SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-248

IN THE MATTER OF

JO DOIG,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: December 16, 1992

Decided: April 6, 1993

Joan Markiewicz Weidner appeared on behalf of the District VII Ethics Committee.

Lowell F. Curran, Jr. 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 private reprimand filed by the District VII Ethics Committee (DEC). Upon review, the Board determined to treat the matter as a recommendation for public discipline.

Respondent was admitted to the practice of law in New Jersey in 1975 and maintains an office in West Windsor Township, Mercer County.

COUNT ONE

Respondent and Raymond Freeman were business partners, along with Gordon Stults, in Orchard View Associates (hereinafter OVA). Until a formal agreement was executed on December 30, 1985, OVA had no written partnership agreement. However, the partnership existed as early as July 1985, when OVA contracted to purchase property

known as Orchard View, and obtained an option to purchase additional property.

In approximately October 1985, Freeman advised respondent that he and Joan Stupler (the grievant herein) were planning to purchase a piece of real estate.[1] Respondent and Stupler did not know each other at that time. Freeman provided respondent with the necessary information to prepare a partnership agreement for Freeman and Stupler to form the Ceres Group, the purpose of which was to invest in real estate.[2] The Ceres Group agreement stated that Stupler and Freeman had each contributed $50,000 in capital and were each due one-half of the net profits and losses. The agreement set out a relationship whereby the partners shared equally the rights and obligations of the partnership. After respondent drafted the partnership agreement, she prepared a cover letter and bill addressed to Stupler and Freeman. Freeman picked up the documents at respondent's office and Stupler paid the bill. At that point, respondent and Stupler had still never met or spoken to each other.

On or about November 14, 1985, Stupler entered into an agreement to purchase property in the township of Cranbury. In early December 1985, Freeman asked respondent to represent Stupler in the purchase. Freeman told respondent that, although only Stupler was named in the contract of sale as purchaser, Freeman and

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[1] Stupler and Freeman were partners in several real estate transactions. Stupler also had an interest in OVA.

[2] Along with Freeman and Stupler, members of both of their families were also named as partners. However, the other family members had no actual interest, except in the case of a potential default by Stupler or Freeman.

Stupler's intention was to transfer title to both Freeman and Stupler after the purchase, their respective interests to be held pursuant to their partnership agreement. The reason for this arrangement was that, while it was Freeman and Stupler's intent to own the property together, Freeman's poor credit history made it unlikely that they would be granted a mortgage, if he applied together with Stupler. As the DEC pointed out, Freeman considered himself to be a purchaser from the beginning, as evidenced by his notations on a letter from Donald S. Driggers, Esq., the sellers' attorney, to Stults, the real estate broker (Exhibit R-10). On that letter, in which Driggers suggested changes to the contract, Freeman wrote a notation, stating, in part, "[w]e have right to cancel or pay over the 1,000.00 if we choose." On December 6, 1985, respondent wrote to Driggers requesting the change Freeman had suggested. Respondent still had never spoken to Stupler.

The DEC found that it was unclear when Stupler first communicated with respondent regarding the Cranbury property. Stupler claimed that there was almost no contact between them, while respondent described minimal contact, typical in simple real estate transactions. The record reveals that respondent dealt with Freeman on most issues. For example, Freeman instructed respondent to request that the title insurance company add Warren Stupler (Stupler's son) and Freeman as purchasers in the insurance binder, then had the company remove Freeman as a purchaser.

Closing of title took place on February 21, 1986.[3] Title was conveyed to Joan and Warren Stupler, who gave a mortgage to Norcrown Bank. Because Warren Stupler did not attend the closing, the mortgage was given by Stupler in his name, pursuant to a power of attorney prepared by respondent. The deed, naming Joan and Warren Stupler as grantees, was recorded on March 10, 1986 (Exhibit C-4). According to Stupler, there was a discussion at the closing about adding Freeman's name to the title (T10/30/91 211). The deed was re-recorded on May 16, 1986, after respondent changed it to read "Joan Stupler and Warren Stupler and Raymond G. Freeman, tenants in common". At the bottom of the deed, respondent added the language: "This deed is being rerecorded to include the name of Raymond G. Freeman which was omitted by mistake at the time it was originally recorded" (Exhibit C-5).

With regard to how the deed was amended and re-recorded, Stupler contended that, after the closing, she received a proposed deed in the mail, granting each party a one-third share.[4] This was contrary to the agreement that Stupler and Freeman would each own one-half. Stupler did not sign the deed.[5] Further, she denied ever receiving a copy of the re-recorded deed with Freeman's name thereon.

