Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-207

IN THE MATTER OF :
PHILIP F. GUIDONE, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 8, 1993

Decided: November 1, 1993

Patricia Garity Smits appeared on behalf of the District X Ethics Committee.

Ronald Reichstein 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 based on a recommendation for public discipline filed by the District X Ethics Committee ("DEC"). The formal ethics complaint charged respondent with violations of RPC 1.7(b) and (c) (conflict of interest arising from the simultaneous representation of clients with competing interests), RPC 1.8 (conflict of interest stemming from a business transaction with a client) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). At the end of the last DEC hearing, on April 2, 1992, the hearing panel, on its own motion, amended the complaint to include a charge of a violation of RPC 1.7(a) (conflict of interest). In addition, the hearing panel granted the presenter's motion to include a charge of a violation

of RPC 1.4(a) and (b) (failure to communicate). In his answer, respondent virtually admitted all of the allegations of the complaint, including a violation of RPC 1.7(c) and RPC 1.8(a). Respondent denied a violation of the balance of RPC 1.8 and of RPC 8.4(c).

Respondent was admitted to the New Jersey bar in 1966. He is a sole practitioner in Chester, County of Morris, New Jersey.

At the time relevant to these ethics proceedings, respondent was a member of the Chester Lions Club, a not-for-profit corporation of the State of New Jersey. During those years, respondent was also a member of the Lions Club Board of Directors, having acted as its First Vice-President from June 1986 to June 1987 and then as its President from June 1987 through June 1988. Respondent was also the Lions Club's attorney.

In 1982, the Lions Club purchased an undeveloped tract of land located on Route 206, in Mount Olive Township. In late 1985, when the Board of Adjustment denied the Club's application to use the site as a flea market, the Club decided to sell the land. It was apparent from the numerous offers received over the next several months that the value of the land had increased considerably since its purchase. During this time, respondent acted not only as the Lions Club's attorney, but also as the sole intermediary through whom such offers were made.

At its April 10, 1986 business meeting, the Lions Club reviewed and discussed the offers received through and presented by respondent. At the end of the meeting, the Lions Club decided to

accept the first offer of purchase in the amount of $1,250,000 that also complied with other conditions of sale. Those conditions were: payment in cash, confirmation of the quality of title by the buyer within thirty days — at the expiration of which the ten percent down payment would become non-refundable — and closing of title within one year of the signature of the contract. The Lions Club authorized respondent to announce the terms and conditions of the sale to all interested parties and to accept the first offer that complied with those terms and conditions.

Sometime after the April 10, 1986 meeting, Frank Adessa, a fellow member of the Lions Club, told respondent to expect a telephone call from a Frank Torsiello, who was interested in purchasing the Mount Olive property. Indeed, in late April 1986, Frank Torsiello informed respondent, by telephone, that he was prepared to meet the Lions Club's terms and conditions. Respondent requested that Torsiello send a confirming letter. Shortly thereafter, respondent received a letter from Torsiello Construction Management ("TCM"), dated May 8, 1986, confirming the offer to purchase the property (Exhibit JF). Respondent then prepared and sent to TCM a proposed contract of sale. On June 10, 1986, respondent received a letter from the law firm of Fox and Fox, advising him that the firm represented TCM in the transaction and proposing certain changes to the contract of sale. Negotiations over certain terms of the contract ensued, culminating in respondent's agreement with the extension of the period to confirm the quality of the title to sixty days and with a potential

ninety-day extension of the closing date, conditioned upon the purchaser's due diligence in pursuing the necessary approvals for the use of the property. There are no allegations that respondent acted improperly in the contract negotiations with TCM.

On or about June 15, 1986, while the contract negotiations were still ongoing, Frank Adessa disclosed to respondent that he and his brother, Gerard Adessa, had an ownership interest in the TCM partnership. Frank Adessa offered respondent a twenty percent interest in the partnership. In fact, Frank Adessa had made an identical offer to numerous members of the Lions Club, who had declined such an offer. Respondent replied that he would give some thought to Adessa's proposal.

