Docket No. XI-2019-0001E

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In the Matter of  
William J. Rush  
An Attorney at Law

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Decision

Argued: September 14, 2017

Considered after remand: May 23, 2019<sup>1</sup>

Decided: October 28, 2019

Richard I. Miller appeared on behalf of the District XI Ethics Committee.

Respondent appeared pro se.

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

This matter was before us on a recommendation for a censure filed by the District XI Ethics Committee (DEC). Respondent was charged with

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<sup>1</sup> Our consideration following remand took place without further oral argument.

violations of RPC 1.2(d) (counseling or assisting a client in illegal or fraudulent conduct); RPC 1.4(b) and (c) (failing to communicate with a client); RPC 1.5(b) (failing to set forth, in writing, the basis or rate of the fee); RPC 1.7(a) (engaging in a concurrent conflict of interest); RPC 1.13 (improperly representing both an organization and its members); RPC 1.15(b) (failing to promptly deliver funds or other property to the client or a third person); RPC 4.3 (failing to disclose to a principal that the attorney represents the organization, not the individual); and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons detailed below, we determine to dismiss the charges against respondent.

Respondent earned admission to the New Jersey bar in 2002. He is currently engaged in the practice of law in Fairfield, New Jersey. During the time frame relevant to this matter, he practiced in Lyndhurst, New Jersey.

In 2016, respondent was reprimanded for lack of diligence, commingling, failure to promptly disburse funds, recordkeeping deficiencies, and conduct involving dishonesty, fraud, deceit, or misrepresentation. In re Rush, 225 N.J. 15 (2016).

This matter previously was before us on a recommendation for a censure filed by the DEC. On September 21, 2017, after hearing oral argument, we

remanded the matter to the Office of Attorney Ethics (OAE) for further investigation. As detailed below, the OAE was satisfied that its investigation disclosed no evidence of additional misconduct. The matter was then returned to us. Neither party requested additional oral argument.

In 2005, Louis Capazzi, Jr. (Capazzi) retained respondent to represent Durie Properties, LLC (Durie Properties), a real estate development partnership formed between the grievant, Ralph Day, Sr. (Ralph), and Capazzi. Ralph and Capazzi had invested over \$2 million in Durie Properties, and Ralph claimed that “it was to be a 50/50 relationship.” According to Ralph, no written operating agreement governed Durie Properties. As part of his defense, however, respondent testified that there was a written operating agreement, that it named Capazzi as the managing member of Durie Properties, and that it gave him the power to buy, sell, and refinance properties in behalf of the company, in his discretion.<sup>2</sup> As part of its additional investigation, the OAE confirmed that Durie Properties had an operating agreement, and that it authorized Capazzi, as the managing member of the LLC, to execute contracts and agreements, in his sole discretion, without Ralph’s consent.

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<sup>2</sup> According to respondent, his law office burned down on May 1, 2013, destroying his client files.

Ralph had no objection to Capazzi's retention of respondent as Durie Properties' counsel. Respondent had a substantial history with Capazzi, having previously represented him individually, and as a principal (along with Capazzi's wife, Ann) of East Coast Title Company. Ralph testified that Capazzi handled the "administrative" aspects of Durie Properties, while he handled the "building" aspects.

Respondent represented Durie Properties in connection with a number of real estate transactions, including sales and refinances. Every real estate contract and financing document that respondent reviewed named Durie Properties as the owner of the relevant real estate. When title searches were ordered for transactions, however, respondent discovered that all the real estate associated with Durie Properties was owned in individual capacities by Ralph, his wife Virginia, Capazzi's wife Ann, or a combination thereof. Accordingly, Durie Properties was not the titled owner of any real estate in the transactions in which respondent acted as its attorney.

Capazzi was respondent's sole point of contact for Durie Properties, and, thus, all client instructions, interaction, and communications came directly from him. Respondent did not provide Durie Properties, Capazzi, Ralph, or any other individual, member, or officer of Durie Properties a retainer

agreement in respect of this representation, although he had not previously represented the company.

Respondent first met Ralph in April 2007, approximately two years into the representation of Durie Properties, when Capazzi requested that respondent represent Ralph in litigation concerning a Durie Properties venture. On April 27, 2007, in connection with that litigation, respondent accompanied Ralph to a deposition. Besides the deposition, respondent met Ralph on only one other occasion, never again represented him, and never met with or communicated with Virginia.

