SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 97-419

IN THE MATTER OF

ROBERT S. SUSSER

AN ATTORNEY AT LAW

Decision

Argued: December 18, 1997

Decided: June 10, 1998

Brian J. Molloy appeared as special presenter.

Theodore W. Geiser appeared on behalf of respondent.

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 Miles S. Winder, III. The complaint charged respondent with violations of RPC 8.4(b) (committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness) and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud,

deceit or misrepresentation) (counts I and II), RPC 1.7(a) and (b) (conflict of interest) (count III) and RPC 1.7 and RPC 1.8(a) (business transaction with client) (count IV).

Respondent was admitted to the New Jersey bar in 1979. In 1989 he received a private reprimand for engaging in a conflict of interest, in violation of RPC 1.7. There, respondent represented a corporation that owed $47,000 to a matrimonial client of respondent. To compound matters, respondent became a stockholder and officer in a corporation that assumed the indebtedness to the matrimonial client.

On November 18, 1997 respondent was suspended for three years for prematurely releasing escrow funds to a corporation in which he had an interest and for misrepresenting the status of the escrow funds to the buyer's attorney.

* * *

This matter was presented by Brian J. Molloy, pursuant to a Supreme Court Order dated August 14, 1996. The Order stated the following:

> It is ORDERED that BRIAN J. MOLLOY, ESQUIRE, having given his consent, is hereby appointed as an uncompensated Special Investigator and, if necessary, Special Presenter, for the purpose of investigating, and if necessary, presenting ethics proceedings under Rule 1:20-3(g)(1) and Rule 1:20-4(g)(1), in Docket Nos. DRB 46, DRB 95-54 and DRB 95-55, effective August 15, 1996, and until further Order of the Court.

This action was necessary because the Office of Attorney Ethics ("OAE") had a conflict involving respondent.

Although respondent contended that, in this matter, the special presenter had exceeded the scope of his authority under the above Order, the Board found that the special presenter's actions were appropriate.

The "False Testimony" in the Parnell Matter

This matter is related to the matter that led to respondent's three-year suspension in 1997. In or about 1985 John Cremeans retained respondent to represent his corporation, Diversified Products, Inc. ("DPI"), in a venture involving the purchase of land and the construction of a small housing development in Neptune. Respondent acted only as counsel to DPI at first. Later on, however, he purchased a one-third interest in DPI. In 1988, DPI needed financing, which was provided by John Cremeans' father, Robert Cremeans, who also began to acquire corporate stock. Some of the loans were the subject matter of promissory notes signed by respondent and John Cremeans on behalf of DPI. Respondent also made loans to DPI.

In the prior ethics matter, respondent was charged with the premature release of escrow funds entrusted to him by Adria and Theodore Parnell, the buyers of property from DPI. Respondent had agreed to escrow $5,000 until DPI completed a "punch list" of items. The escrow check, dated November 17, 1988, was deposited into respondent's trust account on December 9, 1988. However, notwithstanding the escrow agreement, several days later respondent released the funds to his client, DPI, without the Parnells' consent. There,

respondent testified that Robert Cremeans coerced him into releasing the escrow funds to DPI, ostensibly because DPI needed the funds to pay taxes. Although respondent conceded that Cremeans did not threaten him, he alleged that Cremeans intimidated him. Respondent could not recall whether this conversation with Cremeans had occurred in person or by telephone. Respondent never investigated whether Cremeans used the *Parnell* funds to pay DPI's taxes. Cremeans did not testify during the *Parnell* matter, purportedly due to health reasons.

At the hearing of the within matter before the special master, Cremeans denied that he had demanded the release of the escrow funds. Cremeans contended that he was not even aware that the *Parnell* funds had been escrowed until respondent so notified him about six or seven months after the release of the funds. According to Cremeans, respondent informed him that the escrow money had been spent. In addition, Cremeans testified that, in February 1989, he paid DPI's taxes with $11,000 of his own money. Moreover, Cremeans continued, on December 21, 1988, several weeks after the *Parnell* closing, a check in the amount of $5,000 was issued by DPI to Renaissance Construction Corp., a construction company owned by respondent. Cremeans insinuated that respondent converted the escrowed funds to his own use, adding that he knew of no debt due to Renaissance Construction Corp. from DPI.

