SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
DOCKET NO. DRB 90-057

IN THE MATTER OF :

PETER L. HUMEN, :

AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: May 16, 1990

Decided: August 15, 1990

Daniel A. D'Allessandro appeared on behalf of the District VI Ethics Committee.

Mark Denbeaux appeared on behalf of Respondent.

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

This matter is before the Board based on a presentment filed by the District VI Ethics Committee. That presentment details a number of unethical acts by respondent in his representation of Lillian O'Connell.

Respondent was admitted to the practice of law in New Jersey in 1977. He is engaged in the practice of law in Jersey City, New Jersey.

Respondent first met Lillian O'Connell in 1965, when he was employed as a mechanic at a repair shop patronized by Mrs. O'Connell. Respondent later attended St. Peter's College, at which time he became friendly with Mrs. O'Connell, who was employed by the College.

In 1979, Mrs. O'Connell's husband died. Respondent had prepared her husband's will, and began to represent her in the bulk of her legal and financial affairs. For approximately the next eight years, Mrs. O'Connell relied heavily on respondent's advice in business and legal matters.

I. Bartholdi Avenue Property

A. Purchase of Bartholdi Avenue Property by O'Connell

In 1981, respondent advised Mrs. O'Connell to purchase a two-family house on Bartholdi Avenue in Jersey City. Respondent was then friendly with the owner, Thaddeus Lewandowski. At the time of sale, the seller agreed to take back a purchase money mortgage, in the amount of $28,000, on the total purchase price of $44,000.

Respondent claims that the seller had reservations about Mrs. O'Connell's ability to meet the mortgage payments. Allegedly because of the seller's concerns, respondent drafted a rider to the contract of sale that provided that the deed and mortgage would not be recorded until thirty months after the sale. Respondent contended that this was done to permit the seller, Lewandowski, to avoid the necessity for foreclosure action in the event that Mrs.

O'Connell defaulted on the mortgage.[1] The delay in recording the deed and the mortgage had the further effect of eliminating any formal record of Mrs. O'Connell's purchase of the property.

Despite respondent's claim that Mrs. O'Connell was aware of the rider, the committee found, to a clear and convincing standard, that Mrs. O'Connell was neither shown nor advised of the rider when she signed the contract of sale. The committee concluded that, because a traditional closing was not held, and Mrs. O'Connell did not receive copies of either the deed, mortgage or other closing documents, she would not have automatically seen such a rider. Moreover, no documents regarding this sale were recorded until 1987, after respondent purchased the property from Mrs. O'Connell. The committee also found that, although respondent was aware that the seller was married, he did not insist upon a signature from the seller's spouse. He had no explanation as to why he allowed the closing to continue without ensuring good title to his client.

Respondent contended that he did not record any of the documents until 1987 because the title company advised him that an amended deed, containing Mrs. Lewandowski's signature, was required.

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[1] Lewandowski at first denied knowledge of the existence of the rider, and further denied that he requested of respondent that the deed not be recorded. 1T25. (1T refers to the transcript of hearing before the District VI Ethics Committee on October 7, 1985.) It is clear from the balance of Lewandowski's testimony, however, that he was aware that he still retained title to the property since he knew he had to maintain insurance and pay taxes on the property.

Respondent had no evidence supporting this claim, nor could he show that he ever applied for title insurance. The Committee found that, in this instance, respondent was attempting to protect the interests of his friend Lewandowski, as opposed to those of his client, Mrs. O'Connell. His failure to record the deed constituted gross negligence, in violation of DR 6-101 (A)(1), and also created a conflict of interest, contrary to DR 5-105 (A) and in accordance with In re Loring, 62 N.J. 336 (1973).[2]

The Committee further found that respondent had deliberately concealed the existence of the rider from his client and attached the rider after inducing his client to sign the contract of sale. This conduct was viewed by the Committee as a fraudulent withholding of facts from his client, which substantially impaired her ability to protect her interest in the property. The Committee found a violation of DR 7-101 (A)(1)(3).

B. Management of Bartholdi Avenue Property

Mrs. O'Connell managed the Bartholdi property without assistance from respondent until 1983. The record reflects that she collected the rents and made certain disbursements during that time period. In 1983, respondent took over the management of the property. In his response to the grievance, respondent stated that

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[2] The unethical conduct in this case began prior to September 10, 1984, the effective date of the Rules of Professional Conduct. Therefore, both the Disciplinary Rules and the Rules of Professional Conduct apply.

he took over the management of the property because the property was losing money and because Mrs. O'Connell was late on her mortgage payments to Lewandowski.

