SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-467

IN THE MATTER OF	:
LEONARD S. SINGER,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: April 21, 1993

Decided: December 13, 1993

Roy F. McGeady appeared on behalf of the District IIA Ethics Committee.

Carl E. Klotz appeared on behalf of respondent.

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

This disciplinary matter was before the Board on a recommendation for a private reprimand, submitted by the District II-A Ethics Committee ("DEC"), which the Board determined to treat as a recommendation for public discipline. The five-count formal complaint charged respondent with violations of RPC 4.1(a)(2) (failure to disclose a material fact when disclosure is necessary to avoid assisting a fraudulent act by a client), RPC 8.4(a) (violating the Rules of Professional Conduct through the acts of another), RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 1.1(a) (gross negligence).

Respondent was admitted to the New Jersey bar in 1973. He has no prior disciplinary record.

In or about May 1987, respondent was retained by Madeline and Enzo Bulgarini to represent them in the sale of their business, "Anthony's Sub Shop," to Mary Tapp and Jeanene Walker. Respondent had previously represented the Bulgarinis in July 1985, when they purchased that same sub shop from Anthony J. Ciullo, Jr.

Essentially, the ethics complaint charged that respondent deliberately failed to disclose and otherwise misrepresented to Tapp and Walker the true identity of the party who had previously taken title to the business, thereby precluding them from discovering a lien against the assets of the business. That alleged deliberate omission and/or misrepresentation ultimately caused Tapp and Walker to lose the business when its assets were auctioned by the lienholder's heirs to partially satisfy the debt. This transaction was the subject of civil litigation among Tapp and Walker, the Bulgarinis and the lienholders.

A brief background of the prior transaction between Ciullo and the Bulgarinis is necessary to a complete understanding of the ethics charges. When the Bulgarinis purchased "Anthony's Sub Shop" from Anthony Ciullo in 1985, they did not take title to the business in their individual names. Rather, title was conveyed from Ciullo to Vonrich Enterprises, Inc. ("Vonrich"), a corporation of which the Bulgarinis were the principals. At the closing on that transaction, the Bulgarinis executed several documents in favor of Ciullo, including a promissory note (Exhibit J-3), a

security agreement (Exhibit J-4) and a UCC-1 financing statement (Exhibit J-5), all in the name of Vonrich. The record does not disclose whether respondent prepared these documents. Nevertheless, respondent was aware, prior to the Bulgarini to Tapp and Walker closing, that the Bulgarinis had previously taken title to that business in the name of Vonrich and, further, that all of the financing documents had been executed in the name of Vonrich. T141, 147, 163-4.[1] The UCC-1 financing statement, representing a purchase money security interest in favor of Ciullo and against Vonrich, was duly filed with the Department of State in August 1985. The security agreement (J-4) was incorporated by reference into the promissory note (J-3). Together, the documents obligated Vonrich to pay Ciullo $30,000 in fifty-nine equal monthly installments of $396.46. The last installment would be a "balloon" payment of the entire remaining unpaid balance of $19,055.03.

The security agreement listed all of the collateral securing the note, which consisted mainly of equipment and inventory related to the business. Since Ciullo leased the premises from which he operated the sub shop, he did not and could not take back a mortgage on the real property. The security agreement further provided for acceleration of the indebtedness upon various occurrences, including default and/or termination or sale of the business. Finally, it provided that the collateral securing the

[1] "T" denotes the DEC hearing transcript of September 25, 1991. It should be noted that the name "Ciullo" is incorrectly designated throughout the transcript as "Trulo."

debt would be made available to Ciullo in the event of any violation of the terms of the note or security agreement. The sale of the business would constitute such a violation.

