SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-358

IN THE MATTER OF :
:
JOSEPH C. NOTO, :
:
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: February 26, 1992

Decided: April 2, 1992

Joseph D.J. Gourley appeared on behalf of the District XI Ethics Committee.

Paul M. Ambrose, Jr. 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 recommendation for public discipline made by the District XI Ethics Committee ("DEC"). The formal complaint charged respondent with (1) conflict of interest; (2) failure to safeguard escrow funds; (3) conduct involving fraud, deceit or misrepresentation; and (4) lack of truthfulness in statements to others.[1]

Grievants are Victor C. Otley, Jr. and Daniel Kinburn, Esquires, of the law firm of Williams, Caliri, Miller and Otley, who represented the plaintiffs in the underlying lawsuit against

[1] Although the complaint charged respondent with violations of the Rules of Professional Conduct, respondent's acts pre-dated the enactment of those rules in September 1984. Hence, the Disciplinary Rules apply.

respondent and other co-defendants for the same alleged acts of misconduct that underlie this disciplinary proceeding.

* * *

Respondent was admitted to the New Jersey bar in 1968. After a one-year stint as an associate of a sole practitioner in Hackensack, he left the practice of law to head a family concern, the Garden State Tire Corporation. After he left that business, he participated in various business ventures, including as president of a public company for several years. In October 1981, respondent returned to the practice of law. Initially, he shared office space with another attorney, Barry W. Sirota, for a period of two months. Thereafter, in January 1982, he became associated with the law firm of Jeffer, Hopkinson and Vogel ("Jeffer, Hopkinson"). Although no longer a sole practitioner, respondent continued to maintain the business and trust accounts that he had opened in October 1981. He did not disclose this fact to his superiors at Jeffer, Hopkinson.[2]

When respondent returned to the practice of law, he sent announcements to his friends and acquaintances. One of those was Bernard Tucker, a/k/a Ben Tucker, a real estate broker for whom respondent's wife had worked since she was sixteen years old. After his wife left Tucker's employment, however, respondent had no contact with Tucker for years.

---

[2] The evidence in the record is conflicting as to whether the law firm prohibited its attorneys from keeping their own trust accounts.

Upon receiving respondent's announcement, Tucker telephoned respondent to ask him if he was interested in becoming an investor in a real estate transaction. According to Tucker, who had experience in managing several low-income apartment buildings, the City of East Orange was offering to sell a twenty-one-unit building, located at 133 North Maple Avenue, for $10,000. Tucker proposed that they form a corporation in which both would be equal shareholders. The corporation would then offer to sell the building to a newly-formed partnership consisting of investors procured by respondent. Consistent with this plan, respondent formed the Benjo Realty Corporation ("Benjo"), of which Tucker became the president. Respondent then obtained ten investors, all of whom were family members or friends, who purchased partnership units for $3,500 each. The partnership, 133 North Maple Associates, owned an aggregate sixty percent of the property, while Benjo, its general partner, owned forty percent.

It should be noted that this disciplinary matter raises no questions of impropriety with respect to the 133 North Maple Avenue transaction. The circumstances attendant thereto are relevant for background purposes only. It is the propriety of the transactions that followed it that is at issue in these proceedings.

I. The Purchase of the 227 Park Avenue Property

Within a few months of the 133 North Maple transaction, Tucker approached respondent about a similar second business opportunity,

also relating to real property located in East Orange, at 227 Park Avenue. This time, the building consisted of thirty-two units, owned by Chamm I Corporation ("Chamm I"), the equal shareholders of which were Dreama Chambers and her brother, Steven Chambers. According to Tucker, Dreama was willing to sell her stock for $4,000, while Steven was demanding $8,000 for his, ostensibly because of his more active role in the management of the corporation.

In mid-1982, respondent and Tucker acquired Dreama's stock for $4,000. Respondent paid $2,000 toward the purchase price, the other $2,000 to be contributed by Tucker. Tucker assured respondent that he had paid his share in cash. As of the date of the DEC hearing, however, respondent was still not certain whether Tucker had ever paid any monies toward this investment.

In any event, respondent and Tucker became equal shareholders of one-half of the Chamm I stock.[3] Respondent once again succeeded in gathering nine purchasers, all relatives and friends (including his mother and uncle), each of whom paid $5,500 for one unit in the partnership that respondent formed, 227 Park Avenue Associates, for a total of $49,500. The tenth unit went to respondent, exclusive of any outlay of monies on his part. According to respondent, after the nine units had been purchased, Tucker indicated to respondent that he wished the tenth unit to be given to respondent

---

[3] As will be explained below, the $8,000 sum for Steven's stock was tendered after title to the property was transferred from Chamm I to the partnership that respondent created for the purpose of purchasing the property.

to compensate him for his work in the transaction. Respondent then deposited the $49,500 sum into his own trust account, which he had kept open, although he was no longer a sole practitioner.

