

STATE OF CONNECTICUT



Michael P. Bowler
Statewide Bar Counsel

Christopher L. Slack
First Assistant Bar Counsel

Tel: (860) 568-5157
Fax: (860) 568-4953

STATEWIDE GRIEVANCE COMMITTEE

www.jud.ct.gov/sgc/
Second Floor - Suite Two
287 Main Street, East Hartford, Connecticut 06118-1885

06/06/2008

OFFICE OF CHIEF DISCIPLINARY C
100 WASHINGTON STREET
HARTFORD CT 06106

THOMAS A BORNER
BORNER FRASER ALEMAN
155 PROVIDENCE STREET
PO BOX 166
PUTNAM CT 06260

RE: GRIEVANCE COMPLAINT #07-1095
BURDICK vs. BORNER

Dear Respondent and Disciplinary Counsel:

Enclosed herewith is the decision of the reviewing committee of the Statewide Grievance Committee concerning the above referenced matter. In accordance with the Practice Book Sections 2-35, 2-36 and 2-38(a), the Respondent may, within thirty (30) days of the date of this notice, submit to the Statewide Grievance Committee a request for review of the decision.

A request for review must be sent to the Statewide Grievance Committee at the address listed above.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael P. Bowler".

Michael P. Bowler

Encl.

cc: Attorney Gregory A. Benoit
HORTON SHIELDS & KNOX P.C.
Heather C. Burdick

STATEWIDE GRIEVANCE COMMITTEE

Heather Burdick
Complainant

:

Vs.

:

Grievance Complaint #07-1095

Thomas Borner
Respondent

:

DECISION

Pursuant to Practice Book §2-35, the undersigned, duly-appointed reviewing committee of the Statewide Grievance Committee, conducted a hearing at the Superior Court, One Court Street, Middletown, Connecticut on April 10, 2008. The hearing addressed the record of the complaint filed on November 2, 2007, and the probable cause determination filed by the Windham Judicial District Grievance Panel on January 17, 2008, finding that there existed probable cause that the Respondent violated Rules 1.7 and 4.2 of the Rules of Professional Conduct.

Notice of the hearing was mailed to the Complainant, to the Respondent and to the Office of the Chief Disciplinary Counsel on March 6, 2008. Pursuant to Practice Book § 2-35(d) and 3-14 to 3-18, Assistant Disciplinary Counsel Frank Blando pursued the matter before this reviewing committee assisted by legal interns Frank Ganz, Meghan Greco, and James Trudell of the Quinnipiac University School of Law Legal Clinic. At the hearing, both the Complainant and the Respondent appeared and testified. The Respondent was represented by Attorney Kimberly A. Knox. Attorney Richard Rothstein was called as a witness by Disciplinary Counsel. Two exhibits were admitted into evidence. Pre-hearing briefs were filed by Disciplinary Counsel and the Respondent. Reviewing committee member Mr. Peter Jenkins recused himself from participation in the proceedings. Both the Disciplinary Counsel and the Respondent waived the participation of Mr. Jenkins in this matter and agreed to have the undersigned render this decision.

This reviewing committee finds the following facts by clear and convincing evidence:

On September 26, 2007, the Complainant attended the closing to purchase her condominium unit. The closing, originally scheduled for September 25, 2007, was initially rescheduled to September 28, 2007 and later changed to September 26, 2007. The Complainant was advised by her mortgage broker that her attorney, Richard Rothstein, could not attend the rescheduled closing. The mortgage broker referred the Complainant to the Respondent, who represented the seller in the real estate transaction. The mortgage broker and the agent for the seller had contacted the Respondent asking him to also represent the Complainant to accommodate the closing. Present at the closing were the Complainant, the seller, an agent for the seller, the mortgage broker and the Respondent. The Respondent had the Complainant and the seller execute a conflict of interest waiver at the closing. The Complainant and the seller also executed an escrow agreement regarding unfinished construction items that the seller needed to complete in the condominium. No funds were escrowed as part of the agreement.

This reviewing committee also considered the following:

Attorney Richard Rothstein testified at the hearing that he was retained by the Complainant to represent her at the closing of the condominium. Attorney Rothstein testified that his office had corresponded with the Respondent's office through fax communications prior to the closing. He indicated that he was aware that the original closing date of September 25, 2007 was cancelled from his secretary, who received a phone call from the mortgage broker. Attorney Rothstein testified that he could not recall exactly who spoke to whom, but that it was communicated to his office that the closing was then rescheduled to September 28, 2007. His office was not informed of the final closing date of September 26, 2007. Attorney Rothstein did not speak with the Complainant during the period of September 25 to the 27, 2007.