Respondent testified that she planned to prepare a new deed

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[3] According to Stupler's testimony, she met respondent for the first time on that date (T10/30/91 210).

[4] Stupler was uncertain as to who mailed the deed to her (T10/30/91 221).

[5] Stupler testified that Freeman asked her not to sign the deed (T10/30/91 222).

from the Stuplers, as grantors, to the Stuplers and Freeman, as grantees. She testified further that she had told Stupler and Freeman that the transfer could be made only after the title insurance policy issued. However, Stupler advised respondent that her son could not come to the office. Respondent testified that, instead of preparing a power of attorney, as was done for the closing, she contacted the title company and discussed adding Freeman's name to the deed to the Stuplers. Although respondent claimed that she discussed this with Freeman and Stupler, Stupler denied that that was the case. Respondent stated that, since no one had objected to this method, she had added Freeman's name and re-recorded the deed.

* * *

The ethics complaint also charged respondent with a violation of RPC 1.7, in that she engaged in a conflict of interest without disclosure of the conflict to Stupler.

Respondent and Stupler disagreed as to Stupler's knowledge of the business relationship between respondent and Freeman in connection with OVA. Stupler asserted that she first learned that respondent was a partner in OVA after the Cranbury property closing (T10/31/91 119). Respondent admitted that she had never told Stupler about her relationship with Freeman, explaining that she did not think it was necessary. However, respondent claimed that, during conversations with Freeman, he had made reference to the fact that he had disclosed to Stupler that respondent was a partner

in OVA. These conversations allegedly took place prior to the drafting of the Ceres Group partnership agreement.

COUNT TWO

In March 1989, OVA was planning to purchase certain real property. Freeman did not have the necessary funds to make the purchase and, in addition, owed money to Stults (the third partner in OVA). Accordingly, on March 16, 1989, Freeman and Stults entered into an agreement whereby Freeman would transfer his share in OVA to Stults. If the property were sold in the future, Stults would be reimbursed for the sum Freeman owed him, plus interest. The agreement also provided that Stults would pay Stupler $32,000 from the proceeds of the sale and that any remaining funds would be paid to Freeman. On March 20, 1989, the property was transferred to OVA, the partners of which were only respondent and Stults at that time.

At the time of the above agreement, OVA had a contract with a third party for the sale of the property for $750,000, subject to certain contingencies involving the subdivision of the property. Ultimately, however, the deal fell through. By May 1989, OVA was having difficulty selling the property for as little as $130,000, the amount of the mortgage.

In August 1989, respondent filed a bankruptcy petition on behalf of Freeman. One of the questions on the financial statement asked if the debtor had transferred any real or personal property within the last year. Freeman answered "no." Another question

asked if any person was holding anything of value in which the debtor had an interest. Freeman again answered "no." A third question asked if the debtor had made an assignment of property for the benefit of creditors or made a general settlement with creditors. Freeman also answered "no." Respondent signed the petition as attorney for Freeman.

The ethics complaint charged respondent with a violation of RPC 3.3, in that she failed to disclose a material fact to a tribunal, where such disclosure was necessary to avoid assisting an illegal, criminal or fraudulent act by the client. Allegedly, respondent was aware that Freeman had transferred his interest in OVA to Stults when the bankruptcy petition was filed and nevertheless, failed to disclose that fact.

Respondent testified that she was aware that OVA was experiencing difficulty in selling the property for even the amount of the mortgage. There was no evidence that OVA had any other holdings or any equity in the property. Respondent also explained that she never thought about OVA when reviewing Freeman's financial statement, most likely because it had no value.

COUNT THREE

Stupler, who was a named creditor in Freeman's bankruptcy petition, noted that Freeman's interest in OVA was not listed, although she believed that he was a partner and that there was a contract to sell the property for $750,000. Accordingly, Stupler's attorney at that time contacted John F. Bracaglia, Esq., the

trustee in bankruptcy, who scheduled a Section 341 hearing to be held in May 1990.[6] During the Section 341 hearing, aware that the contract for sale of the property had fallen through, respondent contended that the property was only worth $130,000 and that the partners had invested more than that amount to purchase and maintain the property.