Based on the results of the title searches, respondent would amend each of the contracts and corresponding financing documents to recite the actual titled owners of the real estate – again, never Durie Properties. Respondent also would prepare necessary closing documents for execution by the actual titled owners, despite having no communication with the Days. His preparation of these documents was to satisfy the requirements of the lenders and title agencies involved in each transaction.

Respondent did not attend a single closing on behalf of Durie Properties, but, instead, routinely retained a third-party notary, Ankit Duggal, for the execution, acknowledgment, and delivery of all closing documents for each

transaction. Moreover, respondent did not know whether the Days ever actually reviewed or signed the necessary closing documents.

Respondent admitted that, on multiple occasions, “the proceeds from the subject real estate transactions were payable to [Ralph] and/or Virginia, who were listed as payees on one [or] more checks.” Further, respondent admitted that, despite this fact, he neither disbursed any proceeds to the Days, nor notified or consulted with them regarding his receipt of such proceeds. Rather, he systematically disbursed all proceeds from Durie Properties transactions directly to Capazzi, the managing member and his sole client contact.

When questioned by the ethics panel as to whether he had a “fiduciary responsibility . . . to double check or . . . safeguard” the loan and sale proceeds payable to Ralph or Virginia, respondent stated “no, because I believed . . . Mr. Day and Mr. Capazzi were in communication regularly, that their partnership was working.” Respondent admitted that he had issued attorney trust account checks payable to the Days, but then delivered those checks directly to Capazzi, as was his “standard procedure,” even though the Days were listed as “clients” on his attorney trust account ledger. Respondent conceded that Ralph had never “specifically acknowledged or authorized [him] to engage in all of these transactions for him” and that he had taken only “minimal steps to verify” whether the Days were aware of these transactions

and had actually signed the associated documents. Although multiple deeds vested title in the Days, respondent maintained that it was his belief that they had no actual interest in the properties, but, rather, were merely “nominees” for Durie Properties.

Ralph testified that he had participated in some refinances on behalf of Durie Properties but claimed that he was not aware that Capazzi had orchestrated the sale of several of Durie Properties’ assets until “[a]fter the fact.” Ralph claimed that respondent had never contacted him or Virginia regarding any of the transactions.

At some point, Ralph requested that respondent provide him with the HUD-1 forms for the sale of properties on Columbus Avenue and Highland Avenue, in Demarest, New Jersey. According to Ralph, respondent refused to produce the documents, instead instructing him to seek permission from Capazzi. At that point, Ralph retained his own attorney, who obtained copies of the real estate documents. Although those documents purported to contain the Days’ signatures, Ralph denied that either he or Virginia had signed them. Indeed, an expert report included in the record, prepared by forensic document examiners in connection with a civil lawsuit Ralph filed, corroborated his assertion. Specifically, the forensic document examiners concluded that the purported signatures of Ralph and Virginia on the HUD-1 forms “bear no

resemblance to, and are not the normal and naturally written signatures” of Ralph or Virginia.

Ralph claimed that he was forced to file for personal bankruptcy after losing substantial sums of money that he had invested in Durie Properties. When he filed for bankruptcy, he asked Capazzi about the financial status of Durie Properties. Ralph claimed that, in reply, Capazzi misrepresented that several company assets had been sold for “no profits.” According to Ralph, he previously had been unaware that Durie Properties assets repeatedly had been titled in his and Virginia’s names, let alone sold. Ultimately, Ralph sued respondent, Capazzi, Ankit Duggal (the third-party notary), Paul Case (a notary and Capazzi associate), East Coast Title Company, and other entities. Respondent settled the lawsuit as to his liability by contributing \$160,000 to Ralph’s bankruptcy estate. Ralph believed that the funds came from respondent’s malpractice carrier. Capazzi was not found liable in respect of any counts of Ralph’s lawsuit.

Virginia maintained that she, too, had been unaware that Durie Properties’ assets had repeatedly been titled in her and Ralph’s names, or that they had been sold.

As an example, Virginia was the titled owner of property on Columbus Road in Demarest, New Jersey, which was sold on March 30, 2007. The



original contract of sale listed Durie Properties as the owner and seller. Prior to the closing, respondent prepared an amendment to the contract of sale and a HUD-1, both naming Virginia as the owner and seller. At the closing, Duggal signed the HUD-1 on behalf of respondent, purportedly via a limited power of attorney that respondent possessed, but did not produce, in connection with his representation of Durie Properties. Respondent also prepared a deed, dated March 30, 2007, transferring the property from Virginia to the third-party buyer. Respondent admitted that he had no communication with Virginia regarding the sale of the property or the transaction documents; moreover, respondent did not personally obtain her authorization to sell the property.

