SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-285

IN THE MATTER OF	:
EDWARD M. FINK	:
AN ATTORNEY AT LAW	:

Decision of the
Disciplinary Review Board

Argued: October 19, 1994

Decided: May 23, 1995

Lee A. Gronikowski appeared on behalf of the Office of the Attorney Ethics.

Respondent appeared pro se.

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

This matter was before the Board based on a recommendation for discipline filed by Special Master Theodore J. Romankow.

The one-count formal ethics complaint charged respondent with violations of RPC 8.4(b) (commission of a criminal act), for a violation of N.J.S.A. 2C:21-4(a) (altering a false document), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation). These charges resulted from respondent's conduct during the course of his representation of five buyers in

separate real estate transactions. At the conclusion of the ethics hearing, the presenter moved to amend the charges in the complaint to conform to the proofs. As a result, respondent was additionally charged with violations of RPC 1.1 (gross neglect); RPC 4.1 (false statements to others); RPC 8.1 (false statements in connection with a disciplinary action) and RPC 8.4 (taking an improper jurat).

Respondent was admitted to the New Jersey bar in 1970, the District of Columbia bar in 1960 and the New York bar in 1962. His current office address is in Edison, Middlesex County, New Jersey. He has no prior ethics history.

For approximately twenty-four years and until 1991, respondent had been employed by AT&T Bell Laboratories and, thereafter, by its successor, Bell Communications Research, Inc. He dealt primarily with intellectual property matters. Following a financially disastrous divorce, respondent began a sole practice of law on the side to supplement his income.

In the late 1980s, respondent developed a relationship with Dennis Seeman, a real estate agent, and Jerry Salomone, a developer and real estate broker. Respondent did legal work for the two. As a result of their relationship, Seeman and Salomone referred clients to respondent. The charges in this matter stem from respondent's representation of five individuals, in five separate real estate transactions, who were referred by Salomone and Seeman. Respondent represented the five individuals as the purchasers of property (condominiums) sold by Seeman and Salomone. Respondent represented Mr. Francis in October 1988, Mr. Desbordes in November

1988, Mr. Osaji in November 1988, Mr. Shyllon in December 1988 and Mr. Jackson in February 1989.

Foday Mansuray was a real estate broker for Real Estate II, a company in which Seeman and Salomone were the principals. Mansuray located the above five individuals as purchasers. They were all from Africa originally and apparently spoke little English.

Respondent was not retained to prepare the contracts in the matters nor was he involved in the preparation of the documentation needed to obtain the necessary mortgages. He, however, performed other services in connection with the real estate closings.

In each transaction, prior to closing, respondent realized that, apart from the mortgages, there were shortages of funds. He, therefore, contacted each purchaser to inform them how much additional cash was needed at the closing. Apparently, each client told respondent to contact Seeman about the shortages. Seeman, in turn, notified respondent that the purchasers did not have sufficient funds to buy the condominiums and that the shortages would be made up through credits to the purchasers for repairs that needed to be made or had actually been made by the purchasers. In addition, secondary mortgages were to be extended by Salomone. According to respondent, Seeman informed him that the mortgage companies involved (Vision Mortgage Corporation and the Moore Smeare Company) had advised Seeman how to structure the loans, that the mortgage companies were aware of the second mortgages and that no references should be made to the second mortgages in either the RESPA statements (HUD-1 uniform settlement statements) or the

FannieMae Affidavits and Agreements by either the borrower or the seller. 1T89.[1] (Only three affidavits and agreements are part of the record: Francis (Exhibit C-3), Osaji (Exhibit C-10) and Shyllon (Exhibit C-13)). Consistent with the above understanding, respondent did not include information about the second mortgages on either form. Additionally, respondent misrepresented information required to be disclosed in the RESPA statements, specifically, at lines 303 (cash from borrower) and 603 (cash to seller).