The ethics complaint alleged that that offer of information at the Section 341 hearing constituted testimony by respondent while she was an attorney in the case. The complaint alleged a violation of RPC 3.7, which prohibits an attorney from acting as an advocate at a trial in which the attorney is likely to be a witness.

* * *

The DEC determined, with regard to the first count, that respondent had violated RPC 1.7(b) through her dual representation of Stupler and Freeman without obtaining their consent after full disclosure.[7] The DEC noted that, even if respondent's argument that she had represented only Stupler was to be accepted, respondent still had an obligation to obtain Stupler's consent to the representation, after disclosure.

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[6] Although a taped record of the Section 341 hearing would routinely have been made, under standard procedures it would have been destroyed after a period of time. Bracaglia testified that he assumed that the tape had been destroyed by the date of the DEC hearing (T11/8/91 165-166).

[7] The complaint did not specify which sections of RPC 1.7 had allegedly been violated. During the DEC hearing, the presenter stated that the relevant sections of RPC 1.7 were (b) and (c). The complaint also did not state which sections of the pertinent RPCs were in question in the other counts of the complaint. However, a review of the language of the complaint reveals that the sections are RPC 3.3(a)(2) and RPC 3.7(a).

The latter part of Count One charged respondent with a violation of RPC 1.7(c), when title to the property was transferred to Freeman. The DEC concluded,however, that the rule did not apply to that situation because it was not the multiple representation that was improper but, rather, respondent's addition of Freeman's name to an already recorded deed and of the explanatory language.[8] Although the DEC noted that "it was improper to change a deed in that manner irrespective of whether the respondent was a business partner of Freeman," no finding was made of unethical conduct.

Count Two alleged a violation of RPC 3.3(a), in that respondent failed to disclose to a tribunal a material fact -- the transfer of Freeman's interest in Orchard View Associates -- where disclosure was necessary to avoid assisting an illegal, criminal or fraudulent act by the client. The DEC accepted respondent's testimony that she believed that Orchard View had no equity and that, at the time, she had not considered Freeman's involvement in OVA, which she determined had no value. The DEC found that respondent had not violated RPC 3.3(a).

Count Three charged respondent with a violation of RPC 3.7, in that she testified at Freeman's Section 341 hearing while she was serving as his attorney. The DEC did not find that respondent's conduct in this regard was unethical.

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[8] See discussion, supra.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. The DEC found that respondent had violated RPC 1.7(b) and that the other charges against respondent had not been proven by clear and convincing evidence. The Board agrees.

The first count of the complaint charged respondent with a conflict of interest, in violation of RPC 1.7(b). That rule states:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
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> (2) the client consents after a full disclosure of the circumstances and consultation with the client, except that a public entity cannot consent to any such representation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.[9]

The DEC properly determined that respondent had violated RPC 1.7(b), by representing both Stupler and Freeman "beginning with the preparation of the partnership agreement and continuing through the 'transfer' of title to the Cranbury property from the Stuplers

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[9] Although the record refers to the relationship between respondent and Freeman as that of business partners, there is support in the record for a finding of an attorney/client relationship between them as well (T11/20/92 10-13).

to the Stuplers and Freeman" (Hearing Panel Report at 9). Based upon the record, it is clear that Stupler would have reasonably believed that respondent represented both of them. Indeed, Stupler testified that ". . . Mr. Freeman was to be my 50 percent partner and I trusted him to handle it. He knew the attorney and she would be representing both of us as partners" (T10/31/91 40-41).

Respondent, however, contended that she had represented only Stupler and her son at the closing, even though she knew Freeman would be a partner in the transaction (T11/8/91 113, 117). This contention has no merit. Respondent drafted the Ceres partnership agreement on behalf of both parties; she sent her bill to both; she drafted a power of attorney for the transaction in which both were involved and handled the closing; and she later transferred the title to the Stuplers and Freeman. Further, respondent communicated almost exclusively with Freeman. A reasonable review of the transaction leads to the conclusion that respondent was representing both Stupler and Freeman.