Respondent was asked by the Special Ethics Master ("Master") why the selling price had been $55,000, when the stock had been purchased for only $10,000.[4] Respondent replied that Tucker had fixed the $55,000 selling price. According to respondent, Tucker had calculated the price after taking into account certain liabilities, such as, "arrearages," "repairs" and Tucker's "management fees." T7/30/1991 384.

Parenthetically, the record reveals that, between October 20, 1982 and January 13, 1983, respondent disbursed $24,000 in "management fees" to Tucker out of the total net cash assets of Chamm I of $41,500 , derived from the capital contributions made by the 227 Park Avenue limited partners ($49,500 minus $8,000 for the acquisition of Steven Chamber's stock, as seen below). Exhibit 15. The sums paid to Tucker, ostensibly for management fees, were more than one-half of the sums netted by Chamm I from the transaction. The other one-half went for the payment of expenses in connection with the building's maintenance, such as, for instance, oil and water bills and supplies. There is no indication that respondent received any payments from the transaction. Exhibit 15.

---

[4] The record refers, at various times, to a $10,000 purchase price (respondent's $2,000 payment for Dreama's stock plus $8,000 for Steven's) and to a $12,000 purchase price ($4,000 for Dreama's stock plus $8,000 for Steven's). The amounts vary because of the uncertainty as to whether Tucker paid his $2,000 initial contribution toward the acquisition of Dreama's stock.

The first limited partner to contribute a $5,500 share was Sandy Dworkin. She did so on October 8, 1982. On October 15, 1982, Herman Rotenberg (Dworkin's husband), and Carmela Noto (respondent's mother) paid $11,000 and $5,500, respectively. Hence, as of October 15, 1982, the partnership account reflected $22,000 in contributions from three limited partners. The next payment did not occur until ten days later, October 25, 1982. The last payment (ninth share) took place on December 20, 1982.

As noted above, only Dreama Chambers' stock in Chamm I had been purchased before the formation of the 227 Park Avenue partnership. The other one-half of the corporate stock remained in her brother Steven's control. On October 19, 1982, after respondent had received $22,000 from the limited partners, he released $8,000 to Steven Chambers' attorney, Steven Olitsky, for the acquisition of the remaining stock of Chamm I. Exhibit 7. Respondent also released $14,000 to Chamm I on that date. Respondent's testimony, corroborated by the affidavits of the relevant parties (Exhibits O-1 and O-2 attached to the Answer), was that he had obtained the consent of three limited partners, Carmela Noto, Sandy Dworkin and Herman Rotenberg, to the use of their combined funds of $22,000 for the purchase of Steven Chambers' stock.

Also on October 19, 1982, respondent and Tucker, as equal shareholders in Chamm I, sold the building to the 227 Park Avenue partnership for $55,000. As with the 133 North Maple transaction, the limited partners owned an aggregate sixty percent interest in

the building, or a six percent interest each, while Chamm I (i.e, Tucker and respondent) owned the remaining forty percent as the general partner.

As a consequence of the above transaction, in return for respondent's initial investment of $2,000 to buy Dreama's shares of Chamm I, he acquired a six percent share in the 227 Park Avenue partnership as a gift ($5,500), thereby becoming a limited partner, together with one-half of the general partner's forty percent interest in the building. Tucker, in turn, with possibly a zero investment, ended up with a twenty percent ownership interest in the property plus $24,000 as "management fees."

In the Chamm I to 227 Park Avenue partnership transaction, respondent acted as attorney for both seller and buyer, without advising the limited partners of the desirability of engaging independent counsel. Furthermore, although respondent contended that he represented only the partnership in the transaction, and not the individual partners, the record shows that at least one limited partner, Robert Feldman, believed that respondent was also acting as the partners' attorney. According to Feldman, respondent assured him that he would handle all the legal matters. Feldman understood that respondent was acting in a dual capacity: as investor and their lawyer. Feldman added that he trusted and relied on respondent and that, to him, respondent "was a friend and a lawyer wrapped in one . . ." T7/30/1991 214.

Feldman's testimony as to whether respondent had disclosed to the partners his ownership interest in Chamm I was equivocal. He

first claimed that he was unaware of respondent's interest in Chamm I. He later testified that he did not recall whether respondent had revealed his interest in Chamm I to him.[5] The record indicates, however, that respondent disclosed his interest to at least two other partners. Affidavit of Jeffrey Rotenberg, attachment 0-2 to Answer.