With this background, we return to the transaction that forms the basis of this matter. Enzo and Madeline Bulgarini retained respondent, in or about May 1987, to represent them in the sale of the business to Walker and Tapp. Enzo Bulgarini gave respondent several listing agreements, one of which was marked into evidence as R-6. The listing agreement identified the Bulgarinis as the sellers of the property, as opposed to Vonrich. At some point thereafter, respondent learned from Enzo Bulgarini of the proposed sale of the business to Tapp and Walker. He also learned that Walker and Tapp would be represented by William Kattak, Esq. Respondent obtained the details and terms of the proposed sale from Enzo Bulgarini and prepared a proposed contract for sale of the business, which he then sent to Kattak for review. The contract (J-7) identified Enzo and Madeline Bulgarini as sellers. Nowhere in the contract did respondent list the name Vonrich, in spite of the fact that, before preparing the contract for sale, respondent reviewed his file on the purchase of the sub shop by Bulgarini from Ciullo and saw that title to the business had been taken in the name of Vonrich, not Bulgarini. That knowledge notwithstanding, respondent inserted the word "none" under paragraph 13 of the contract, which reads:

> 13. OTHER NAMES AND ADDRESSES: Seller represents and warrants that he has not used any other business names and addresses within the 3 years last past except as follows.

Respondent did, however, overstrike language in paragraph 1 of the Contract, which purported to convey free and clear title to the business, and inserted, instead, the words "subject to the security interests lien [sic] of Anthony Ciullo."

Respondent testified that, in addition to making that change to paragraph 1 of the contract, he had spoken with Kattak on more than one occasion prior to closing and had made Kattak aware of the lien. Respondent could not state with certainty, however, that he had mentioned to Kattak the name or existence of the entity "Vonrich" at any time. Respondent further testified that "he [Kattak] was aware there was a lien and he was aware that should the Trulo [sic] lien be foreclosed, that [sic] Mr. and Mrs. Bulgarini was [sic] going to have to hold his clients harmless." T149. It was for that reason, respondent testified, that Kattak had inserted under paragraph 1 of the contract the words "Seller to hold buyer harmless from any outstanding creditors of seller relating to aforesaid property." Respondent further testified that he had told Kattak about a telephone conversation with Lavinthal, the attorney for the Ciullos, and was trying to get in touch with him again, ostensibly to try to work out the lien. According to respondent, Kattak did not seem concerned.

In fact, respondent did more than attempt to telephone Ciullo's attorney. He wrote to Lavinthal on two occasions prior to the closing of June 4, 1987. Specifically, respondent wrote to Lavinthal on May 6, 1987 (J-14), stating that the contract "is contingent upon your client [sic] removing the present lien that

they have covering the above captioned property." The letter goes on to request that a discharge of the recorded UCC-1 be sent to him, in the event that Ciullo was willing to discharge the lien. Since respondent apparently did not receive an answer to that letter, he sent Lavinthal another letter, dated May 29, 1987 (J-15), requesting a prompt response to his previous letter. While Enzo Bulgarini was shown as having received a copy of the May 29, 1987 letter, Kattak was shown as having received a copy of neither. In any event, respondent never received a reply to either of those letters. Nevertheless, he proceeded to close on the property. Again, he did so in spite of the fact that, at some point prior to the closing, he was aware that transfer of the property would constitute a default and would call into play the acceleration provisions of the note and security agreement, as well as the collateral provisions.

On June 4, 1987, the closing was held at respondent's office. At that time, the parties executed the contract for sale. Several other documents were also exchanged, including, most significantly, a bill of sale (J-10) prepared and witnessed by respondent. Enzo and Madeline Bulgarini signed the bill of sale in their individual names. By respondent's own admission, he did not include in that document either the name or any other reference to Vonrich.

Paragraph 3 of the bill of sale read as follows:

> Promises by Seller. The Seller promises that no one else has any legal rights in the property, the Seller will defend the Buyer against the claim and will pay all costs, attorney fees and damages.

At the bottom half of the bill of sale is an affidavit of ownership:

> MADELINE BULGARINI and ENZO BULGARINI say(s) under oath; The Seller is at least 18 years old and the owner of the property described in the Bill of Sale. The Seller is in sole possession of this property. No other persons have any legal rights or security interest in this property. There are no pending lawsuits or judgments against the Seller or other legal obligations which may be enforced against this property. No bankruptcy or insolvency proceedings have been started by or against the seller.

Respondent admitted that he should have made reference to the Ciullo lien in the bill of sale. In fact, in order for the Ciullo lien to appear on a search, reference to Vonrich, as seller, should have been made. Nevertheless, respondent explained that the omission of any such reference was an oversight on his part, notwithstanding the fact that, only six or seven days earlier, he had requested Lavinthal to respond to his request for a discharge of that very same lien. Respondent further explained that he did not use the name Vonrich on the contract of sale because Bulgarini, at that time, was not using the Vonrich name and Bulgarini had told respondent that he was the seller.