Respondent's testimony before the hearing panel contradicted this statement. At that time, he testified that the property was in fact making a profit. Additionally, his claim that Mrs. O'Connell was late in her mortgage payments was contradicted by Mr. Lewandowski, who indicated that all payments were within the time specified by the mortgage.

Mrs. O'Connell testified that, after respondent took over the management of the Bartholdi Avenue property, he told her that he was paying a portion of the mortgage to Lewandowski with his own funds because the income from Bartholdi Avenue did not cover the total amount due. 1T94.

Once respondent took over the management of the property, he never formally accounted to his client for either the income produced by the property or the expenses required to maintain the property. Respondent also failed to claim either a profit or a loss for the Bartholdi Avenue property on Mrs. O'Connell's income tax returns, which were prepared by him. From 1982 through 1987, the only reference to the Bartholdi Avenue Property on Mrs. O'Connell's tax returns is a 1982 claim for depreciation of the property based on fifteen-year life. That claim did not reappear in any subsequent year. Moreover, no claim was made for tax deduction for interest paid on the Lewandowski mortgage and no schedule of income or expenses, as required by the tax code, was

prepared. The Committee noted that the absence of a record on the tax returns was particularly troubling, in view of respondent's testimony that he had advised Mrs. O'Connell to purchase the property for "tax purposes." The Committee concluded that respondent's failure to include the property on the tax returns supported "the proposition that Humen did not want a public record of O'Connell's ownership of the property."

The Committee found that respondent's management of the property violated R.P.C. 1.3, as well as R.P.C. 1.4 (a) and (b). Moreover, Mrs. O'Connell's possible exposure to tax liability as a result of respondent's failure to report or account for any income to her from the property constituted a violation of DR 7-101 (A)(3), in the Committee's opinion. The Committee further noted that, even though no charge of misappropriation of client funds was before it, respondent's admission that the Bartholdi Avenue property made a profit and his failure to account for this income violated R.P.C. 1.15 (b).

C. Sale of Bartholdi Avenue Property

In 1984, respondent induced Mrs. O'Connell to sell the Bartholdi Avenue property to him for $40,000 -- $14,000 less than the reconstructed appraisal valuation of $54,000.[3] Exhibit C-26 in

[3] In late 1986, prior to recording any documents regarding the sale from Lewandowski to O'Connell or from O'Connell to Humen, respondent asked Lewandowski to sign a deed transferring the Bartholdi Avenue property directly to him. Respondent told Lewandowski that the transfer of property was a way for Mrs. O'Connell to repay money owed to respondent. 1T30.

evidence. Mrs. O'Connell testified that she sold the property because she believed she was losing money on her investment. She further testified that respondent discouraged her from seeking other buyers or contacting a realtor. 1T113. Respondent contended before the Committee that the lower price reflected the deterioration of the Jersey City neighborhood, although in fact property values were on the rise. He further contended that the actual purchase price was $48,000, but that he reduced the price by $8,000 to allow for fees owed to him by Mrs. O'Connell.

In his initial response to the grievance as well as in his formal answer, respondent stated that he had advised Mrs. O'Connell to seek independent counsel. He admitted, however, at hearing before the Committee, that he had never advised her to seek other counsel.

The October 9, 1984 contract for sale provided, in paragraph four, that respondent, as purchaser, was to be given credit for legal fees and payments made on the property, and was to be given further credit "for any major repairs done, being done or to be done to maintain the integrity" of the property. Additionally, in paragraph 5, respondent claimed a credit for mortgage payments made to the Barbour County Bank on property owned by Mrs. O'Connell in West Virginia.[4]

Subsequently, an "Agreement for Sale of Real Estate" dated August 11, 1986, purported to convey the Bartholdi Avenue property

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[4] As noted infra, mortgage payments on the West Virginia property were covered by the Bartholdi Avenue income, not by funds paid by respondent.

to respondent for $1.00. That document further grants an "unrestricted" power of attorney to respondent, which "shall not be affected by any intervening circumstances, including death or incapacity, but shall survive to allow Peter L. Humen, Esq., the right to effect any transfer he shall so see fit." Exhibit C-18 in evidence.

A deed reflecting the transfer of the property from Mrs. O'Connell to M.L.H. Properties (Respondent) was signed on May 28, 1987, and recorded on September 15, 1987.