II. The Sale of the 227 Park Avenue Property

The limited partners soon became concerned with their investments. Although each partner began to receive a monthly check for $200 by way of return of their capital contribution, the checks stopped after a few months. When respondent asked Tucker about the rental monies, Tucker explained that he had neglected to deposit them. Tucker assured respondent that he would deposit them forthwith and send the checks to the partners. When he did, however, the checks bounced. Respondent then urged Tucker to implement a better procedure for the collection and deposit of the rents. Respondent requested that Tucker furnish an accounting, which Tucker never did. After respondent was forced to hire an accountant to review the records, it was discovered that there was a shortfall of approximately $10,000 in rents collected for each property, 133 North Maple and 227 Park Avenue. Confronted with

[5] The partnership agreement, Exhibit 8, cites Chamm I as its general partner. Although it is signed by Tucker, as president of Chamm I, the agreement does not reveal respondent's interest in the corporation.

this fact, Tucker confessed to respondent that he had used the monies for his own purposes. Tucker promised to replace the sums.

Thereafter, respondent called for a meeting of the limited partners. Tucker was also present. When pressed about the rents, Tucker assured the partners that he would replace the monies within one week. Indeed, the following week, Tucker gave respondent four checks. Once again, however, the checks bounced. At that juncture, the partners decided to take over the management of the building and to place it for sale. Respondent also demanded that Tucker transfer to him or to the partners Tucker's shares of stock in Chamm I. Tucker did surrender the stock, although the name of the assignee and the date are not on the document. Exhibit 23. Respondent also went to the Prosecutor's Office to report Tucker's utterance of bad checks. He was informed that that office was too busy to concern itself with such matters and that it would take six months to one year to get to the case. According to respondent, the Prosecutor's Office refused to file any papers at that time.

In August 1983, Tucker contacted respondent to ask him if he was interested in selling both the 133 North Maple Avenue and the 227 Park Avenue buildings to a group of investors that included Tucker and two other individuals, Leo Tencer and Nathan Zuckerberg, for $50,000 and $100,000, respectively. Respondent replied that he was. Tucker also informed respondent that he intended to purchase an assignment of a mortgage on a third building for $10,000 and simultaneously sell it for $40,000 to the same group of investors. Tucker asked respondent to handle this latter transaction for him

as a favor. Respondent agreed. Respondent then had a meeting with the limited partners, who expressed their interest in selling the buildings to the investment group. Thereafter, respondent met with Tucker and with one of the investors, Tencer, to discuss the transactions. At that meeting, Tencer was successful in obtaining from respondent a reduction in the sales price of both properties: the 133 North Maple Avenue building would be sold for $46,500 and the 227 Park Avenue building for $88,500. Accordingly, Tucker, Tencer and Zuckerberg each had to contribute $15,500 toward the $46,500 price for the 133 North Maple Avenue property, $29,500 toward the $88,500 price for the 227 Park Avenue property and $13,333.33 toward the $40,000 price for the assignment of the mortgage.

Respondent did not represent the investment group in the transactions. Barry W. Sirota, Esq., the attorney with whom respondent once shared office space, acted as the buyers' attorney. Respondent represented the 227 Park Avenue partnership, as seller. Once again, the limited partners went without legal representation, relying on respondent's status as a lawyer for the protection of their interests. Respondent also represented Tucker in the assignment of the mortgage, as a favor to Tucker. As correctly pointed out by the Master, respondent never adequately explained why he was willing to accommodate Tucker when, a mere few months before, respondent had attempted to file a criminal complaint against Tucker for stealing rental monies.

On September 27, 1983, after respondent met with Tucker and

Tencer, but before the closings of title, respondent and Tucker had a private conversation in a car in a parking lot. According to respondent, Tucker

> . . . emotionally [broke] down in front of me. And I was taken back [sic]. And I said, What's going on? He says, 'Well, you know, I'm not going to pay you for my share.
>
> So he tells me, 'I'm not going to pay my share at this point because I feel that even though I don't have an interest in -- although you made me surrender my stock in the corporation and everything if you don't -- I don't want to have a problem because I'm going to sue you because I know if we -- if the general partners sell the property for the profit that after you --' and he knew because he was familiar with the books and records, he knew that the limited partners would get back their contribution, that there would be profits. And he says he felt that he was owed management fees, repairs, reimbursements for extensive repairs for things he did during the period he operated both buildings. And also, he was entitled to the profit because he felt that it would be owed him.
>
> And I looked at him and I said, 'I don't agree with you, Mr. Ben' at that time, I said. But I didn't want to have a lawsuit. And I made a decision business-wise, I said, hey, he could pay his share, come into the general partnership. Then the partnership has a lawsuit, the litigation supporting all of this could be a problem. So I said, 'Look, I don't agree with you but I understand what you're saying but I don't agree with you.' And we just left it on that basis.
>
> . . .
>
> As far as I was concerned, I had made a business decision that even though Tucker and I disagreed on what the consideration would be that I did not want to get involved with a lawsuit with Tucker over this. And I just said, 'Okay. I don't agree with you at all but I'll go along with this.'
>
> Because now I'm thinking as a businessman. You must remember that I'm coming from that perspective as a businessman, that the limited partners were paid back, all the liabilities were paid.
>
> The question -- see, the partnership agreement