When asked on direct examination whether, in retrospect, he believed that he should have made reference to Vonrich in the sale documents, respondent answered that he certainly should have disclosed it as a prior name used, in paragraph 13 of the contract of sale. On the other hand, he noted, inclusion of such a reference would not have disclosed the existence of a lien if the Bulgarinis had subsequently conveyed the property to another corporation wholly owned by them, as authorized by the memorandum

of closing (J-6) prepared at the Ciullo to Vonrich closing in July 1985. That notwithstanding, respondent steadfastly claimed that it was not his intention to conceal the Ciullo lien from the buyers and that any omission was due to oversight. Had he intended to conceal the lien, he testified, he would not have inserted in the contract any reference to the Ciullo lien in the contract.

Respondent further maintained that there were no discussions at closing about the Ciullo lien and that it was always the parties' intention that the buyers would, in effect, assume the Ciullo lien by paying to the Bulgarinis monthly installments that the Bulgarinis, in turn, would use to satisfy the Ciullo lien. That this was the parties' intention, respondent testified, was evidenced by the fact that the dollar amount of the monthly payments to be made by Tapp and Walker to the Bulgarinis was the same dollar amount as the monthly payments to be made by the Bulgarinis/Vonrich to Ciullo. In fact, however, the repayment structure for the Bulgarini to Tapp and Walker transaction was different from that between Ciullo and Bulgarini. Specifically, as previously noted, the promissory note from Bulgarini in favor of Ciullo (J-3) provided for a balloon payment of the unpaid balance of the debt in excess of $19,000 after fifty-nine equal monthly payments. On the other hand, the promissory note from Tapp and Walker in favor of the Bulgarinis (J-8) provided for no such balloon payment and allowed the buyers to satisfy the debt in equal monthly payments over a term of ten years. T159-160.

William Kattak also testified at the DEC hearing. Kattak's testimony differed significantly from respondent's. Kattak testified that, prior to closing, he discussed with respondent, by telephone, the contract language dealing with the lien. Because that language caused him some concern, Kattak engaged the services of a title company to conduct a search. He ordered the search, however, in the names of Enzo and Madeline Bulgarini and Anthony's Sub Shop because those were the parties identified as the sellers in the contract of sale. In short, Kattak testified that, inasmuch as he had never been advised of any other name of a party-in-interest, he relied upon the language of the contract, including the language contained in paragraph 13. He received a report from the title agency (J-12), disclosing three judgments entered against the Bulgarinis individually, but none against Anthony's Sub Shop (those judgments were attached to the contract of sale, which contained a provision that seller would satisfy them at the time of closing). Similarly, the UCC search disclosed no record of liens against Anthony's Sub Shop or Enzo and Madeline Bulgarini.

Upon receiving the report, Kattak sent a copy to respondent on May 19, 1987, with a letter (J-11) asking respondent if the judgments identified therein were, indeed, against his clients. He received no indication from respondent that there were additional liens that did not appear on the search. Indeed, respondent admitted that he never brought the continued existence of the lien to Kattak's attention. This was so in spite of the fact that respondent wrote his second letter to Lavinthal (J-15) on

May 29, 1987, requesting the discharge of the lien — approximately ten days after he received a copy of the search showing no liens against the property. In any event, having heard nothing from respondent contradicting the report, Kattak assumed that any liens that may have previously existed either had not been recorded (and were, therefore, ineffective) or had been satisfied or otherwise discharged.

At closing, Kattak recalled commenting to respondent that he "didn't come up with" any evidence of a lien against the property or business. However, he could not recall respondent's answer, if any. T34-35, 78-81.