Respondent argued that, even if she had represented both parties, her representation of one was not materially limited by her representation of the other; she contended that there was "a unity of purpose between the two" (Respondent's Memorandum at 5). The record does not reveal this to be the case. Stupler and Freeman were not in equal positions entering into the transaction: Stupler was to advance the funds and sign the mortgage; Freeman was to manage the property. The possibility of a conflict between the two was evident. Yet, respondent referred to it as a "fanciful

possibility." If, in fact, respondent held the belief that her representation of one could not be materially limited by her representation of the other, that belief could not be deemed reasonable. Indeed, the record reveals that respondent was unable to recognize at what point her clients were in conflict. The following exchange took place before the DEC:

> A. I knew that they weren't getting along as partners, but there was no question about the fact that they were both involved in this venture.
>
> Q. What led you to believe that they were not getting along as partners?
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> A. Well two things, number one Ray had come to me and he had gotten with [sic] this notice of violations from the Township during the summer, I forgot which year actually but it's in my file. And apparently Cranberry [sic] Township was citing him because they hadn't gone and made the application for site plan approval. And he asked me if I would represent them on that. But he indicated to me that he and Joan were having problems because he had gotten all of the violations. He was managing the property at the time. So, I said look I'll prepare -- I'll help you as much as I can, but you're going to have some sort of survey and site plan worked on for the property before you can submit the application. And I filled out the application as much as I could, as I understand, and I gave him a letter to Joan saying if she wanted me to handle this for them, that I would want a $1,000 retainer and I would bill whatever my hourly rate was. I think it was $125 at the time. Then he called me up and said no, she was going to have Don Driggers handle this matter for them.
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> [T11/8/91 28-29]

Even after she recognized that her clients' interests were in conflict, respondent still believed that she could represent both. Respondent placed herself in a situation wherein she served two masters, with undivided loyalty to neither.

Respondent was required to obtain the consent of Stupler and Freeman to the dual representation after full disclosure of not

only the possible difficulties in the dual representation, but also of her business relationship with Freeman. This she did not do. As the DEC noted, "[e]ven if it could be said that the respondent did not represent Freeman in these matters, the hearing panel also finds that the [sic] she was required by RPC 1.7(b) to disclose her business relationship with Freeman before undertaking representation of Stupler" (Hearing Panel Report at 12).

Respondent testified that she did not disclose her relationship with Freeman to Stupler because Freeman had done so.[10] The rule, however, does not anticipate that the client should disclose relevant information on behalf of the attorney. Freeman, a lay person, would not have had the knowledge to fully advise Stupler of the potential pitfalls of the arrangement they were anticipating. Respondent's statement that she "didn't think it was necessary" to advise Stupler of her relationship with Freeman evidences her lack of understanding of the rule requirements, as well as of its purpose.

Respondent also acted unethically when she altered the deed to reflect Freeman's ownership of the property. Not only did she not inform Stupler and the bank of her action but, more seriously, she misrepresented the reason for the inclusion of Freeman's name on a recorded document, in violation of RPC 8.4(c).[11] Indeed, as the

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[10] Stupler testified that she did not know of the relationship.

[11] Although the complaint does not allege a violation of RPC 8.4(c), the evidence supports a finding that respondent violated that rule. Respondent admitted that she was aware of the reason why Freeman's name was not listed on the mortgage application and of the agreement to transfer title to Freeman after the closing. The pleadings are, therefore, deemed to be amended to conform to

DEC noted,

> [o]ne conclusion that can be drawn from this testimony is that the respondent wanted to conceal from the Bank the fact that the property was being transferred to Freeman, whose credit history was bad. The respondent also testified that she was on the Board of Directors of Norcrown Bank. These facts raised questions about the conduct of the respondent that were not the subject of complaint. However, they caused sufficient concern that the hearing panel did not want them to go unnoticed. [Panel Report, footnote 2 at 6].

In the second count of the complaint, respondent was charged with failure to disclose a material fact to a tribunal where the disclosure was necessary to avoid assisting her client in an illegal, criminal or fraudulent act. When Freeman asked respondent to represent him in his bankruptcy proceeding, respondent gave Freeman a worksheet, which is part of the bankruptcy petition, to be filled out. She then had his answers typed. Information concerning Freeman's assignment to Stults was not included in the petition.

According to respondent's testimony, she believed that Freeman's interest in the property had no value and, accordingly, it was not included in his petition.[12] With regard to this issue, the following exchange took place during the DEC hearing:

> Q. All right. He did not reveal that transfer or that assignment in the petition, isn't that correct?
>
> A. Yes.
>
> Q. And wasn't that transfer or assignment from Mr. Freeman to Mr. Stolts [sic] within the one year period of time raised in that question of the petition?

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the proofs.

[12] Bracaglia testified that he believed that it was not included because Freeman had no ownership interest in it at the time (T11/8/91 183).

