

IN RE: MORY K. BRENNER

S.J.C. Order of Term Suspension entered by Justice Ireland on May 5, 2003, with an effective date of June 4, 2003. <sup>1</sup>

SUMMARY<sup>2</sup>

In the summer of 1997, a husband and wife hired the respondent because they were facing foreclosure on both their residential and commercial properties. Over the next six months, the respondent billed the husband and wife hourly for debt workout services on both properties.

The respondent was not able to negotiate and consummate an agreement with the mortgage holder concerning the commercial property. However in December of 1998, over one year after the respondent was hired, he arranged a sale of the residential property from the husband and wife to their adult son and daughter-in-law ("adult children"). The respondent advised the adult children that all of the outstanding liens for the residence would be paid from the mortgage proceeds. The husband and wife ("parents") paid forbearance fees of \$15,000 to their existing mortgagee to forgo foreclosure and allow the closing to go forward.

A mortgage company approved the adult children for a mortgage on the parents' residence on several conditions. The terms of the new first mortgage prohibited secondary financing without permission. However, unknown to the mortgage company, the respondent arranged for a second mortgage from the adult children to a trust in the amount of \$14,500 at 18% interest. Although the respondent informed the adult children that he was sole trustee of the trust, he did not inform them that a close family member was the beneficiary or that the terms of the first mortgage prohibited secondary financing without permission of the lender.

Underwriters for the lender had factored in rental income for the adult children's residence in approving the mortgage loan. The lender's closing instructions therefore also conditioned the adult children's mortgage loan on their occupancy of the parents' home and the rental of their residence. The respondent prepared and caused the adult children to execute an affidavit of occupancy of the parents' home. This affidavit was false and the respondent knew it to be false. The respondent knew that the adult children were still living in their own home and that they did not intend to occupy the parents' home. Unknown to the new first mortgagee, the plan of the respondent and the parents was that the parents, and not the adult children, would continue to reside in the property and to pay the new mortgage.

The closing on the new mortgage was held on January 8, 1999. At the closing, the respondent represented all parties: the mortgage company, the parents, the adult children, and the second mortgagee trust. The respondent went to record and recorded the deed and the first mortgage on January 12, 1999. The respondent did not record the second mortgage. The respondent as trustee of the trust did not in fact fund the \$14,500 second mortgage at the time of the execution of the mortgage documents or at any time thereafter. Similarly, at no time did the respondent disclose the existence of the second mortgage to the first mortgagee.

In connection with this closing, the respondent prepared the certification of title and certified title to the first mortgagee and the adult children. In the certification of title, as well as on the HUD-1 settlement statement that he prepared, the respondent intentionally misrepresented that the parents (sellers) would bring cash to the closing to make up the

balance of the purchase price. The respondent knew that the parents would not bring any cash to the closing. Further, the respondent was aware of a duly recorded lien on the parents' residence by the Massachusetts Department of Revenue ("DOR lien") in the amount of \$22,482.35. In the certification of title, as well as on the HUD-1 settlement statement that he prepared, the respondent omitted the DOR lien. The amount owed the IRS, as listed on the HUD-1 settlement statement, was \$35,583.55. Accordingly, even if the respondent had funded the \$14,500 second mortgage or had the parents brought cash to the closing as set forth on the HUD-1 statement, with the DOR lien the total funds received at closing would nonetheless have been insufficient to pay all liens and to clear title on the residential property.

Prior to the closing, the respondent caused a title insurance binder to issue and represented, as required, that he would clear title within thirty (30) days of the closing. The respondent knew when the title insurance binder was requested that this was a misrepresentation and he would not obtain clear title within thirty days of the closing. The respondent never informed the lender that he failed to obtain a title insurance policy in the lender's name.

Following the closing, the respondent failed to disburse all of the funds in fact received at the closing. As of January 15, 1999, the respondent held an escrow balance of \$24,437.10. The respondent made no payment to the IRS or the DOR from the escrow funds.

On March 31, 1999, the parents and the adult children discharged the respondent. However, despite numerous written requests from successor counsel commencing after March of 1999, the respondent did not turn over the parents' files until September 5, 2000, three months after Bar Counsel began its investigation.

On November 12, 1999, the respondent remitted \$16,900 to successor counsel from the escrowed funds. Successor counsel used a portion of these funds to negotiate a settlement and payment of the DOR lien. The debt to the IRS is still in negotiation and has continued to accumulate substantial interest and penalties. The respondent has agreed to remit the balance remaining in his IOLTA account from this transaction to another escrow agent when one is named.