Following the payoff of the balance of approximately $26,000 on the Lewandowski mortgage in May 1987, respondent advised Mrs. O'Connell that he would retain the nearly $14,000[5] remaining from the purchase price to cover his fees and monies allegedly owed to him for payments on both the Bartholdi Avenue and West Virginia properties. 1T96 to 97. He did not submit any bill or statement of services to Mrs. O'Connell, either before or after receipt of the funds. In his "Response to Grievance," Exhibit C-25 in evidence, respondent stated that he had "incurred financial obligations" by paying the Lewandowski and West Virginia mortgages and by managing the Bartholdi Avenue property. During testimony before the Committee, respondent admitted, to the contrary, that the rental income on Bartholdi Avenue was more than enough to cover

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[5] There is some confusion in the record as to the exact amount involved. The Hearing Panel Report lists the mortgage payoff as $22,000, and the balance remaining as $18,000. Testimony of Theodore Lewandowski, 1T, and respondent's letter of September 10, 1987 to Mrs. O'Connell's new attorney, part of Exhibit C-21, support the amounts of about a $26,000 mortgage payoff and balance of approximately $14,000.

both mortgages.[6] Despite repeated requests, neither a formal accounting of the Bartholdi Avenue property nor a statement of services in support of fees taken by respondent was provided to Mrs. O'Connell.[7]

An apparent attempt at a reconstructed accounting was entered in evidence as Exhibit C-22C. That accounting is interesting in several respects. Disbursements from 1983 through May 1987 on the property totalled $28,129.98. Income from that property during that same period totalled $46,300.99, more than $18,000. in excess of disbursements. Exhibit C-22C also shows that, beginning in August 1985, more than a year after the contract for sale was signed between respondent and Mrs. O'Connell, significant additional expenditures were made for "labor costs" and "supplies and materials." Between August 1985 and May 15, 1987, Exhibit C-22C refers to a total of $32,850.06 in such payments, a majority

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[6] In fact, respondent advised the appraiser hired by the Committee that the rents on the Bartholdi Avenue duplex had increased from $300 per month per unit in 1981 to $590 per month per unit as of the time of the appraisal. Thus, the property earned a minimum of $600. per month in 1981. By 1984, a total of $11,824.33 was deposited from that property, reflecting total income of nearly $1,000. per month. Exhibit C-22C. The Lewandowski mortgage payment, which included funds for payment of real estate taxes and homeowner's insurance, was $486.42 per month, while the West Virginia mortgage payment was $182. per month. The record is clear that the rental income more than covered these two mortgages as well as expenses incidental to the Jersey City property.

[7] Respondent claims that he earned $22,000 ($8,000 credit on the purchase price and $14,000 in funds withheld at closing) in his various representations of Mrs. O'Connell. At hearing before the Board, the presenter opined that "there isn't $5,000 worth of work in those files. There's little work for Lillian O'Connell. There's a lot of work for Peter Humen ...." BT15. BT denotes the transcript of the Board hearing on May 16, 1990.

of which were made in cash. Reference to the reconstructed real estate appraisal, Exhibit C-26 in evidence, shows that most, if not all, of these expenditures were made by respondent on improvements to the property, including nearly $24,000. spent on the attempted conversion of the attic to a third apartment. Exhibit C-26 at page 8.

Mrs. O'Connell did not receive a penny from the sale of the Bartholdi Avenue property. Moreover, she did not receive any income from the property once respondent took over its management, despite its admitted profitability.

In his initial response to the O'Connell grievance, respondent contended that he had an agreement of sale with Mrs. O'Connell as early as 1982, but was unable to locate the document. In the middle of the ethics hearings, respondent produced Exhibit C-30 in evidence,[8] dated April 9, 1982, in which Mrs. O'Connell allegedly agreed to sell the Bartholdi Avenue property to him for $44,000. after her death, if her children had no interest in purchasing it; permitted him to manage the property and agreed further that a sum in excess of $5,000 in fees was then due to him. At hearing, Mrs. O'Connell admitted that the signature was hers, but denied ever signing the document. Her claim that respondent often had her sign documents in blank was supported by various blank documents in the record, provided by respondent and signed in blank by Mrs. O'Connell. Exhibit R-28. The Committee further considered that

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[8] The original of C-30 is marked in evidence as Exhibit R-53-2.

the document, which was typed, had only a pencil line for Mrs. O'Connell's signature, that respondent did not produce the document in compliance with discovery, and that he was unable to explain the purpose of the document. Based on these facts, the Committee concluded that the document had been fabricated by respondent after he obtained Mrs. O'Connell's signature.