One week after receiving the offer, on or about June 21, 1986, respondent, through Frank Adessa, accepted a twenty percent ownership in the TCM partnership. Respondent did not disclose his participation in the venture to the Lions Club. Respondent reasoned that disclosure was not necessary because, at the time, all major issues in connection with the contract of sale had already been resolved ("only a few things needed to be 'cleared up' ") and also because he had only a minority interest in the venture.

Thereafter, in late June 1986, respondent, as a principal in the transaction, along with Torsiello, Di Cioccio — another partner in the deal — Gerard Adessa and Frank Adessa, signed a letter setting forth an interim agreement for the formation of a partnership and listing the principals' proportionate shares in the

venture, as follows: Torsiello, 30%; Di Cioccio, 10%; Gerard and Frank Adessa, 40%; and "Other Principals", 20%. Respondent testified that, although the letter was dated June 2, 1986 (Exhibit JJ), it was not presented for his signature until late June 1986 because the identity of the last principal to join the deal was still undetermined on June 2, 1986. According to respondent, that was also the reason why the word "Principal" had been typed below the signature line, instead of his name.

The June 2, 1986 letter also set forth the amount of the cash contributions to be made by each partner:

> It is understood and agreed by all principals' signatures below that they will share in any profit, loss and assessments for various fees incurred during the processing of the applciation [sic] for Township approval in their proportionate share as herein indicated. It is also understood and agreed that a formal partnership agreement will be drawn for execution by all principals at the closing of the deal. In the event the deal does not close, the terms and conditions of the signed contract as referred to above will determine the disposition of the deposit funds and assessment funds as may be required.

On July 21, 1986, the contract of sale was finalized and executed by the parties. At the time that the contract was signed, respondent was Vice-President of the Lions Club. The contract listed the Lions Club as seller and Torsiello Construction Management as buyer. Only Fred M. Schmidt, the Lions Club President at the time, and Anthony Torsiello signed the contract (Exhibit JL).

The $125,000 deposit, advanced by Torsiello, was entrusted to respondent, as escrow agent. At Frank Adessa's request, respondent

wrote a check, made payable to Frank Adessa, in the amount equivalent to twenty percent of the $125,000 down payment, previously advanced by Torsiello. Respondent's subsequent cash contributions to the partnership were all made payable to Frank Adessa because, according to respondent, it was "the appropriate thing to do and was in keeping with the request that [Frank Adessa] made. Since Mr. Adessa had experience in these types of developments and I did not, I obviously relied on his expertise" (Exhibit JD).

In August 1986, Torsiello asked respondent to prepare and file an application for a site plan and subdivision approval before the Mount Olive Planning Board. Respondent did so on February 3, 1987 (Exhibit JM). Section 1-C of the subdivision application requested that the applicant, if a corporation or a partnership, attach a list of the names and addresses of persons having a ten percent interest or more in the corporation or partnership. Respondent did not disclose the names and addresses of the partners, all of whom had a ten percent or more interest in the venture, including himself. Neither did respondent reveal to the Lions Club, at that time, his interest in the transaction, although he had informed the Board of Directors of his role in filing the subdivision application in behalf of the buyers, to which the Board of Directors offered no objections. However, although respondent apprised the Lions Club of his representation of the buyer in the subdivision approval, he did not advise it about the possible adverse consequences of the dual representation.

By letter dated March 4, 1987, David Fox informed respondent, as the attorney for the Lions Club in the transaction, that four acres of the unimproved land had been designated as wetlands and, as such, neither qualified as buildable land nor could be used for any other purpose. David Fox requested that, in light of this recent discovery, the purchase price be reduced by $200,000 ($50,000 per acre) (Exhibit JN). By letter dated March 23, 1987, respondent replied as follows:

> Dear Mr. Fox:
>
> I have reviewed your letter of March 4, 1987, and in light of the Contract of Sale, we find nothing therein that specifically relates to price per acre being allocated to 'buildable' unimproved land.
>
> You will also recall under the Contract, that the Purchaser had three [] months from the date of the Contract to investigate the land and to cancel the Contract if that determination was not satisfactory to them. No such notification was furnished. Accordingly, I find no basis for the reduction of the purchase price.
> [Exhibit JN]

On April 2, 1987, David Fox again wrote to respondent, reminding him that the seller had an obligation to convey clear and marketable title, in accordance with the contract, and that, accordingly, an appropriate adjustment in the purchase price should be made because of the four acres designated as wetlands. In that letter, David Fox suggested that "it might be useful for a meeting to be held among you and your client and myself and my client in this regard" (Exhibit JN). Asked, at the DEC hearing, whether David Fox also represented respondent's interest in the transaction, respondent replied that it was his understanding that

David Fox represented only Torsiello and Di Cioccio.