Respondent, in turn, maintained that Cremeans demanded the release of the escrow funds. Although at the *Parnell* hearing respondent could not recall where that conversation

had taken place or whether it had been conducted by telephone or in person, he testified in this matter that the conversation had occurred in person in his office.

The complaint charged respondent with giving false testimony to the special master in the *Parnell* matter.

The Bankruptcy Matter

On March 24, 1995 respondent filed a Chapter 13 bankruptcy petition on his own behalf. Although his last mortgage payment had been made about two years earlier and foreclosure proceedings had begun, respondent's bankruptcy plan provided that he would cure the arrearages over several months, while making all current mortgage payments. After the mortgage lender, Collective Bank, filed a motion for relief from the automatic stay, respondent filed an opposing certification, which read as follows:

> From the moment I filed the petition in this matter, I began setting aside approximately $1,700.00 per month for the monthly mortgage payment. Therefore, I am prepared to satisfy my obligations under the proposed plan.

The bankruptcy judge denied the bank's motion for relief from the stay. The bank then served a subpoena on respondent, requesting proof that the funds had been set aside. Respondent submitted a copy of his July 1995 checking account statement showing a balance of $3,523 as of July 1, 1995 and a balance of $5,897 as of July 31, 1995. Respondent's mortgage payments of $1,730 were due on the first day of each month. Accordingly, on July 1, 1995 respondent's balance should have been at least $6,920 in order to satisfy the four

mortgage payments due from April through July. Because as of July 1, 1995 the balance was only $3,523, there was a shortfall of $3,397.

For his part, respondent testified that he was confused about precisely how much should be segregated. Respondent explained that, because his mortgage loan had an adjustable interest rate, he had unsuccessfully tried to ascertain from Collective Bank the exact amount of the mortgage payment; the rate changed as of May 1 of each year. In addition, respondent contended that, because the bank had failed to pay his real estate taxes, he did not know whether to include the usual escrow amount in his mortgage payment.

The Katz Matter

In March 1983 Jerome and Margaret Katz retained the law firm of Blaustein and Wasserman to represent them in a claim involving termite infestation of their home. Although the Katzes sought out Allen Wasserman's representation, their matter was handled by respondent, then an associate with the firm. In September 1983, when respondent left that firm to join Karasic & Stone, the *Katz* file went with him. However, Karasic & Stone had represented one of the defendants in the *Katz* litigation, a realtor named Barry Kantrowitz, in a prior unrelated collection matter. Due to this conflict of interest, Kantrowitz objected to respondent's participation in the *Katz* litigation, insisting that he withdraw as counsel. In June 1984 respondent filed a substitution of attorney naming Philip Leone as new counsel for the Katzes.

Although all appearances suggested that respondent had withdrawn as counsel for the Katzes, he continued to represent them, albeit not of record. On September 21, 1984, three months after respondent filed the substitution of attorney, he sent a letter to Dr. Lyle Hagmann, an expert retained on behalf of the Katzes. The letter stated as follows: "Enclosed is a Brief I wrote in the Katz case. For your information, Phil Leone, Esq., is co-counsel." Respondent concluded the letter by inviting Hagmann to contact him (as opposed to Leone) if he needed further information. On September 26, 1984 respondent sent a second letter to Hagmann, reading as follows:

> First, because of a conflict of interest among the defendants in this case, I was required to substitute another attorney into the case. Still, I am primarily responsible behind the scenes for putting the case together. However, in your report, you must remove any reference of my presence at your inspection or information I have provided to you. You simply should refer to information provided to you by plaintiff's attorney.