Shortly after the closing took place, Kattak received a telephone call from Tapp and Walker, who were already operating the business, indicating that a Lisa Desmond, who claimed to be the daughter of the by then deceased Ciullo, had visited the sub shop looking for Enzo Bulgarini and demanding to know who they were. Furthermore, Desmond was demanding full satisfaction of the Ciullo lien. Desmond also telephoned Kattak. It was during that conversation, Kattak testified, that he heard, for the very first time, the word "Vonrich." As a result of his conversation with Desmond, Kattak immediately ordered a new search — this time using the name Vonrich as the debtor. That search (J-13), of course, disclosed the Ciullo lien against the property and the UCC-1 financing statement, to which a list of the affected property was attached. That list covered — it was stipulated — the very same property that was purchased by Tapp and Walker. Upset at this

development, Kattak telephoned respondent and angrily demanded to know why respondent had not disclosed to him the existence and/or involvement of Vonrich. Respondent did not give Kattak an answer.

Jeanene Walker, one of the buyers, testified that, when she first saw the contract for sale in Kattak's office, he assured her that the lien mentioned therein would be cleared up before he allowed them to sign anything. She further recalled having subsequently discussed the lien with Enzo Bulgarini, who informed her that he had "paid it off." Walker testified that, during her discussions with everyone involved in this transaction, including the real estate agent, the name Vonrich had never been mentioned. When Tapp and Walker attended the closing, Kattak asked respondent if the lien was "cleared up." Respondent either answered in the affirmative, nodded in the affirmative or had a brief conversation with Kattak, whereupon Kattak turned to Tapp and Walker and nodded in the affirmative. Walker and Tapp signed the contract at closing, despite the continued presence of the Ciullo lien language therein, because they had been assured by their attorney, at the closing, that the lien had been "cleared up."

Edna Perrotta, the broker in the transaction, testified that Enzo Bulgarini had informed her, in Tapp's presence, of the existence of a lien on the property and that Tapp would have to satisfy that lien. Inasmuch as Tapp had little available cash, Bulgarini suggested to Perrotta, in Tapp's presence, that Tapp make the payments to him and that he would then turn them over to the lienholder. Perrotta testified that Tapp acquiesced to this

arrangement. Tapp did not testify at the DEC hearing. Perrotta did not recall whether the name of any lienholder had ever been used during this conversation.

Finally, Lisa Desmond, the daughter of Anthony Ciullo, testified that the very first time she learned about the sale of the business by Bulgarini was when she called the shop in early June to speak with Enzo Bulgarini, who had, apparently, stopped making payments to Ciullo's estate approximately one month before the closing. She further testified that she was never approached by anyone regarding the discharge of the existing lien and that she would have never accepted assignment of the indebtedness to a new party but, rather, would have insisted on total satisfaction of the lien. In September 1987, Desmond auctioned off the property securing the lien, in partial satisfaction of the $27,000 balance owed to her father's estate by the Bulgarinis.

Ultimately, approximately one month following discovery of the continued existence of the Ciullo lien, Walker and Tapp, upon advice of counsel, ceased to operate the business. The lien dispute remained unresolved as of that time.

* * *

The DEC found that respondent knowingly structured the sale and assisted the Bulgarinis in structuring the sale in a manner that would prevent Ciullo from learning of the sale and from accelerating the satisfaction of the balance due on the loan. The DEC concluded that respondent had assisted the Bulgarinis in committing a fraudulent act against Ciullo, in violation of RPC

4.1(a)(2). The DEC also found respondent guilty of a violation of RPC 1.1(a), by virtue of his failure to disclose to Tapp and Walker the true identity of the titleholder to the business — Vonrich. The DEC noted:

> Had this data been accurately set forth, it would have clearly put buyers on notice of the existence of the lien. If buyers had previously been aware of the lien [as may have been the case], the accurate recital of that information would not have affected the deal. If, as buyers claim, they were unaware of this information, and intended to take the business clear of all prior liens, the accurate recital of the information would have alerted them to discover the existence and extent of the lien and allowed them to take whatever action they deemed necessary to protect themselves.
> [Hearing Panel Report at 13.]

As noted by the DEC, respondent attributed this failure on his part to an oversight. That assertion notwithstanding, however, the DEC found that the evidence failed, "by a narrow margin," to satisfy the clear and convincing standard necessary to show that respondent's conduct was deliberate as to Tapp and Walker. The DEC, therefore, dismissed Counts Two, Three and Four of the complaint, charging respondent with violations of RPC 4.1(a)(2), RPC 8.4(c) and RPC 8.4(a), and recommended a private reprimand for respondent's violations of RPC 4.1(a) (2) and RPC 1.1(a).