After his initial conversation with Seeman, respondent did not question Seeman again with respect to the omitted reference to the secondary financing. Respondent assumed that the mortgage companies were aware of the second mortgages and that they did not want them listed because they were short-term loans. Respondent never contacted Wade Stahler, the loan officer with whom Seaman apparently had dealt at Moore Smeare Mortgage Company, or Christopher Santangelo, the loan officer at Vision Mortgage Corporation, to confirm Seeman's instructions or to verify that the mortgage companies were, in fact, aware of the second mortgages.

Respondent testified that, initially, he had suspicions about the reason for the instructions to omit the second mortgages on the forms. He was not altogether certain that Seeman and Salomone ever intended to collect the monies reflected in the mortgages and he felt that they may have been trying to inflate the prices of the

[1] 1T denotes the transcript of the hearing on March 1, 1994.

units. 1T93. Respondent later testified that, because the primary mortgage companies were willing to lend the money to the purchasers based on the property appraisals, he believed that the values of the properties must have been proper. 2T88.[2]

The RESPA statement contains the following certification:

> To the best of my knowledge the HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds which were received and have been or will be disbursed by the undersigned as part of the settlement of this transaction.

Respondent's signature appears thereunder as the settlement agent. Immediately beneath respondent's signature appears this notice:

> WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title U.S. Code Section 1001 and Section 1010.

The FannieMae Affidavit requires the disclosure of subordinate financing. It requires certifications by the buyer and seller that all representations made in the document are true and correct. Respondent prepared and notarized each FannieMae Affidavit. The document also contains an "advisory notice":

> If any statement in the foregoing Affidavit and Agreement is made under oath by Borrower Affiant or Seller Affiant with knowledge that such statement is false, the person making such false statement may be subject to civil and criminal penalties under applicable law.

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[2] 2T denotes the transcript of the hearing on March 2, 1994.

In addition to the foregoing, the Vision Mortgage Corporation commitment letter in the Francis closing (Exhibit C-4) specifically stated:

> It is understood and accepted that this mortgage shall be a first lien secured by the subject property with no secondary financing permitted. (emphasis supplied).

Respondent never contacted Vision Mortgage Corporation to ascertain the reason for the discrepancy between the instructions he had received from Seeman and the absolute prohibition contained in the mortgage commitment.

* * *

Respondent's representation of Desbordes was done through a power-of-attorney because apparently he was out of the country at the time of the closing. Desbordes executed the power- of-attorney at the offices of Real Estate II, in Seeman's presence. Respondent testified that Seeman telephoned him to notify him that Desbordes was in his office. Respondent also testified that he spoke with Desbordes on the telephone because Desbordes had questions about the language in the power-of-attorney. Thereafter, respondent went to Real Estate II, but Desbordes had already left. Seeman notified respondent that Desbordes had just signed the power-of-attorney, just as Desbordes had earlier indicated to respondent. Respondent took Desbordes' jurat without Desbordes' being present and without Desbordes' signing the document in respondent's presence. 2T71.

The record is devoid of any indication that a problem arose from any action respondent may have taken pursuant to the power-of-attorney.

* * *

During an audit by the Office of Attorney Ethics ("OAE") respondent advised the investigator that Shyllon had not wanted to close on the condominium. Shyllon was concerned that he could not afford the property. Respondent claimed that he advised Shyllon that he was not required to purchase the property. Subsequently, Seeman apparently persuaded Shyllon to go ahead with the transaction. 1T40. There is no evidence in the record that respondent coerced Shyllon to purchase the property or that he failed to properly represent the client in connection with this transaction.

* * *

Respondent testified that, "in essence," he prepared the deeds and affidavits of title for each of the five transactions on behalf of the sellers. Although the sellers offered to pay respondent, he was concerned that receiving payment from them might raise an issue of conflict of interest. 1T95. Respondent apparently received $3000 in fees from the purchasers of the five properties. 2T76. The record is silent as to whether respondent notified each client

of the dual representation or of any conflicts that could arise as the result of his "quasi" dual representation of both buyer and seller.