The Committee further concluded that, even assuming that C-30/R-53C was genuine, respondent's conduct was still inappropriate. Despite his awareness of the degree of trust and faith Mrs. O'Connell reposed in him, respondent became an adversary of his client without advising her to seek independent counsel. The Committee concluded that respondent had violated R.P.C. 1.8 (a) and 8.4 (c).

II. Mortgage on Bricktown Property

In 1985, Mrs. O'Connell decided to purchase a home in a new development in Bricktown. She had recently sold another home, and had more than $250,000 in liquid assets. The purchase price of the Bricktown home was $93,000.

Initially, Mrs. O'Connell relied on the developer's attorney to handle all aspects of the transaction. Subsequently, however, there were construction delays and Mrs. O'Connell was served with a "time of the essence" letter. She then sought the advice of respondent. It was agreed that a portion of the purchase price would be financed. Respondent told Mrs. O'Connell that he would try to find a mortgagee to lend her $40,000, but explained to her

that this could be difficult because of her "poor financial position." Prior to closing, respondent notified Mrs. O'Connell that he had found private investors who were willing to lend her the money, although these individuals wished to remain nameless. Respondent arrived at the closing with $40,000 in cash in his briefcase. He then had Mrs. O'Connell sign a mortgage listing the mortgagee as "Peter L. Humen, Receiver."

Mrs. O'Connell testified that the mortgagee was not listed on the document at the time she signed it. She further contended that she did not know that respondent was the lender. Although respondent claimed that he fully disclosed to Mrs. O'Connell that he was the lender at the time of the transaction, he was unable to explain why the mortgage referred to him as a receiver.

The Committee found that Mrs. O'Connell's position that she was not advised that respondent was the lender was supported by a number of factors. First of all, Mrs. O'Connell testified that respondent advised her that, in addition to the mortgage, the lenders demanded that her Public Service stock, valued at $40,000, be held as security for the transaction. As a result, a separate trust account was set up with Merrill Lynch, of which respondent was named as trustee.

At hearing, Mrs. O'Connell claimed that she was unaware of the existence of the account. Each month, mortgage payments in the amount of $500 were transferred from Mrs. O'Connell's Merrill Lynch Cash Account to the Merrill Lynch Trust Account. Thereafter, Mrs. O'Connell was convinced by her children that the interest rate of

thirteen and one-half percent on the mortgage was no longer appropriate, and she sought refinancing of the balance due through respondent. She stated that respondent advised her that the principals to the mortgage would not refinance at a lower rate, and, in fact, had called in the mortgage and had insisted upon sale of her stock. 1T156. Subsequent to that date, Mrs. O'Connell understood that her mortgage had been satisfied by sale of the Public Service stock. She testified that, at the time of sale of that stock, the principals to the mortgage insisted that any profit above the $40,000 owed (approximately $6,000) be divided between the principals and Mrs. O'Connell. Id.

The $500 mortgage payment was transferred each month from the cash account to the trust account for approximately one year. Respondent never withdrew any money from that trust account. Subsequently, in late 1987, the trust account was closed and the cash balance and stock were returned to Mrs. O'Connell's cash management account. Respondent has advised that the $40,000 mortgage has not yet been paid off by Mrs. O'Connell.

The Committee found clear and convincing evidence that respondent had withheld from his client the fact that he was the lender. They found no other credible explanation for the particular facts. The Committee further concluded that, even if he had disclosed his identity as the mortgagee, he was in a "patently obvious position of conflict with his client." The Committee further found that the absence of monetary benefit from the transaction to respondent was immaterial to the conflict.

Given the respondent's admission that he never suggested that his client retain independent counsel for the transaction, the Committee found that respondent had violated R.P.C. 1.4 (b), 1.8 (a) and 8.4 (c).

III. Miscellaneous Charges

In addition to the above noted areas where misconduct was found, the Committee reviewed several other charges. Specifically, it reviewed a charge that respondent had acted unethically with regard to the sale of property owned by Mrs. O'Connell in West Virginia. The Committee found that, contrary to the charges filed, the purchase price on the property was reasonable, the funds involved were promptly remitted to Mrs. O'Connell, the seller was independently represented by a West Virginia Counsel, and the closing was properly conducted. Therefore, that count of the complaint was dismissed.

In addition, respondent was charged with improper financial dealings on Mrs. O'Connell's behalf. The Committee found, however, that Mrs. O'Connell was, in fact, primarily advised by personnel from Merrill Lynch concerning her Merrill Lynch accounts. The Committee found no ethical violation in this matter.