At the hearing, the Complainant testified that the Respondent did not protect her interests at the closing because the Respondent did not escrow any funds to cover the expense of the unfinished construction items. The Complainant testified that she and the seller were still disputing the completion of the unfinished construction items. The Complainant testified that she understood Attorney Richard Rothstein could not attend the rescheduled closing. The Complainant was given this information from the mortgage broker and did not speak with Attorney Rothstein's office directly. The Complainant attended the rescheduled closing with the understanding that the Respondent would represent both the buyer and the seller as an accommodation. The Complainant maintained that there was no discussion of holding money in escrow to fund completion of the unfinished construction items.

At the hearing, the Respondent testified that he explained the conflict of interest waiver to the Complainant and the fact that he was representing both the buyer and the seller if they agreed. The Respondent maintained that he advised the Complainant that funds should be set aside for the escrow agreement but the Complainant declined. The Respondent testified that the remaining repair items were what are commonly called a "punch list" and seemed minor in nature. The Respondent testified he thought the repairs had in fact been completed. The Respondent testified that he did not know the Complainant was represented by Attorney Rothstein and understood from the mortgage broker that he was asked to represent the Complainant and the seller to accommodate the closing date.

At the closing, the Complainant never asked for another attorney or for Attorney Rothstein. The Respondent indicated that closing dates are set between the paralegal from his office and the office of the other attorney or the mortgage company involved in the purchase of the property. The Respondent indicated he had not heard of Attorney Richard Rothstein until after the closing. Attorney Rothstein's office telephoned the Respondent's office on the morning of September 28, 2007 inquiring about the closing.

This reviewing committee finds the following violations of the Rules of Professional Conduct and the Practice Book by clear and convincing evidence:

The evidence indicates that the Respondent represented both the Complainant and the seller at the real estate closing. The Respondent had both the seller and the Complainant execute an agreement that concerned unfinished repairs (the "punch list") that was entitled an escrow agreement. No funds were set aside to complete the repairs. This reviewing committee finds by clear and convincing evidence that the Respondent violated Rule 1.7 of the Rules of Professional Conduct by representing both the Complainant and the seller at the real estate closing. Rule 1.7 (a) provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest, which is defined as the representation of one client that is directly adverse to the interests of another client. Pursuant to Rule 1.7 (b) (1) a lawyer may still represent a client, even if there is a concurrent conflict of interest, if the lawyer reasonably believes he or she will be able to provide competent and diligent representation to the affected client. When the need for an escrow agreement to resolve unfinished construction issues arose, the interests of the clients became adverse. It was not reasonable for the Respondent to believe at that point that the dual representation should continue or that he could provide competent and diligent representation to both affected clients.

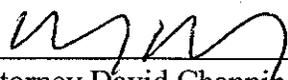
This reviewing committee, however, cannot conclude by clear and convincing evidence that the Respondent communicated with a person known to be represented by counsel in violation of Rule 4.2 of the Rules of Professional Conduct. There was insufficient and conflicting evidence that the Respondent knew that the Complainant had retained Attorney Rothstein to represent her at the real estate closing. The Complainant did not communicate with Attorney Rothstein's office regarding the rescheduled real estate closing dates, nor did she indicate at the closing that she wished Attorney Rothstein to represent her. The Complainant testified she agreed to the rescheduled closing date knowing that the Respondent would represent both the buyer and the seller as an accommodation so the closing could go forward. Much of the lack of clarity on this issue for this reviewing committee is the result of an apparent lack of direct communication between the attorneys and parties, and an over-reliance on the representations of third parties not involved in this grievance complaint.

Since this reviewing committee concludes that the Respondent engaged in unethical conduct, we order the Respondent to attend, in-person and at his own expense, a continuing legal education course in legal ethics. The course must consist of a minimum of three credit hours and must be completed within six months of the issuance of this decision. The Respondent is further ordered to provide the Statewide Grievance Committee with written confirmation of his compliance with this condition within thirty days of completion of the continuing legal education course.

(E)

DECISION DATE: 6/6/08

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Attorney David Channing

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Attorney Howard Gould