At the ethics hearing, respondent conceded that he had attempted to conceal his continued involvement in the *Katz* litigation and that his conduct was wrong:

> Q. You told the expert that you were primarily responsible behind the scenes, right, for putting the case together? You didn't want your involvement known. Did you?
> A. That is correct.
> Q. And, in fact, you told the experts delete any references to you in the expert report. Didn't you?
> A. Yes.
> Q. [Y]ou didn't want him to disclose the fact that you were involved. Isn't that right?
> A. That is correct. . . .
> Q. Were you trying to conceal the fact that you were still involved in the case?
> A. Yes. . . .

Q. Did you feel that you were being dishonest or misleading in any way in connection with that deceit?
A. Yes.

Moreover, respondent admitted at the ethics hearing that his computer had generated letterhead with Leone's name, thereby creating the impression that Leone had prepared letters and documents actually prepared by respondent. Leone signed the documents prepared by respondent. One such example was the trial brief. On this issue the following exchange took place:

Q. Why didn't you sign it in your own name?
A. Because I was no longer counsel of record.
Q. Because it was a conflict of interest?
A. Yes.
Q. . . . . In your mind, you couldn't sign it because of a conflict, but you could prepare it. Is that right?
A. In my mind?
Q. Yes.
A. That is a good question. I don't know the answer to that question.
Q. Well, what were you thinking at the time, Mr. Susser?
A. At the time – from the standpoint of conflict of interest law, I thought I should divorce myself completely from the case.
Q. You didn't do that. Did you?
A. That is correct. I did not. . . I thought I was doing what was best for Mr. and Mrs. Katz by what I was doing. And, Mr. Molloy, you and I know that I was placing myself in jeopardy because of that.

* * *

Q. Was that a conscious decision you made at the time?
A. Yes, it was a very conscious decision.

* * *

Q. So in jeopardy, you mean in terms of ethically? I am just understanding the nature of the jeopardy you are talking about.

A. Yes, I guess, ethical.

Although respondent formally withdrew as counsel of record, he appeared at the *Katz* trial and was involved in settlement negotiations. At one point, he even attempted to address the judge, who, according to an affidavit filed by Jerome Katz, would not permit respondent to be heard due to the conflict of interest.

Ultimately, the Katzes settled the termite infestation case by accepting $45,000 from the defendants. The Katzes then consulted Wasserman, whom they had originally retained, about setting aside the settlement on the basis that respondent had coerced them into accepting it. When respondent learned that Wasserman was representing the Katzes, he asked Wasserman to protect his litigation expenses from any recovery. It did not escape the Board's attention that in respondent's accounting of expenses he listed three items incurred after he had withdrawn from the case.

According to Wasserman, his motion to vacate the settlement was granted based, in part, on the conflict of interest in which respondent was involved. The Katzes received a judgment of approximately $280,000. Respondent then filed a motion for an attorney's lien, seeking fees for his prior representation of the Katzes. In his affidavit in support of his motion, respondent stated that "I was attorney for Mr. and Mrs. Katz until June 1984 when as the result of a discovered conflict of interest, I withdrew as counsel."

The Cremeans Conflict of Interest Matter

As mentioned earlier, respondent was counsel for DPI. He also represented Robert Cremeans and, in some cases, Cremeans' wife, Thelma, including in the refinance of their home mortgage and unconditional guarantees for loans to DPI signed by the Cremeanses or Robert Cremeans individually. According to Cremeans, respondent represented both him, as buyer, and DPI, as seller, in the conveyance of two properties; allegedly Cremeans never received title to those properties. Cremeans testified that, although respondent prepared a mortgage to secure a $200,000 loan that Cremeans made to DPI, respondent instructed him not to record the mortgage. Furthermore, in September 1992 the Cremeanses guaranteed the payment of a $25,000 loan made by Tinton Falls State Bank to respondent. Respondent's bankruptcy proceeding discharged his indebtedness to the bank. Cremeans testified at the ethics hearing that he continues to pay that loan every month.