Not having received a reply from respondent, David Fox continued to pursue the request for a price reduction by letters dated April 29, May 27 and June 26, 1987. In that last letter, David Fox also requested that respondent obtain from the Lions Club a ninety-day extension of the closing of title.

Respondent did not convey David Fox' request for a price reduction to the Lions Club. In fact, respondent did not disclose to the Lions Club that David Fox was seeking an abatement in the purchase price until the Board of Directors meeting held in September 1987. Respondent testified that he did not immediately communicate those requests to the Lions Club because not all partners in the venture were in agreement that the purchase price should be reduced. He explained that neither he nor the Adessas believed that credit should be given for the four acres designated as wetlands. In fact, respondent testified, he had expressed to David Fox his and the Adessas' belief that the price reduction was not appropriate but, presumably, David Fox had continued to press the issue in behalf of Torsiello and Di Cioccio.

When David Fox, however, requested a ninety-day extension of the closing of title, respondent was forced to so apprise the Lions Club in order to obtain its approval. At the Club's July 9, 1987 meeting, respondent presented a report on the progress in the sale of the property and presented to the Board of Directors David Fox' request for an extension of the closing date. Respondent recommended to the Lions Club that the request be granted. The

Board of Directors voted to approve the extension. Again, respondent did not advise the Club of the wetlands problem and did not disclose his participation in the venture.

In August 1987, however, an eighty percent majority of the TCM partnership asked respondent to communicate to the Lions Club the partnership's request for a price reduction. Respondent did so at its September 10, 1987 meeting. It was then that respondent, for the first time, disclosed to the Club that he had a "position" in the partnership. According to respondent,

> I told them that I had become a partner in the purchasing of the property with Mr. DeSiekio [sic]. I said that this, in my opinion, that it was a conflict, that the Board might want to consider other representation, continue with the purchase of the property, that I had been requested by the other partners to present to the Board a request for a reduction in the purchase price of the property because of there being a little over four acres of land which I described as wetlands, meaning that we could not build on it, that the requested reduction -- and I should say before I got into that discussion I suggested -- I stepped down from the chair of the meeting because the President does run the meeting, and I asked I think the Vice President or Second or Third Vice President, whoever was there, I forget, to assume the direction of the meeting and then discussion proceeded from that point as to the request and my continuing to represent the Club at that point. The Board of Directors determined, as was said, they should not be given credit, that the time period had expired for review of the land. Again, there's [sic] provisions in the contract that gave 60 days to walk away from the project if found it was unsatisfactory. The Board of Directors authorized me to go ahead and to proceed with closing of the property in accordance with the contract which we subsequently did about a month and a half later. I guess it was something like that.
>
> [T4/1/1992 154-155]

Once again, respondent failed to fully explain to the Lions Club the pitfalls of the representation, stemming from his

financial interest in the venture. Although it was his testimony that he had advised the Club to consider separate counsel, one club member testified that respondent "[j]ust assured us there was no problem with it, that it could go on without any problem" (T1/23/1992 45). In addition, as another member testified, "we kind of felt that we were so far along in the process with Phil and the contract and Torciello [sic] that to bring another attorney in at the time would be probably not in our best interest" (T1/23/1992 89).

The reaction to respondent's financial interest in the venture was one of shock, according to at least one member who testified at the DEC hearing. According to another member — also a member of the Board of Directors — there was "a lot of dissension" among the members, upon the discovery of respondent's monetary stake in the transaction. One member became so upset that he walked out of the meeting. Other members felt powerless to evaluate the full impact of respondent's disclosure at that time. In any event, as mentioned earlier, the Board of Directors voted to continue with respondent's representation.