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's finding that respondent's conduct was unethical is supported by clear and convincing evidence. The Board disagrees, however, with the DEC's finding that respondent did not intentionally misrepresent to Tapp and Walker the true identity of

the lienholder, in violation of RPC 4.1 and RPC 8.4(c). Respondent prepared a bill of sale containing a false statement — that no one else had any legal rights or security interests in the property. Despite respondent's protestations to the contrary, the Board was not persuaded that the omission of reference to the Ciullo lien on the bill of sale was the product of oversight, rather than of knowledge and deliberation.

Respondent's preparation of the bill of sale must be viewed in its relevant context. Specifically, respondent prepared that document with the knowledge, acquired after reviewing his prior file, that title to the business had been taken in the name of Vonrich and that all of the financing and security agreements had been executed in that name. When respondent received from Kattak a copy of the judgment and UCC search showing no liens against the property, the Bulgarinis or Anthony's Sub Shop, he knew that the lien continued to exist. This is clearly evidenced by the fact that respondent wrote to the lienholder's attorney, Lavinthal, ten days after he received a copy of the judgment and UCC search, imploring him to respond to his earlier letter requesting the discharge of the lien. That notwithstanding, he did not disclose to Kattak the continued existence of the lien in the name of Vonrich and prepared the false bill of sale. When viewed against this backdrop, respondent's contention that his omission of the Vonrich name had been inadvertent is devoid of any credibility. The Board is convinced that respondent intentionally hid the

existence of the Ciullo lien from Tapp and Walker, in violation of RPC 4.1 and RPC 8.4(c).

On the other hand, the Board is unable to agree with the DEC's conclusion that respondent deliberately structured the sale (or that he assisted his clients to do so) in such a manner as to prevent the lienholder from learning of the sale and from accelerating the loan. While Lisa Desmond may not have been made aware of the sale, it is clear that respondent both telephoned and wrote to Ciullo's attorney on at least two occasions to attempt to resolve the lien in some manner. It would be unfair to visit upon respondent the consequences of that attorney's ostensible failure to notify Lisa Desmond of the impending sale of the business. For that reason the Board cannot find, by clear and convincing evidence, that respondent deliberately concealed the sale from the lienholder.

The only question remaining, then, is the appropriate quantum of discipline to be imposed for respondent's misconduct.

Respondent's conduct was similar to that displayed by the attorney in In re Nichols, 95 N.J. 126 (1984), who received a public reprimand for entering into a business transaction with a client and for misrepresentation. There, the attorney, who represented the husband in a divorce matter, displayed interest in purchasing a piece of vacant real property owned by the parties. After the parties' separation, the husband, who had moved out of State, gave the attorney a key to the house and asked him to

arrange for certain repairs. The attorney then advertised for and obtained a tenant for the property without the knowledge or consent of the parties and notwithstanding the fact that a contract to sell the property to the attorney had not been executed. The lease respondent prepared identified himself as the landlord. The Court found that, in addition to becoming embroiled in a conflict of interest situation, the attorney had deceived the tenants by holding himself out as the landlord.

Here, respondent, too, made a serious misrepresentation to Tapp and Walker and to her attorney. The Board, however, recognizes that the purpose of discipline is not the punishment of the offender, but "protection of the public against an attorney who cannot or will not measure up to the high standard of responsibility required of every member of the profession." In re Getchius, 88 N.J. 269, 276 (1982), citing In re Stout, 76 N.J. 321, 325 (1978). The severity of the discipline to be imposed must comport with the seriousness of the ethical infraction in light of all the relevant circumstances. In re Nigohosian, 86 N.J. 308, 315 (1982). Mitigating factors as well as aggravating factors are, therefore, relevant and may be considered. Respondent has never before been the subject of discipline. In addition, he derived no personal gain from his misconduct. The Board is, therefore, of the

view that a public reprimand is sufficient discipline for respondent's ethics transgressions. The Board unanimously so recommends.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 12/13/1993

By: Raymond R. Trombadore
Raymond R. Trombadore, Esq.
Chair
Disciplinary Review Board