Respondent was also charged with refusing to remit promptly to Mrs. O'Connell her share of the settlement in a tort action, allegedly because of the pendency of the instant ethics matter. The Committee found that, while respondent should have released the

money at an earlier point in time, his reaction to the "transformation of his long-time client to ethics adversary" may have caused the delay. The Committee found that, albeit unwise, respondent's effort to obtain a written acknowledgement from his client regarding her agreement on the settlement was understandable. Therefore, the Committee found no clear and convincing evidence of unethical conduct in this regard.

The Committee also considered charges that respondent had failed to communicate about the inheritance tax return filed following Mrs. O'Connell's husband's death in 1979, and further failed to act diligently with regard to her 1979 tax return. Following a careful review of the file, the Committee concluded that negligence by respondent had not been proved to a clear and convincing standard. The Committee further concluded that the forms utilized by the Internal Revenue Service were "virtually incomprehensible," and dismissed the charges of failure to communicate and failure to act diligently in this particular matter.

Respondent was also charged with violation of R.P.C. 1.4 and 1.5 by failing to keep Mrs. O'Connell adequately informed of her affairs and failing to provide statements of services and disbursements or give her copies of records or other documents. Respondent was also charged with violation of R.P.C. 1.14, based on the theory that respondent's overall conduct was particularly egregious because of O'Connell's state of mind and her reliance on him. The Committee concluded that R.P.C. 1.14 was not applicable

to this case because Mrs. O'Connell, although dependent upon respondent, was in full possession of her faculties.

The Committee did, however, find violation of R.P.C. 1.5, stating that:

> We are thoroughly convinced that throughout the course of his representation of O'Connell, respondent failed to maintain a proper attorney-client relationship. The friendship and trust she felt for respondent cannot excuse his failure to provide statements of services, written fee arrangements or documents necessary for her to protect her interests. On the contrary, O'Connell's lack of sophistication, distress following her husband's death and total reliance on Humen imposed a heightened duty on respondent to treat her with candor and fairness. Regrettably, respondent instead saw O'Connell as a means to further his own interest. His conduct in this regard violated R.P.C. 1.4 (b).

In its conclusion, the Committee noted that, because respondent's derelictions were not confined to his initial years of representation of O'Connell, it could not view his acts as a product of inexperience. To the contrary, the pattern of misconduct continued until 1987, by which time respondent had been licensed to practice for ten years.

The Committee further expressed concern with what it regarded as respondent's failure to comply with its lawful discovery demands. It noted that, during the middle of the proceedings, respondent produced a full file drawer of papers. A number of the documents then produced had been demanded long before by the presenter. The Committee noted that some confusion may have resulted from the death of respondent's first counsel, but found

no justification for what it termed respondent's "wholesale disregard of discovery procedures." The Committee also noted respondent's "apparent lack of remorse." Although respondent admitted that he had made some mistakes, the Committee judged respondent to be unaware of the extent of his ethical violations. The Committee concluded that respondent's misconduct required public discipline.

CONCLUSION AND RECOMMENDATION

Because "dire consequences" may follow a finding of unethical conduct against an attorney, such a finding must be sustained by clear and convincing evidence. In re Pennica, 36 N.J. 401, 419 (1962). See In re Sears, 71 N.J. 175, 197 (1976); In re Rockoff, 66 N.J. 394, 396-97 (1975); In re Hyett, 61 N.J. 518, 520 (1972). To recommend the imposition of discipline, each Board member must be able to reach "a firm belief or conviction as to the truth of the allegations sought to be established, enabling him or her to find, without hesitancy, the truth of the precise facts at issue." See In re Boardwalk Regency Casino License Application, 180 N.J. Super. 324, 339 (App. Div. 1981), modified on other grounds, 90 N.J. 361 (1982); Aiello v. Knoll Golf Club, 64 N.J.Super. 156, 162 (App. Div. 1960).

As did the District VI Ethics Committee below, the Board has carefully reviewed and independently assessed the record to

determine whether respondent complied with his ethical obligations. The Board concludes that he did not.

Cognizant of the clear and convincing standard governing its de novo examination of the entire record, the Board concurs with the District VI Ethics Committee in finding respondent guilty of unethical conduct throughout his representation of Lillian O'Connell. This unethical conduct included (a) improprieties in his representation of Mrs. O'Connell in the purchase of the Bartholdi Avenue property; (b) failure to report or account to his client for profit earned by the Bartholdi Avenue property while under his management; (c) engaging in conflict of interest situations in his subsequent purchase of the Bartholdi Avenue property from his own client; (d) retaining the proceeds of this purchase as fees earned without ever providing a bill or statement of services rendered; and (e) acting deceitfully and placing himself in an obvious position of conflict in lending $40,000. to his client as a mortgage on her Bricktown property, while hiding from his client the fact that he was the mortgagee. The Board further concurs with the Committee's dismissal of counts 2, 6, 9, 10, 11 and 12.