Respondent never suggested to Cremeans that he seek independent counsel, disclosed to him any conflict of interest in connection with the multiple representation or obtained Cremeans' consent to the representation.

Respondent acknowledged that at various times he represented DPI, Robert Cremeans, Thelma Cremeans and John Cremeans and that sometimes the parties were at opposite ends of a transaction. He asserted that he did not then and still does not perceive any conflict of interest under those circumstances. Respondent admitted that, when he instructed Robert Cremeans not to record the mortgage given to him by DPI as security for loans, he was representing DPI, not Cremeans, and that he failed to explain this circumstance to Cremeans.

* * *

The special master dismissed the charges of violations of RPC 8.4(b) and (c) in the *Parnell* matter, finding that, in light of the conflicting testimony offered by Cremeans and respondent, he could not conclude by clear and convincing evidence that respondent had lied under oath. With respect to the bankruptcy matter, the special master found that respondent lied under oath in certifying to the bankruptcy court that he had set aside sufficient funds to pay his mortgage, in violation of RPC 8.4(b) and (c). As to the *Katz* matter, the special master concluded that respondent had engaged in a conflict of interest, in violation of RPC 1.7(a) and (b). Finally, the special master found that respondent had also engaged in a conflict of interest in the *Cremeans* matter, in violation of RPC 1.7 and RPC 1.8(a).

The special master recommended a three-year suspension and the appointment of a proctor to monitor respondent's practice after his reinstatement.

* * *

Following a *de novo* review of the record, the Board is satisfied that the special master's finding of unethical conduct are supported by clear and convincing evidence.

In the *Parnell* matter, the special master correctly dismissed RPC 8.4(b) and (c). RPC 8.4(b) requires the commission of a criminal act. While there might be some suspicion that

respondent was not truthful in his testimony in the *Parnell* matter, there was no showing that he had been charged with, much less convicted of, perjury. Moreover, in light of Cremeans' testimony that he had not demanded the release of the escrow funds and respondent's testimony to the contrary, and in the absence of any documentary proofs, the evidence of wrongdoing is not clear and convincing. Accordingly, the charges in count I were appropriately dismissed.

With respect to the bankruptcy matter, respondent filed a certification to the bankruptcy court, stating in clear and unequivocal terms that, upon the filing of his bankruptcy petition, he had set aside sufficient funds to pay his mortgage obligations. Given that respondent filed the bankruptcy petition in March and had a monthly mortgage obligation of $1,730 payable on the first of the month, at the time of his July certification he should have already set aside $6,920. However, respondent's bank account statement showed a balance of $3,523 as of July 1, or $3,397 less than was required. Respondent's explanation that he was confused over the amount of the mortgage was not persuasive; respondent unambiguously certified to the court that the funds had already been segregated.

Respondent's misrepresentation to the court in this context violated RPC 8.4(c). However, just as in count I, there was no showing that respondent was charged with or convicted of perjury in connection with his bankruptcy certification. Thus, the Board dismissed the charge of a violation of RPC 8.4(b). The Board found, however, that respondent violated RPC 3.3(a)(1) (false statement of material fact to a tribunal). Although

respondent was not specifically charged with a violation of that rule, the facts in the complaint gave him sufficient notice of the alleged improper conduct and of the potential violation of that rule. Furthermore, the record developed below contains clear and convincing evidence of a violation of that RPC. Respondent unequivocally represented to the bankruptcy court that he had segregated sufficient funds to pay his mortgage obligation. Respondent did not object to the admission of such evidence in the record. In light of the foregoing, the Board deemed the complaint amended to conform to the proofs. R. 4:9-2; *In re Logan* 70 *N.J.* 222, 232 (1976), and found a violation of RPC 3.3(a)(1).