Duggal testified that, during the time frame when he provided notary and real estate closing services to respondent, he was also a law student. He did not produce a notary log or any other records that would have shed light on his interaction with the Days. He conceded that, when deposed in connection with Ralph's lawsuit, he had testified that he had never met Ralph, and could not identify him, despite Ralph's presence at the deposition.

Duggal claimed that respondent repeatedly sent him, unaccompanied, to Durie Properties closings, where he often was charged with negotiating substantive issues relating to real estate transactions, while consulting respondent over the telephone. Moreover, both respondent and Duggal

admitted that Duggal frequently signed closing documents on behalf of respondent, and purportedly on behalf of the Days, pursuant to a power of attorney authorizing respondent to act on their behalf. Respondent did not produce the power of attorney at the hearing. Duggal admitted that, if respondent had simply represented to him that the Days had signed documents, he likely would have notarized the documents, based solely on that representation.

Included in the closing documents for Columbus Road was a “Closing Authorization,” which specifically authorized the sale of the property and the disbursement of the sales proceeds to respondent’s representative. Respondent prepared the “Closing Authorization,” which was required by the title company, on his firm’s letterhead. A “signature bearing [Virginia’s] name appears” on the document. Respondent admitted that he neither discussed the document with Virginia nor witnessed her execution of it. He did not attend the closing for the sale of the property, entrusting the transaction to Duggal.

In connection with the sale, a check for \$608,840.40, payable to Virginia, was issued; respondent neither disbursed those sales proceeds to Virginia nor notified her of their receipt or disposition. Rather, respondent delivered the check to Capazzi. Sometime after the closing, respondent received an additional \$3,500 check, payable to Virginia, for “the release of

escrow funds.” Once again, respondent neither disbursed those funds to Virginia nor notified her of their receipt or disposition; rather, he delivered the check to Capazzi. Ralph denied that respondent had the Days’ permission to disburse those funds in this manner.

Moreover, Ralph denied that the signatures on the HUD-1, the deed of conveyance, the other transaction documents, and the sales proceeds checks were the signatures of Virginia, with whom he enjoyed forty-one years of marriage, and stated that the signatures were “not even close.” Virginia corroborated that assertion. Moreover, Ralph testified that the only time that he ever met Duggal was during the deposition he attended with respondent, and that Virginia had never met Duggal.

Ralph asserted that he and Virginia suffered negative, punitive tax consequences relating to this transaction. He maintained that, since he and Virginia were unaware of the transaction and received none of the sale proceeds, they did not report income from the sale. He claimed that, consequently, the Internal Revenue Service had imputed the sales proceeds to them, and forced them to pay income taxes, plus penalties and interest, in connection with the sale.

During the ethics hearing, respondent testified that he had discontinued his use of third-party notary services for closings, due to the allegations in this

case, implying that he may have been placed in a precarious ethics position by their misdeeds. He stated that the use of such services “opens me up to a tremendous amount of exposure, whether it’s legitimate or not.”

In his April 24, 2019 brief to us, respondent denied that he committed misconduct. He, thus, requested that we dismiss the charges against him. In the alternative, he requested that we impose discipline less than a censure.

On March 18, 2019, the OAE reported that it had completed its additional investigation and that there was insufficient evidence to support charges other than the RPC violations alleged in the original formal ethics complaint. Of particular importance, the OAE informed us that the Durie Properties operating agreement authorized Capazzi, as the managing member of the LLC, to execute contracts and agreements, in his sole discretion, without Ralph’s consent.

The DEC determined that the evidence did not establish that respondent violated RPC 1.2(d), stating that “[a]ll parties recognized Durie Properties as the equitable owner of the properties in the various real estate transactions.” Moreover, the DEC found that the Days “acquiesced to” the titling of the real estate in their names, for “purposes of financing.”

Likewise, the DEC further determined that there was insufficient evidence that respondent violated RPC 1.4(b) and (c), stating that Ralph had

“acquiesced to” Capazzi’s handling the “administrative end of Durie Properties.” Moreover, the DEC found not credible Ralph’s testimony that respondent had refused to turn over documents relating to real estate transactions.

The hearing panel also determined that, because respondent had not represented either Ralph or Virginia in connection with the Durie Properties real estate transactions, he was not guilty of violating RPC 1.7(a). Moreover, the DEC described Ralph as a “sophisticated businessman and investor,” which undermined any allegation of a conflict of interest by respondent.