The closing of title took place on October 21, 1987. Respondent alone appeared in behalf of the Club. David Fox represented Torsiello and, presumably, Di Cioccio. The record is silent as to who appeared in behalf of the Adessas. According to respondent, he tendered one or two certified checks to David Fox as respondent's share of the additional cash needed to close title. David Fox, however, did not accept the checks because of a dispute

on the amount tendered. Title was taken in the name of Torsiello Construction Management Co. Ultimately, Torsiello and Di Cioccio instituted litigation against respondent and the Addessas, seeking a declaratory judgment that the defendants had no interest, either legal or equitable, in the property because of their failure and refusal to pay the necessary monies and to otherwise comply with the conditions on the acquisition of the property.

The effect of respondent's disclosure to the Lions Club of his business interest in the partnership continued to be felt over the next several months, notwithstanding some of the members' belief that the matter should be put to rest to avoid adverse repercussions to the Club's reputation. Earl Bridgette, the member who succeeded respondent as its President, testified that, for a period of six months following respondent's disclosure, he received resignations from fourteen of the Club's forty-seven members. It was then that Mr. Bridgette decided to appoint a Blue Ribbon Committee to investigate whether respondent's conduct had caused any financial loss to the Club and whether respondent had violated the Club rules. Reflecting the members' concern over the situation, Mr. Bridgette wrote, in a letter to the Blue Ribbon Committee, that "[i]n my considered opinion, this is the most serious matter to confront our Club in a long while * * * " (Exhibit CL). Respondent was asked to supply the Blue Ribbon Committee with written information about the date of his involvement in the venture and also the extent of his participation in the deal.

At the subsequent Board of Directors meeting, respondent orally provided details of his involvement in the transaction. Despite the Club's request, respondent never furnished anything in writing, contending that to do so would be too time-consuming.

At the end of its investigation, the Blue Ribbon Committee concluded that no financial harm had been visited on the Club as a result of respondent's conduct. The Committee found, however, that respondent had violated the Club's code of ethics and, accordingly, called for his resignation. Respondent refused to resign. He persisted with his refusal even after President Bridgette assured him that his resignation would be handled "diplomatically" and apprised him of the "turmoil" reigning among the members because of his continued membership in the Club. Ultimately, the Committee's recommendation was submitted to the Board of Directors, who decided, by a vote of twelve to ten, to allow respondent to remain a Club member.

* * *

At the conclusion of the ethics hearing, the DEC found that respondent had violated RPC 1.7(b) because he "did not provide full disclosure to the Lions Club in a timely manner of his responsibilities to and interest in TCM and [ ] he did not secure consent from the Lions Club as specified in 1.7(b)(2)" (Hearing Panel Report at 10-11). The DEC also found that respondent had violated RPC 1.8 when he acquired a pecuniary interest in the property that was adverse to the interests of the Lions Club; when

he became involved in a business transaction with terms neither fair nor reasonable to the Club; and when he failed to fully disclose and transmit those terms to the Lions Club in writing, in a manner that should have been reasonably understood by its members. In addition, the DEC concluded that respondent's failure to furnish the Lions Club with timely notice of his interest in the property, to advise it of the desirability of seeking the advice of independent counsel, and to obtain the Club's written consent to the representation had violated RPC 1.8(a)(2) and (3). Finally, the DEC found that respondent had violated RPC 1.4(a) and (b) when he did not advise the Club, in writing, of his interest in TCM, of the wetlands problem and the consequent request for a price abatement, and of his participation in TCM, as requested by the Club. The DEC did not find clear and convincing evidence that respondent had violated RPC 1.7(a) or RPC 8.4(c).

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board was satisfied that the conclusions of the DEC that respondent acted unethically are fully supported by clear and convincing evidence. Respondent's conduct violated RPC 1.7(a), (b) and (c), RPC 1.8(a), RPC 1.4 and, in addition, RPC 8.4(c). Although the Board agreed with the DEC that respondent violated RPC 1.4, it concluded that respondent's failure to disclose to the Lions Club his interest in the venture in a timely manner more properly violated RPC 1.8(a), and not RPC 1.4, as found by the DEC. It was respondent's failure to apprise

the Club, in a timely manner, of the wetlands problem and of the purchasers' request for a price reduction that breached RPC 1.4. The Board is also unable to agree with the DEC's finding that respondent did not deliberately conceal from the Lions Club, his participation in the transaction.