A. Yes.

Q. So it should have been noted in the petition, correct?

A. Yes.

Q. Now you're his attorney and you said you reviewed his answers?

A. Yes.

Q. Not only were you his attorney but you were in essence a partner in Orchard View at the time?

A. Yes.

Q. Did you not think it was necessary to question him further about his agreement with Mr. Stolts [sic] ?

A. In hind sight, [sic] I certainly probably should have. I didn't even think of the transfer at all because it had no value. In other words, the property had no value. When I filed the petition there was no equity in this property. I didn't even think of it.

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Q. But if the complaint [sic] tells you I have property, I have real estate, but it has no equity value do you feel you have no further obligation as to acquiring for the basis of that?

A. I would say list it.

Q. You would say list it?

A. I would say list it and put no equity under schedule B1.

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Q. If you had known that the agreement with Mr. Stolts [sic] enabled Mr. Freeman to potentially get money back on the sale of the Orchard View property, would you have entered that information on the petition?

A. Yeah, I'm not sure I would have listed under interests in partnership. I might have listed under contingent, under claims, or I may have listed it under B3, which is property not otherwise scheduled right here.

> Q. You would have listed it but not necessarily in the category that I asked you about, which is interest in partnerships?
>
> A. My gut reaction is that typically it should have been under 12 B, and then I would have exempted, if you wanted to say it had value, then again I would have exempted it under B-4.
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> [T11/8/91 206-210]

Respondent went on to discuss her belief that there was no equity in the property. She explained that her belief was based on, among other factors, general market conditions in the area and the fact that there were no developments and changes in zoning.

The difficulty with respondent's belief is that an appraisal for $450,000 was submitted to the trustee in bankruptcy approximately eight to nine months after the Section 341 hearing. However, given the changes in circumstances surrounding the property, respondent may well have believed at that time that it had no value and, accordingly, did not list it on the petition. Like the DEC, the Board found no clear and convincing evidence of an ethics violation in this regard.

The Board also agreed with the DEC's conclusion that respondent did not violate RPC 3.7. It does not appear from the record that respondent was "testifying" when she offered information as to the value of the Orchard View property. Indeed, Bracaglia explained that an individual offering testimony at a 341 hearing would be under oath. According to Bracaglia, not only was respondent not under oath, but her statement might have been made with the purpose to answer a question that Freeman was unable to answer (T11/8/91 175-176). Bracaglia believed that statement was

intended to explain the value of the property (T11/8/182-183).

The DEC determined that, for the purposes of RPC 3.7, the Section 341 hearing did not constitute a trial.[13]

Respondent's conduct violated RPC 1.7(b) and RPC 8.4(c). Conduct of this sort ordinarily merits the imposition of a public reprimand. A public reprimand was deemed appropriate discipline in In re Chase, 68 N.J. 392 (1975). Chase lent the funds of one client to another without informing the former of the relationship and making the disclosure required under the disciplinary rules. Chase argued that the "representation" mentioned in the disciplinary rule referred to "a legal controversy between multiple clients". The Court, in severely reprimanding Chase, noted that, in that context, representation

> contemplates all the ways in which an attorney can or does act for others, whether in matters of law, business or otherwise. . . . Advice and representation in relation to investments are commonly sought of and afforded by lawyers to laymen. The activity here was squarely within both the letter and the spirit of the rule. (Citations omitted).
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> [Id. at 397].

In In re Hughes, 114 N.J. 612 (1989), an attorney received a public reprimand for his involvement in a business relationship with his paramour, from whom he borrowed a substantial sum of money to finance a business venture, without advising her to seek independent legal counsel.

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[13] With regard to the dispute over the value of the Orchard View property, the Board noted that, apparently after the case was closed, Bracaglia received an appraisal of the property and filed a motion to reopen the case. The motion was misfiled. Bracaglia testified that he intends to re-file his motion to reopen the case (T11/8/91 168-170).

Even in the absence of a conflict of interest, respondent's conduct in connection with the alteration on the deed alone would have warranted a public reprimand.

The Board, by a requisite majority, recommends that a public reprimand be imposed in this matter.[14] Two members dissented from the majority's view, believing that a private reprimand should be imposed. Two members did not participate.

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

Dated: 4/6/1993

By: Raymond R. Trombadore
Chair
Disciplinary Review Board

[14] The Board has noted that, respondent was privately reprimanded, on November 15, 1984, for improper use of a trade name, Princeton Road Legal Services, in connection with her law practice.