The respondent did not adequately advise any of the clients that the interests of the respondent, the parents, the adult children, the trust, and the mortgage company were potentially different or adverse or that the respondent's representation of any of the parties may be materially limited by his responsibilities to another client, or to a third person, or by his own interests, or that separate counsel should be consulted. He accordingly did not obtain the parties' consent after consultation to the potential conflicts of interest. The respondent's representation of the buyer, seller, and mortgage company in the purchase and sale and closing on the parents' home constituted a conflict of interest in violation of Mass. R. Prof. C. 1.7(a), (b).

The respondent as trustee of the trust entered into a business transaction with the adult children on terms that were not fair or reasonable to the adult children because the respondent knew that the transaction was prohibited by the first mortgagee. The terms of the transaction were not fully disclosed and transmitted in writing to the adult children in a manner that they understood. The respondent did not give the adult children a reasonable opportunity to seek the advice of independent counsel in the transaction, and the adult children did not waive the conflict in writing.

The respondent's representation in the second mortgage transaction of both the adult children and the trust, which was another client and one in which the respondent personally had an interest as trustee of a close relative of the beneficiary, constituted a conflict of interest in violation of Mass. R. Prof. C. 1.7(a), (b) and entering into a business transaction with a client without complying with the requirements of 1.8(a) and in violation of that rule. The respondent's failure, as trustee of the trust, and as counsel to both the adult children and trust, to fund the second mortgage constituted conduct involving a misrepresentation in

violation of Mass. R. Prof. C. 8.4(c), and conflict of interest in violation of Mass. R. Prof. C. 1.7(a), (b).

The respondent's actions as trustee of the trust in entering into a second mortgage with the adult children, in violation of the lender's closing conditions, constituted conduct involving a misrepresentation in violation of Mass. R. Prof. C. 8.4(c) and a failure to adequately communicate to the clients the lender's closing conditions in violation of Mass. R. Prof. C. 1.4(b).

The respondent's intentionally causing the Massachusetts DOR lien to be omitted from both the HUD-1 settlement statement and the title certification on the sale of the parents' home constituted a misrepresentation in violation of Mass. R. Prof. C. 8.4(c). The respondent's intentionally causing a misrepresentation to be made to the title insurance company that title to the property would be cleared within 30 days of the closing, and the respondent's subsequent failure to inform the lender that he did not obtain title insurance in the name of the lender following the closing, constituted a violation of Mass. R. Prof. C. 8.4(c).

The respondent's preparation and submission to the first mortgagee of the adult children's affidavit of occupancy when the respondent knew it to be false, constituted a violation of Mass. R. Prof. C. 8.4(c).

The respondent's failure to pay all liens following the closing constituted a failure to provide competent representation to a client in violation of Mass. R. Prof. C. 1.1, failure to handle a client matter with reasonable diligence in violation of Mass. R. Prof. C. 1.3, failure to promptly disburse escrowed funds in violation of Mass. R. Prof. C. 1.15 (a), (b), and misrepresentation in violation of Mass. R. Prof. C. 8.4(c).

The respondent's failure to turn over the parents' file upon his discharge constituted a violation of Mass. R. Prof. C. 1.16(e).

In separate, unrelated transactions between June of 1997 and May of 2000, the respondent made loans to other clients of his law practice in his capacity as trustee for the trust. In each of these transactions, he acted as counsel for the client and the trust and in each of these transactions he did not disclose that a close family member was the trust beneficiary. As trustee for the trust, the respondent also made five or more loans in the 12-month period between July of 1997 and July of 1998 without the license required by statute, in violation of M.G.L. c. 255E, section 2.

The respondent's conduct in making loans to clients as the sole trustee of the trust, where the representation may have been directly adverse to another client or materially limited by the respondent's obligations to another client or to a third party or by the respondent's own interests, without obtaining effective consent after consultation, constituted a conflict of interest in violation of Mass. R. Prof. C. 1.7(a) and (b). The respondent's conduct in entering into a business transaction with clients in the above circumstances is a conflict of interest in violation of Mass. R. Prof. C. 1.8(a). The respondent's conduct in making more than four loans in twelve consecutive months as sole trustee of the trust, without first obtaining a license as required by M.G.L. c.255E, § 2, constitutes conduct reflecting on his fitness to practice law in violation of Mass. R. Prof. C. 8.4(h) and failure to adequately prepare in violation of Mass. R. Prof. C. 1.1.

This matter came before the Board on a stipulation of facts and disciplinary violations and a joint recommendation for a three-year suspension. On April 14, 2003, the Board of Bar Overseers voted to accept the stipulation and to recommend the agreed upon disposition to the Supreme Judicial Court. The Court so ordered on May 5, 2003.

<sup>1</sup> The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

<sup>2</sup> Compiled by the Board of Bar Overseers based on the record before the Supreme Judicial Court.

Please direct all questions to [webmaster@massbbo.org](mailto:webmaster@massbbo.org).  
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