* * *

In October 1990, respondent was contacted by the Middlesex County Prosecutor's Office in connection with an investigation of Seeman and Salomone's operations. Within ten minutes into respondent's interview, he knew that he had become a subject of the investigation because he was given his Miranda warning. Initially, on the advice of counsel, respondent agreed to plead guilty to a fourth degree crime. Later, however, he felt that his attorney had given him bad advice and retracted his agreement with the prosecutor. Respondent thereafter entered a not guilty plea to an accusation charging him with a violation of N.J.S.A. 2C:28-3. He was admitted into the pretrial intervention (PTI) program. Upon his successful completion of the program, the complaint against him was dismissed. (Allegedly, Seeman and Salomone participated in a scheme to defraud mortgage lenders by providing them false information on behalf of the purchasers. Both entered guilty pleas: Seeman to conspiracy and Salomone to theft by deception and conspiracy. Apparently, the two loan officers were not prosecuted.)

During the course of the prosecutor's investigation, respondent made a false statement in a tape-recorded interview. On

October 16, 1990, when asked why there was no mention of the second mortgage on the RESPA statements, respondent replied:

> Again, the only reason I didn't put anything on the RESPA is because of the limitation of room there. And I put it on my ledger card and plus I had my own personal notes. No other reason.
>
> [Exhibit C-22 at 19]

On March 27, 1991, respondent recanted this statement, indicating it was a misstatement of fact. He further stated that, when he had an opportunity to reflect on the matter and review his notes, he was able to "make a more accurate determination as to what actually transpired." Exhibit C-23 at 30.

During the OAE audit, the OAE investigator asked respondent whether references to the second mortgages were omitted because there was no room on the RESPA statement. Respondent replied "well, we all know that is not true." 1T48. He admitted to the investigator that his failure to include the information was wrong. 1T50. He also conceded that the figures that appeared at lines 303 and 603 of the RESPA statement were not correct. According to the investigator, respondent told her that the figures were not accurate in a technical sense. Respondent claimed, however, that, when the numbers were tallied in terms of credits and the second mortgages, "the seller [sic] got what they were entitled to." Id.

As a result of the action taken by the Middlesex County Prosecutor's Office, respondent was terminated from his position of more than twenty-four years at Bell Communications Research, Inc.

In his defense, respondent claimed that he was an inexperienced real estate attorney. Respondent offered, in

mitigation, that he served on numerous committees of the American Bar Association, the New Jersey Patent Law Association, the American Intellectual Property Law Association, the New York State Bar Association, and numerous civic organizations within the community in which he was raised.

Since 1980, respondent has been an adjunct professor at Middlesex County College and, since 1984, he has served as an adjunct professor at Montclair State College. Respondent also served on committees in Edison Township for the superintendent of schools and was president of his synagogue.

Respondent claimed that, over a period of more than seventeen years, he was involved in no more than fifty real estate closings. He, therefore, blamed his mistakes on his lack of expertise in real estate matters.

* * *

Notwithstanding that respondent successfully completed the PTI program and the complaint against him was dismissed, the Special Master found that the record was replete with acts of misconduct that proved respondent's criminal conduct by clear and convincing evidence. The Special Master, therefore, found that respondent violated RPC 8.4(b). The Special Master also found that respondent's conduct in failing to provide necessary and required information of secondary financing was unethical and in violation of RPC 8.4(a) and (c).

The Special Master concluded that respondent was attempting to hide behind the fact that he was a corporate attorney for thirty years and, hence, not familiar with the procedures of private practitioners. The Special Master further concluded that respondent was obligated to understand his trade and his ethics requirements before he attempted to handle real estate closings.

The Special Master found that respondent represented both the buyers and sellers in the transactions, in that he also prepared affidavits of title and deeds. He was, therefore, required to advise the buyers of his dual representation. While the Special Master claimed that respondent failed to so advise his clients, he found that the record did not establish the violations by clear and convincing evidence. He, therefore, found no ethics violation on that score.