Respondent's misconduct in the *Katz* matter in count III was a flagrant violation of the conflict of interest rules. After filing a substitution of counsel due to an admitted conflict of interest, respondent continued to represent the Katzes "behind the scenes." He wrote the trial brief signed by Leone; he prepared and generated from his computer other documents with Leone's letterhead for Leone's signature; he wrote in a letter to the Katzes' expert witness that, although he was removed due to a conflict of interest, he remained primarily responsible for the case; and he appeared at the *Katz* trial, engaged in settlement negotiations and even tried to address the judge, who would not permit him to be heard.

Although respondent admitted that he had engaged in a conflict of interest and had tried to conceal his misconduct, respondent's counsel argued that no such conflict existed. Counsel contended that, notwithstanding respondent's admission, respondent was mistaken because he does not comprehend conflict of interest issues. The Board disagreed with

counsel that there was no conflict. It is unquestionable that everyone involved in the case, including respondent, the judge in the *Katz* matter, Kantrowitz, Wasserman and the attorneys in the firm of Karasic & Stone who permitted respondent to withdraw, believed there was a conflict. The conflict of interest was obvious and respondent not only knew it, but tried to hide it.

Moreover, respondent's attempt to conceal his involvement in the case after his withdrawal supports a finding of a violation of RPC 8.4(c) and (d) (conduct prejudicial to the administration of justice). Although respondent was not specifically charged with a violation of RPC 8.4(c) and (d), the facts in the complaint gave him sufficient notice of the alleged improper conduct and of the potential violation of those rules. Furthermore, the record developed below contains clear and convincing evidence of violations of RPC 8.4(c) and (d). Respondent did not object to the admission of such evidence in the record. Indeed, he conceded his dishonesty and deceit. In light of the foregoing, the Board also deemed this count of the complaint amended to conform to the proofs. R. 4:9-2; *In re Logan, supra,* 70 *N.J.* 222, 232 (1976).

Respondent disregarded the conflict of interest prohibition in the *Cremeans* matter as well. While ordinarily there is little cause for concern if an attorney represents a small business and the principals of that business so long as their interests are identical, here, respondent's conduct was more serious. He owned an interest in the corporation. Respondent represented the corporation in matters in which the individual shareholders had interests that

conflicted with those of the corporation. For example, in a transaction in which Robert Cremeans loaned money to DPI, respondent advised Cremeans not to record the mortgage given as security for the loan. Respondent acknowledged that, in this transaction, he failed to inform Cremeans that he was representing the corporation, not Cremeans individually. He also failed to advise the Cremeanses to seek independent counsel when they guaranteed a loan on his behalf, with the result that respondent discharged his indebtedness through bankruptcy, while the Cremeanses are still paying off the loan.

* * *

In sum, respondent engaged in two flagrant conflict of interest situations and misrepresented facts to a court. Not only did he continue to represent the Katzes after he had filed a substitution of attorney, but he also deliberately concealed his involvement in the case. He made a conscious decision to disregard his obligation to Kantrowitz, his firm's former client, who had objected to his participation in the case. Although respondent claimed that he was doing what he thought was in the Katzes' best interest, an ulterior motive surfaced when he filed a motion to recover attorney's fees for his representation in the *Katz* litigation. The record supports the conclusion that, rather than being moved by altruism in protecting his client's interest, respondent was motivated by greed. While the Katzes may not have suffered economic injury, they were required to retain new counsel to set aside the settlement

on the basis of respondent's conflict of interest and were delayed in receiving compensation for their damages.

In *Cremeans*, the other conflict of interest matter, respondent represented DPI and its individual shareholders – sometimes against each other. In addition, he owned an interest in DPI and engaged in business transactions with Cremeans. At no time did respondent disclose the conflict to Cremeans or obtain his written consent to the representation.