The Board disagrees with two findings of the Committee, and does not find clear and convincing evidence of respondent's alleged fabrication of Exhibit C-30 (the original of which is entered into evidence as R-53-2). Additionally, contrary to the findings of the Committee below, the Board does not find sufficient evidence to

support a charge of lack of candor or cooperation with the Committee in violation of R.P.C. 8.1.

I. ALLEGED FABRICATION OF FALSE EVIDENCE

While the Board confirms a majority of the findings of the District VI Ethics Committee, it does not find clear and convincing proof that respondent fabricated Exhibit C-30 to aid in his own defense in the ethics proceedings. The Board agrees that the evidence creates a strong suspicion that the document is not genuine: the penciled-in signature line; the grievant's failure to recall what respondent argues is an agreement to sell to him one of her primary assets; the failure to provide what, in respondent's view, was an important document to the Committee until the hearing was well underway; and the proofs that respondent habitually obtained signatures from his client on blank documents, all create the suspicion that the document is not genuine. However, something more than a suspicion must exist for a lawyer's guilt in a disciplinary matter to be established by a clear and convincing standard. Inferences and other logical deductions, whether favorable or detrimental, may be drawn only from established fact and cannot be bottomed on speculation or surmise. See Ferdinand v. Agricultural Insurance Company of Watertown, N.Y., 22 N.J. 482, 488, 494, 496 (1956).

II. CHARGE OF VIOLATION OF R.P.C. 8.1

The Board is further unable to find, from the totality of the facts before it, that respondent exhibited a lack of candor or cooperation with the Committee sufficient to find a violation of R.P.C. 8.1. The Board is troubled by the variance between respondent's sworn testimony, formal answer, and initial "Response to Grievance", and is further troubled by his lack of recall and inconclusive responses on cross-examination. Moreover, the delay in providing discovery documents to the Committee cannot be countenanced.

The Board places great importance on the necessity for full cooperation and candor by a respondent with disciplinary authorities. "[A]ny sophistry or half-truth or other tactic which has as its purpose or effect the frustration of the disciplinary proceeding is deceitful and indefensible from an ethical standpoint and contrary to the spirit of the rules...." In re Gavel, 22 N.J. 248 (1956).

The question of respondent's candor is, however, clouded by respondent's claim that, at the beginning of the ethics proceedings, he relied on the advice of his attorney, and acted accordingly. That attorney was then suffering from cancer, and shortly thereafter died. Respondent's contention can, therefore, be neither proved nor disproved. Given this circumstance, the Board is unable to conclude that the available proofs support a finding of violation of R.P.C 8.1 by clear and convincing evidence.

III. BARTHOLDI AVENUE PROPERTY

A. Purchase by O'Connell

Respondent's representation of Lillian O'Connell as buyer of the Bartholdi Avenue property was fraught with irregularities and improprieties. Respondent's failure to record the deed and mortgage for a period of six years, as well as his failure to insist upon the signing of the deed by the seller's spouse at the time of closing, presents a clear case of gross negligence, in violation of DR 6-101(A). Moreover, the Board finds that respondent's failure to advise his client of the existence of the rider, which respondent claims was prepared at the behest of the seller, was improper. Even assuming that respondent's claim was valid, he admittedly placed the desires of a non-client friend over the needs of his own client. In so doing, respondent violated DR 5-104(A) and DR 7-101(A). See In re Loring, 62 N.J. 336, 342 (1973).

B. Management of Bartholdi Avenue Property

Respondent's failure to account regularly to his client concerning both the rental income earned by the Bartholdi Avenue Property and the maintenance expenses incurred thereon were inexcusable. The Board is further convinced, from a review of the client's testimony and respondent's "Response to Grievance", that any limited "accounting" actually provided to the client by respondent on an informal basis was misleading: she was under the impression not only that the property did not show a profit, but

also that she was obligated to respondent for part of the mortgage payments on the property and for mortgage payments made by him on her West Virginia property. Respondent's conduct in this matter shows a lack of reasonable diligence, in violation of R.P.C. 1.3, as well as a failure to communicate properly with his client, contrary to R.P.C. 1.4. As noted by the Committee, the client's possible tax exposure resulting from respondent's failure to include any income from Bartholdi Avenue on her tax return for five years violated DR 7-101(A)(3). Even more egregious is the fact that respondent misrepresented Mrs. O'Connell's financial situation to her, thereby violating R.P.C. 8.4(c).