The Special Master also found a violation of RPC 4.1, because of respondent's false statement to the prosecutor's office, and of RPC 1.1 and RPC 8.4, both for his failure to witness Desbordes' signature on the power-of-attorney and for the false jurat.

The Special Master considered, as mitigating factors, respondent's active role in various committees of the American Bar Association, his record in academia, his religious activities and involvement in various local organizations. The Special Master, nevertheless, recommended a suspension of no fewer than six months and the successful completion of an ethics course, prior to readmission.

* * *

Following a de novo review of the record, the Board is satisfied that the Special Master's findings are fully supported by clear and convincing evidence. Respondent's failure to include required information on both the RESPA statements and the Fannie-Mae affidavits, as well as his conduct in providing false information on the RESPA statement were unquestionably unethical and violative of RPC 4.1 and RPC 8.4(c). Respondent's guilty plea also established a violation of RPC 8.4(b). In addition, respondent's initial false statement to the prosecutor regarding his failure to include the secondary financing on the RESPA statements and FannieMae affidavits violated RPC 8.4(c) and (d). Lastly, respondent's improper acknowledgment on Desbordes' power-of-attorney was unethical, notwithstanding respondent's argument that, at the time that the acknowledgement was taken, he did not violate any statute or believe that any harm would result from his actions. Respondent's conduct in this regard violated RPC 8.4(c) because, contrary to the terms of the acknowledgement, Desbordes did not personally appear before respondent to sign the power-of-attorney.

The record, however, cannot sustain a finding that respondent was involved in a scheme to defraud the mortgage lenders. Likewise, there is no clear and convincing evidence to substantiate a finding of a violation of RPC 1.7 (conflict of interest).

Had this case involved only an improper jurat, then an admonition or a public reprimand might have been sufficient. See In re Coughlin, 91 N.J. 374 (1982) (attorney received a public reprimand for the improper execution of the jurat on an affidavit and executing the acknowledgment on the affidavit outside of the signatory's presence.) Respondent's conduct in this matter, however, was much more serious, albeit not as egregious as the conduct exhibited in In re Labendz, 95 N.J. 273 (1984). There, the attorney actively participated in an attempt to perpetrate a fraud on a federally insured savings and loan association in order to obtain a mortgage for a client. In imposing a one-year suspension, the Court found that the attorney knowingly made and, in fact, instigated the fraudulent misrepresentations. The Court noted that no party suffered any loss and that the attorney "did not realize any substantial gain" from the transaction. The Court remarked that "[n]evertheless, a lawyer has the independent duty to act with total honesty and to avoid participating in any fraud or misrepresentation." Id. at 279.

Here, there is no evidence that respondent was involved in a larger scheme designed to perpetrate a fraud on the mortgage lender or that he instigated the misrepresentations. There is also no evidence that respondent derived any personal benefit from his misconduct, other than his fees. However, respondent's actions in failing to report the secondary mortgages in five matters were compounded by his misstatement to the prosecutor and his taking of an improper jurat. Respondent's alleged inexperience in real

estate matters is no excuse. He was apparently a capable intellectual property attorney and, in fact, participated in approximately fifty real estate transactions. Also, from the outset of these matters respondent felt that something was amiss. Yet, he failed to take the required steps to ensure that, by following Seeman's instructions, he was not engaging in any improper acts.

On the other hand, respondent has already suffered greatly from his misconduct. He lost a lucrative position with an esteemed corporation and has tarnished his professional reputation. Notwithstanding the above, his contributions to the community and his many accomplishments, the Board was convinced that a period of suspension was warranted. Accordingly, the Board unanimously voted to suspend respondent for six months. The Board also determined to require respondent to complete the professional responsibility component of the Skills Training Courts of the Institute for Continuing Legal Education (ICLE), prior to his reinstatement to the practice of law. Three members did not participate.

The Board further required respondent to pay the Disciplinary Oversight Committee for administrative costs.

Dated: 5/23/95

RAYMOND R. TROMBADORE
Chair
Disciplinary Review Board