I. THE CONFLICT OF INTERESTS

There is no dispute that respondent informed the Lions Club of his representation of TCM in filing an application for site plan and subdivision approval. There is also no question that the Lions Club did not object to that representation. What respondent did not do, however, was to make full disclosure of the circumstances of the representation, within the meaning of RPC 1.7. Respondent's disclosure did not include an explanation of the implications of the common representation and the risks involved therein. How could respondent represent both clients with undivided loyalty when, for instance, the contract called for due diligence on the part of the buyers to obtain all of the necessary approvals and respondent, as the attorney for the club, had to advise it on whether the buyers — his own partners in the transaction — had exercised sufficient diligence to be granted a ninety-day extension of the closing of title? At a minimum, respondent's conduct created an appearance of impropriety, in that his multiple representation posed substantial risk of disservice to the Club's interests. His conduct in this regard violated RPC 1.7(a), (b) and (c).

In addition, respondent violated RPC 1.8(a), when he failed to reveal to the Club his participation in the venture. Admittedly, from June 1986 through September 1987, respondent did not disclose to the Lions Club his financial interest in the transaction. The Board found meritless his contention that disclosure was not necessary because all major issues in the contract had already been negotiated at the time that he joined the venture. Other significant issues still needed to be resolved, as evidenced by the negotiations that ensued between respondent and David Fox' office and by the substantial modifications contained in the rider to the contract. The Board also rejected respondent's claim that disclosure was not required because of his minority interest in the partnership. The extent of a lawyer's interest in a business transaction with a client is irrelevant to a finding of a violation of RPC 1.8.

Respondent did not inform the Lions Club of his participation in the deal because he knew it was improper. Otherwise, why not disclose it? It was a known fact that Frank Adessa had offered a percentage interest in the deal to numerous Board members, who declined. Had respondent made full disclosure of his interest to the Club members, there likely would not have been any opposition from the majority of them. Indeed, as one member testified,

> [i]n polling the members of the Club about this incident and going through the other process of the debates that we had in the resolution that I made, there is no question that we probably would have continued to sell Phil Guidone and Frank Adessa the property. We had no problem with selling them the property. I don't think that was ever in question that we have the problem [sic]

> selling the property [but] [w]e would have liked to have known they were the buyers and then maybe we would have read the contract.
>
> [T4/1/1992 19-20]

It seems, thus, that the Club members' concerns, expressed after respondent's disclosure of his interest, were not so much with the fact that respondent was a partner in the venture but, more properly, with the blind trust they had reposed on respondent in the representation of their interests. That same member testified that, had he known that respondent was one of the buyers, he would not have personally agreed that respondent act as the Club's attorney. Indeed, it is evident from the record that the Club's decision not to engage new counsel, after the discovery of respondent's interest in the deal, was based on the members' belief that they had no other choice because of the advanced stage of the transaction. In the words of a Club member who testified at the DEC hearing, to obtain another attorney would have been "confusing," "monumental" (T1/23/1992 66).

Not only did respondent fail to disclose his interest to the Lions Club for a period in excess of one year, but when he finally was forced to so apprise the Club, he stopped short of his obligations. Indeed, RPC 1.8 requires that, prior to entering into a business transaction with a client, the attorney disclose and transmit to the client, in writing, the terms of the transaction. That rule also requires that the client be advised of the desirability of seeking the advice of independent counsel and that the client consent to the transaction, in writing. Respondent's

disclosure of his interest was not sufficient to enable the Club members to make a decision to retain separate counsel. Indeed, some members complained that, at the time of the disclosure, they did not have enough information about respondent's involvement in the transaction to make an informed decision and, in fact, requested that respondent supply to them, in writing, a full account of his participation in the venture. This, too, respondent did not do, alleging that it would have been too time-consuming.