In *In re Humen*, 123 *N.J.* 289 (1991), the Court discussed the pitfalls of entangling the attorney's business concerns with those of his or her clients:

> We have warned attorneys repeatedly of the dangers of engaging in business transactions with their clients. See *In re Silverman*, 113 *N.J.* 193, 214, 459 *A.*2d 1225 (1988); *In re Reiss* 101 *N.J.* 475, 486, 502 *A.*2d 560 (1986) In *In re Wolk*, 82 *N.J.* 326, 333, 413 *A.* 2d 317 (1980), we stated:
>
> > When a lawyer has a personal economic stake in a business transaction, he must see to it that the client understands that the attorney's objectivity and ability to give the client undivided loyalty may be affected.
> >
> > [*In re Humen*, *supra*, 123 *N.J.* at 300]

Generally, in cases involving conflicts of interest, absent egregious circumstances or economic injury to clients, a reprimand constitutes appropriate discipline. *In re Berkowitz*, 136 *N.J.* 134 (1994). However, when serious economic injury results, a term of suspension has been imposed. *In re Doyle*, 146 *N.J.* 629, 642 (1996). Here, the Cremeanses guaranteed a $25,000 loan extended to respondent. After respondent's obligation to repay the loan was discharged in bankruptcy, the Cremeanses were required to honor their loan guarantee. Had respondent instructed them to obtain independent counsel, they might not have guaranteed

respondent's loan. Because the Cremeanses suffered serious economic injury, a period of suspension is appropriate for this violation alone.

In the bankruptcy matter, respondent displayed a flagrant disregard for the truth in filing a certification knowing that a judge would be relying on his representations in ruling on a motion. Yet, at the ethics hearing, respondent seemed oblivious to the seriousness of this misconduct. He showed no remorse in having lied to a judge and his adversary.

In *In re Haft*, 146 *N.J.* 489 (1996), the attorney violated RPC 1.7(b), RPC 1.8(a) and RPC 8.4(c) by borrowing money from a client without explaining the risk to the client or advising the client to consult independent counsel. The attorney also gave the client a mortgage note as security for the loan, without disclosing that the property that was the subject of the mortgage was also owned by respondent's wife or that there were two mortgages that had priority over the client's. The attorney did not record the mortgage. Moreover, on a subsequent mortgage application, the attorney failed to disclose the existence of the mortgage given to the client, disclosing only the two recorded mortgages. The attorney was suspended for one year.

In *In re Humen, supra,* 123 *N.J.* 289 (1991), the attorney represented a friend, an elderly widow, in the purchase of property from another friend of the attorney, who took back a purchase money mortgage. Because of the seller's concern that the client would not be able to make the mortgage payments, the attorney did not record the deed or mortgage. The attorney then persuaded the client to permit him to manage the property, after which he

never accounted to the client for the income produced by the property. Instead, he misrepresented to the client that the property was operating at a loss. The attorney bought the property from the client, paying less than she had three years earlier, despite the appreciation of property values. Finally, the attorney loaned money to the client on terms favorable to the attorney, without disclosing to her that he was the lender. He also failed to advise the client to seek independent counsel in any of these transactions. The Court suspended the attorney for two years.

Arguably, respondent's disciplinary history could mandate disbarment. He received a private reprimand for engaging in a conflict of interest, the same type of misconduct committed here. Moreover, he recently was suspended for three years. However, the *Cremeans* matter was related to the *Parnell* matter, for which respondent received the three-year suspension. Most likely, he would not have received additional discipline had those matters been heard simultaneously. Furthermore, respondent's misconduct in the *Katz* matter occurred fourteen years ago, in 1984. The passage of time is a mitigating factor. *In re Kotok*, 108 *N.J.* 314 (1987).

Given the seriousness of respondent's misconduct, the economic harm to the Cremeanses and his ethics history, the Board unanimously determined to impose a suspension of two years, consecutive to the three-year suspension previously imposed. Respondent must complete the Institute for Continuing Legal Education core courses within one year following his reinstatement. In addition, respondent must practice under the supervision of a proctor for three years. Two members did not participate.

The Board further determined to require respondent to reimburse the Discipline Oversight Committee for administrative costs.

Dated: 6/10/98

LEE M. HYMERLING
Chair
Disciplinary Review Board