Although the Committee did not find misappropriation of client funds, respondent's failure to account for his client's income violated R.P.C. 1.15(b). The Board agrees that respondent has failed to safekeep his client's property. This violation of R.P.C. 1.15(b) apparently continues to date: nothing has been provided to this Board to demonstrate that any income and/or interest on income due to Mrs. O'Connell has been paid.

C. Respondent's Purchase of Bartholdi Avenue Property

The record demonstrates that respondent had a personal interest in obtaining the Bartholdi Avenue property at least as of April, 1982. Exhibit C-30 in evidence. His interest in, and subsequent purchase of, this property placed him in an incurable conflict of interest situation. He was fully aware of Mrs. O'Connell's reliance on his advice and of her lack of

sophistication in business matters. As soon as he broached the subject of purchasing the property, he should have insisted that Mrs. O'Connell obtain independent counsel. This he failed to do. He thereby violated R.P.C. 1.7(b) and 1.8(a), as well as DR 5-104(A) and 5-105(A).

Separate violations of these rules were committed by respondent at each step of the transaction, including: the October 9, 1984 contract for sale, drafted by him; the 1986 attempt to have Lewandowski sign the deed directly over to him; the August 11, 1986 Agreement of Sale of Real Estate (Exhibit C-18 in evidence); and the May 28, 1987 deed from Mrs. O'Connell to M.L.H. Properties (the respondent). Exhibit C-10 in evidence.

The Board is further troubled by several aspects of this transaction. Mrs. O'Connell testified, in essence, that she believed the property to be a bad investment and therefore determined to sell it. Respondent dissuaded her from seeking other buyers or the services of a real estate broker, and subsequently purchased the property from her for $14,000. less than the reconstructed appraised value.[9] Exhibit C-26 in evidence. These

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[9] A second reconstructed appraisal was submitted to the Board by respondent. The Board has not given any weight to this appraisal in light of respondent's failure to dispute the appraisal obtained by the presenter by presenting that material to the Committee at hearing, or by calling the original appraiser as a witness. The review undertaken by the Board is de novo on the written record. That record is developed at the Committee level. R. 1:20-4(3). Absent some reasonable showing that the document in question could not have been provided below, the Board will not accord it any weight.

are not the actions of an attorney looking out for his client's best interests.

The Board finds, further, that respondent's failure to provide a statement of services to Mrs. O'Connell in support of his claim for fees of approximately $14,000 allegedly due him (and counted against the purchase price after respondent's payoff of the Lewandowski Mortgage) was improper and violated R.P.C. 1.5 and R.P.C. 1.15(b). This failure, combined with respondent's original claims that the funds represented payoff of sums advanced by respondent to cover the Bartholdi Avenue and West Viginia mortgage, raises a strong suspicion that the claim of fees earned cannot be justified. Once more, however, the record falls short of the requisite level of proof, and neither overreaching nor misappropriation can be found.

IV. MORTGAGE ON BRICKTOWN PROPERTY

Respondent was again involved in a serious conflict of interest situation with his client, Mrs. O'Connell, when he, first, convinced her that she required a mortgage to purchase her Bricktown home and, secondly, and unbeknownst to her, provided the $40,000. in cash for that mortgage.[10] While this conflict is by itself serious, respondent compounded this unethical conduct by insisting on holding her Public Service stock as security above and beyond the mortgage on the property, albeit the stock was held in

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[10] During this period, respondent and Mrs. O'Connell had already signed the contract for sale on the Bartholdi Avenue property.

an account in Mrs. O'Connell's name. Moreover, respondent later refused to renegotiate the interest rate, although rates had fallen, and did not even refer his client to a bank or other source to locate a lower rate. To the contrary, he called in the mortgage, and then told his client that the fictitious mortgagees wanted a cut on the profit realized by the stock.

The fact that the stock was not actually sold by respondent is virtually irrelevant. It is respondent's avariciousness and statements to his clients that greatly trouble this Board. It is clear that, at every step of this matter, respondent's main goal was to insure that he obtain every possible profit from this transaction. It is to avoid this very type of situation that attorneys are required to deal at arms' length with a client. Here, the problem is compounded by the fact that respondent was dealing with an elderly widow who relied on him for her financial well-being. The Board, therefore, finds, as did the Committee below, that respondent violated R.P.C. 1.4(b), by failing to explain the matter sufficiently to allow Mrs. O'Connell to make an informed decision; R.P.C. 1.8(a), by acquiring a pecuniary interest adverse to Mrs. O'Connell without advising her to seek other counsel and without obtaining her written, informed consent to the transaction; and R.P.C. 8.4(b), by deceiving his client and misrepresenting the mortgage situation to her.