In short, for a period in excess of one year, respondent did not disclose to the Lions Club members his participation in the venture and, when he finally did so, he did not communicate to them, in writing, the terms of the transaction, did not advise them, within the meaning of the rule, of the desirability of seeking the advice of independent counsel and did not obtain the Club's consent to the transaction, in writing.

The Board was troubled by respondent's failure to realize the gravity of the conflict posed by his personal interest in the transaction and also by the appearance of impropriety created thereby. The members' concern for the damage to the Club's reputation was obvious. As one member testified,

> * * * the Lions Club is a service organization. It's the largest organization of its type in the world. When you become a member of this group, you're there to do good things. You want to help people, be of service to the community and to your neighborhood. You're not there to get involved in some complicated legal plan or injure the reputation of anybody. There were times that I thought if these proceedings - - if the issue that we were dealing with at the time became public, it may appear that we purchased the land from ourselves, that there was an inside deal, and I was very afraid of that * * * * [T1/23/1992 55]

Respondent's conduct on that score violated RPC 1.8(a).

II. THE CONCEALMENT OF RESPONDENT'S INTEREST IN THE VENTURE

Unlike the DEC, the Board found that the evidence clearly and convincingly established that respondent knowingly hid his participation in the transaction from the Club, in violation of RPC 8.4(c). "In some situations, silence can be no less a misrepresentation than words." Crispen v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984). The Board's conclusion is based on respondent's failure to disclose his business interest to the Club for a period in excess of one year; on the conviction that respondent would have kept this interest hidden from the Club, if not for the other TCM partners' insistence on a price abatement; on the fact that respondent's name was not typed on the June 2, 1986 letter setting forth the percentage of each partner's interest in the transaction (Exhibit JJ); and on the fact that respondent's cash contributions to the venture were always covert and accomplished through checks made payable to Frank Adessa, who, in turn, would write checks to the partnership.

Also troublesome was respondent's lack of recognition of wrongdoing after he witnessed the uproar and turmoil among the Board members caused by his conduct. Not only did respondent fail to cooperate with the Club, when he refused to give it a written statement about his involvement in the transaction, but he also refused to resign from the Club, following the Blue Ribbon Committee's conclusion that he had violated the Club's ethics rules

and its recommendation that he should submit his resignation.

In mitigation, the Board considered that respondent's conduct caused no financial harm to the Lions Club, as found by the Blue Ribbon Committee. Although at least one club member believed that respondent's advice to the Club to grant a ninety-day extension of the closing of title caused the Club to lose $39,000 to $50,000 in interest on the purchase price of $1,250,000, the Board adopted the decision reached by the Blue Ribbon Committee on that issue.

As to the appropriate quantum of discipline. The discipline in cases involving conflict of interest situations has ranged from a public reprimand to disbarment. See In re Wolk, 82 N.J. 326 (1990) (disbarment for submitting false counsel fee affidavit to court and counselling widowed client to invest $10,000 in company in which the attorney had an interest); In re Humen, 123 N.J. 289 (1991) (two-year suspension for advising client to purchase property from friend, thereby placing friend's interests above those of client, and for serious entanglement of attorney's business concerns with client's); In re Hurd, 69 N.J. 369 (1976) (three-month suspension for misconduct intended to benefit sister by preparing a deed conveying title to elderly client's property to sister, in exchange for $2,000 loan by sister to pay taxes on the property); and In re Hughes, 114 N.J. 612 (1989) (public reprimand for extracting a $22,500 personal loan from client with whom attorney shared an intimate relationship, without advising client to seek independent counsel).

In light of respondent's involvement in serious conflict of

interest situations, of his concealment of his interest in the TCM partnership, and of the fact that his actions were aimed at self-enrichment, a seven-member majority of the Board recommends that he be suspended for a period of three months. Two members would have imposed a public reprimand because of respondent's unblemished professional career of twenty years before this incident, his cooperation with the disciplinary authorities and the absence of financial harm to the Lions Club.

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

Dated: 11/1/1993

By: _____
Raymond R. Trombadore
Chair
Disciplinary Review Board