Based on its finding that respondent had not represented either Ralph or Virginia in connection with the Durie Properties real estate transactions, the DEC determined that he was not guilty of violating RPC 1.13. The DEC again relied on its determination that Capazzi was the “managing partner of Durie Properties,” with Ralph’s consent.

The DEC declined to find respondent guilty of violating RPC 4.3, perceiving no evidence that Ralph misunderstood respondent’s role in the various real estate transactions in this matter. Moreover, the hearing panel again relied on its determination that Ralph “acquiesced to” Capazzi’s role as “managing partner of Durie Properties.”

Further, the DEC determined that respondent was not guilty of violating RPC 8.4(c), citing its findings that “[a]ll parties recognized Durie Properties as the equitable owner of the properties in the various real estate transactions” and that the Days “acquiesced to” the titling of the real estate in their names, for “purposes of financing.” The DEC found no credible evidence that respondent engaged in conduct that was fraudulent, dishonest, or deceitful.

The hearing panel found that respondent was guilty of violating RPC 1.5(b), finding that, although he had previously represented Capazzi, he previously had not represented Durie Properties, and, therefore, was required to set forth, in writing, the basis or rate of his fee. In addition, the panel found a violation of RPC 1.15(b), reasoning that “it is undisputed that the various closings checks were made payable” to the Days, yet respondent delivered those checks directly to Capazzi. The DEC determined that respondent’s conduct in respect of the Days was “indicative of [respondent's] blasé way of handling the various real estate matters” and, thus, violated his duties under RPC 1.15(b).

In mitigation, the hearing panel found that respondent “has instituted new office policies and procedures regarding real estate closings.” In aggravation, the DEC inaccurately cited respondent’s “numerous previous

public reprimands, including one that was specifically for a violation of RPC 1.15(b).”<sup>3</sup>

In recommending a censure, the DEC emphasized respondent’s prior discipline.

Following a de novo review of the record, we determine that the DEC’s conclusion that respondent’s conduct was unethical is not supported by clear and convincing evidence. Although the record developed in this case raises concerns regarding respondent’s nonchalant conduct vis-à-vis the respective interests of the client, Durie Properties, and the other relevant parties, including Capazzi, East Coast Title Company, and the Days, it fails to offer evidence sufficient to sustain any of the charged ethics violations.

To the contrary, we determine that the following facts and conclusions are supported by clear and convincing evidence. In 2005, respondent was retained to represent Durie Properties, a real estate development partnership formed by Capazzi and Ralph, in connection with real estate transactions, including sales and refinances. The company’s principals, Capazzi and Ralph, both desired that respondent fill that role.

Although respondent had not previously represented Durie Properties, he had a substantial prior relationship with, and history of representation of,

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<sup>3</sup> As stated previously, respondent has received only one prior reprimand.

Capazzi, both individually, and as a principal (along with Capazzi's wife, Ann) of East Coast Title Company. Besides respondent's one-time personal representation of Ralph, in connection with a deposition, the scope of respondent's representation was limited to the representation of Durie Properties, an LLC. RPC 1.13(a) states that "[a] lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents." Under this context, the record supports a finding that Capazzi was the managing member of Durie Properties and, thus, had the requisite authority, in his sole discretion, to buy, sell, and refinance properties in behalf of the company. Although Ralph disputed this fact, the record contains no evidence that undermines that conclusion. In fact, Ralph testified that the agreement was that Capazzi handled the "administrative" aspects of Durie Properties, while he handled the "building" aspects.

Under this contextual framework, there is insufficient evidence to sustain any of the charged ethics violations. Specifically, the record supports a finding that, as the managing member of Durie Properties, Capazzi possessed the authority, pursuant to the operating agreement, to engage in the transactions under scrutiny in this case, in behalf of the company and its members, Capazzi and Ralph. As Capazzi was respondent's sole point of client



contact, it was neither unreasonable nor unethical for respondent to take his client instructions solely from Capazzi, and to obtain and/or disburse all Durie Properties funds through Capazzi. Capazzi, of course, was duty-bound, as the fiduciary for Durie Properties, to then properly disburse all the company's funds, as required under the LLC's operating agreement. Whether Capazzi did so or not, the record is bereft of facts that would impute to respondent any liability for Capazzi's acts or omissions, as the managing member of Durie Properties.