III. TOTALITY OF CONDUCT

In nearly every aspect of his representation of Mrs. O'Connell, respondent was guilty of unethical conduct running the gamut from misrepresentation and deceit to conflicts of interest and failure to safeguard property. There remains the issue of the quantum of discipline to be imposed.

"A lawyer is required to maintain the highest professional and ethical standards in his dealings with clients." In re Gavel, 22 N.J. 248, 262 (1956).

> It is well settled that all transactions of an attorney are subject to close scrutiny and the burden of establishing fairness and equity of the transaction rests upon the attorney... If the burden is not satisfied, equity has regarded such transactions tainted so as to constitute a constructive fraud. .... circumstances comparable to those in this case have been considered to be suggestive of imposition or overreaching giving rise to a presumption of undue influence and invalidity (citation omitted).
> [In re Gallop, 85 N.J. 317, 322 (1981).]

In Gallop, an attorney was suspended for six months after negotiating, drafting and executing a deed and trust agreement for an elderly client, where the attorney was named as both trustee and beneficiary of the trust and where, despite the obvious inherent conflict of interest, that attorney failed to insure that the client had obtained independent legal advice.

The Court has previously addressed the responsibility of an attorney to a client with whom he or she engages in a business transaction:

> 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 Wolk, 82 N.J. 326, 333 (1988).]

Where an attorney has failed to recognize this obligation, the discipline imposed has ranged from public reprimand to disbarment. See In re Gavel, supra, (where attorney was disbarred for arranging for the transfer of four properties from the client to respondent's wife, misrepresented facts to a bank to obtain a mortgage, sold the property within a year and never turned over any of the proceeds to the client); In re Loring, supra, (public reprimand for, inter alia, conflict of interest in representing clients at closing while pressing an adverse lien on his own behalf on the proceeds of sale); In re Gallop, supra; In re Nichols, 95 N.J. 126 (1984) (public reprimand for involvement in purchase of client's home while continuing representation of the client in two matters, as well as for rental of property without authority from or notice to absent owners, and misrepresented ownership to the tenants); In re Harris, 115 N.J. 181 (1989) (two-year reciprocal suspension for inducing one client to lend large sum to another client of whom respondent was a judgment-creditor, without advising first client of the financial difficulties of the borrowing client); and In re Silverman, 113 N.J. 193 (1988) (retroactive suspension for six years for misrepresentations, false statements under oath, and improper participation in a business transaction with an elderly client).

In Silverman, disbarment was avoided in part because the attorney's fraudulent conduct was limited to a single, if long term, transaction. The Court also considered, in respondent's favor, the fact that respondent harbored "a genuine belief that the venture would reap substantial reward" both for the attorney and the client. The conduct was, thus, distinguishable from In re Wolk, supra, because the facts did not demonstrate a "hoodwinking" of clients.

In the case now before the Board, respondent's misconduct is limited to what is essentially one transaction: the representation of Lillian O'Connell. It is clear that, throughout this representation, respondent failed to separate his personal relationship with Mrs. O'Connell from his professional association. His failure to accomplish this separation, and deal with his client professionally and at arms' length, cannot be excused.

A majority of the Board is of the view that a one-year suspension is appropriate discipline for respondent's misconduct. Two members of the Board regard respondent's conduct as more serious and, therefore, voted for a two-year suspension. These two members considered that, while the conflict of interest situations presented in this case might, alone, justify a short suspension, respondent's failure to provide a statement for services rendered, to substantiate his fee, and to account for income and expenditures for the Bartholdi Avenue property, requires a two-year suspension. One member voted for disbarment, based on the conclusion that respondent took advantage of his client from the inception of the

attorney-client relationship. This member found that respondent's failure to record the Lewandowski-O'Connell mortgage, respondent's later request that Lewandowski sign the property directly over to him, and respondent's retention of the $14,000 as legal fees without presenting a bill, all support the conclusion that respondent intended to take the property from the client. In re Wolk, 82 N.J. 326 (1980); In re Kazlow, 98 N.J. 9 (1984).

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

Dated: 6/15/1990

By: Raymond R. Trombadore
Chair
Disciplinary Review Board