Thus, there is no evidence to support a finding that respondent, in his representation of Durie Properties, including the sale or refinancing of its assets, and the initial disbursement of its company funds through Capazzi, committed misconduct. Based on the structure of the representation of Durie Properties, the evidence does not support the conclusion that respondent violated RPC 1.2(d) (counseling or assisting a client in illegal or fraudulent conduct), as there is no evidence in the record, besides Ralph's uncorroborated accusations, that Capazzi was committing illegal or fraudulent conduct, or that, if he were, respondent was either aware of, or complicit in, such malfeasance.

Moreover, given respondent's representation of the LLC, and Capazzi's role as its managing member, we find insufficient evidence to conclude that

respondent violated RPC 1.4(b) and (c) (failure to communicate with a client), since he had no duty to communicate with the Days.

Next, in light of respondent's substantial prior relationship and representation of Capazzi, there is insufficient evidence for us to conclude that respondent's failure to provide Durie Properties with a written fee agreement violated RPC 1.5(b). The purpose of that Rule is to provide a client with advance notice of an attorney's basis or rate of the legal fee. In this case, given respondent and Capazzi's prior attorney-client relationship, respondent satisfied the spirit of the Rule, through the parties' previous course of conduct and Capazzi's familiarity with respondent's fee structure. Capazzi, as the managing member of Durie Properties, had advance notice of respondent's fee schedule. Based on the evolution of the attorney-client relationship between respondent and Capazzi, as an individual, to Capazzi, as a corporate managing member, respondent was not required to set forth in writing the basis or rate of his fee. Notably, the record is bereft of any claim, by Ralph or any other party, that Durie Properties and its principals were unaware of respondent's fee structure, or objected, at any time, to his billings in connection with his representation of the company.

Additionally, given Capazzi's role as respondent's sole point of contact for Durie Properties, we determine that there is insufficient evidence to

conclude that respondent violated RPC 1.15(b) (failure to promptly deliver funds or other property to the client or a third person) by disbursing Durie Properties' funds through Capazzi. Arguably, respondent could have exercised further diligence in respect of handing, directly to Capazzi, checks issued to the Days. The record, however, does not contain clear and convincing evidence that Capazzi misapplied those proceeds or otherwise failed to discharge his fiduciary duties, in his role as the managing member of the LLC. Although Ralph claimed that Capazzi did so, in the context of their business dispute, he provided no corroboration. Therefore, we find insufficient evidence to reach that conclusion and to sanction respondent for any accomplice liability to such conduct, either by act or omission.

Moreover, the evidence does not establish that respondent violated either RPC 1.7(a) (engaging in a concurrent conflict of interest) or RPC 1.13 (improper dual representation of an organization and its members). As stated above, the record supports a finding that respondent's representation of Ralph was limited to a single deposition involving litigation connected to his corporate membership in Durie Properties. There is, thus, insufficient evidence to find that an attorney-client relationship had formed between respondent and Ralph or Virginia Day, as individuals. Rather, the record and RPC 1.13(a) both support a finding that respondent solely represented the corporate client, Durie

Properties, and, thus, did not engage in any conflict or improper dual representation.

Based on that logic, the record also contains insufficient evidence to support a finding that respondent violated RPC 4.3 (failure to disclose to a principal that the attorney represents the organization, not the individual). There is no evidence, and Ralph did not assert, that respondent's representation of him, at one deposition, led Ralph to believe that respondent served as his attorney, as an individual, rather than serving as the attorney for Durie Properties.

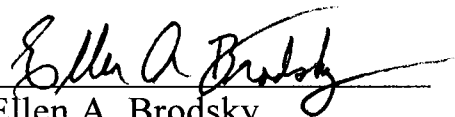
Finally, we find insufficient evidence to conclude that respondent violated RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). As respondent admitted, during the ethics hearing, the nonchalant manner in which he represented Durie Properties placed him in some precarious positions in respect of the RPCs. The record does not contain the necessary facts, however, to conclude that respondent's conduct constituted a violation of RPC 8.4(c).

For the above reasons, we determine to dismiss the charges against respondent.

Vice-Chair Gallipoli voted to impose a censure.

Members Petrou, Rivera, and Singer did not participate.

Disciplinary Review Board  
Bruce W. Clark, Chair

By:   
Ellen A. Brodsky  
Chief Counsel

SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of William J. Rush  
Docket No. DRB 19-113


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Decided: October 28, 2019

Disposition: Dismiss

<i>Members</i>	Dismiss	Censure	Recused	Did Not Participate
Clark	X			
Gallipoli		X		
Boyer	X			
Hoberman	X			
Joseph	X			
Petrou				X
Rivera				X
Singer				X
Zmirich	X			
Total:	5	1	0	3

  
Ellen A. Brodsky  
Chief Counsel