> provided for a 40-60 split of profits after all liabilities and capital contributions were returned. So if he had a suit and he was successful there would have been -- he would have been 20 percent of the 40 percent because he was -- his argument would have been that he was entitled to management fees and all of these things.
>
> So when you added up the management fees and the cost of this and his potential argument of the surrender of stock certificate and he should have got something for it I said that it's not worth this. We're not talking a lot of money and it wasn't worth this. I mean it just wasn't worth this.
>
> So he understood he was not going to be paying it and that I would not be pressing him on it.
>
> [T7/31/1991 31-35]

Tencer and Zuckerberg were unaware that Tucker would not be paying his share. Similarly, respondent did not inform the 227 Park Avenue limited partners that he had agreed to reduce the purchase price of the two properties from $50,000 to $46,500 and from $100,000 to $88,500 and, more significantly, that Tucker would not be paying his one-third share, thereby further reducing the purchase price of the two properties to $59,000 and $31,000. Asked by the Master whether he felt, as a general partner, that he owed a fiduciary obligation to his limited partners, respondent replied that they were just "happy [to get] back their money." T7/31/1991 98.

At that same private meeting with respondent, Tucker offered him a gift of $8,000, or one-half of Tucker's profits from the "flip" of the assignment of the mortgage. According to respondent, Tucker told him

> 'Joe, I don't know how to make this up to you. I'm going to be getting some money out of this transaction with the assignment of mortgage and I'd like to give you'-- at that time I thought he said roughly $8,000 to help me. Because he knew I had other liabilities out there which were -- I mean there was personal injury suit, there was [sic] arrearages and things. So he said, 'I'd like to make this up to you give this to you.'
>
> [T7/31/1991 107]

Consistent with respondent's promise to Tucker, respondent handled the assignment of the mortgage in Tucker's behalf. Respondent testified that he prepared the document assigning the mortgage from Tucker to the group of investors (incorporated as Walnut Gardens).[6] That assignment took place on October 4, 1983. The day before, October 3, 1983, respondent handled the three closings in escrow at his office. The closings were in escrow because the checks produced by Tencer and Zuckerberg had not been certified. Respondent instructed them to submit certified checks the next day, October 4, 1983, whereupon he would authorize Sirota, the buyers' attorney, to proceed with the recording of the documents.

Tencer was unable to attend the October 3, 1983 closings. He sent his accountant, Ben Botwick, in his place. Zuckerberg sent his son-in-law, Anthony D'Agostino, to represent his interests. In the underlying civil litigation against respondent, Tencer and

---

[6] Respondent testified that, although his signature appeared on the front page of the assignment of mortgage between Em Gee Enterprises, Inc. and Tucker, dated September 6, 1983, another attorney, David M. Beckerman, Esq., had prepared it. Because, however, Beckerman was on vacation at the time of the recording of the assignment, respondent signed his own name thereon to allow it to be recorded.

D'Agostino submitted affidavits stating that respondent had affirmatively misrepresented at the closings that Tucker had paid his share of the purchase price for the two properties and for the assignment. Exhibits 12 and 13. Respondent denied having made such representation. D'Agostino also contended that respondent had informed them that the back taxes on the property subject to the assignment were $17,000. Exhibit 13, at 6-7. Respondent also disputed this contention.

In any event, it is undisputed that, on October 3, 1983, the day that the closings in escrow took place, Tencer and Zuckerberg each paid $29,500 for the 227 Park Avenue building, for a total of $59,000; $15,500 for the 133 North Maple Avenue building, for a total of $31,000; and $13,333.33 for the assignment of the mortgage, for a total of $26,666.66. Tucker paid nothing.

On October 4, 1983, Tencer and Zuckerberg submitted certified checks to respondent, as requested. The next day, October 5, 1983, respondent released $9,000 to Em Gee Enterprises, Inc., the assignor of the mortgage, to pay for the balance of the assignment of the mortgage (Tucker had already given a $1,000 down payment to Em Gee). Exhibit 9.

Also on October 5, 1983, out of the total net profit of $17,666.66 from the assignment of the mortgage transaction ($26,666.66 minus $9,000), respondent disbursed $9,333.33 to Tucker, as Tucker's net profit. Consistent with his arrangement with Tucker, on October 19, 1983 respondent paid himself $8,333.33. Exhibit 9. The $1,000 difference between Tucker's and respondent's

shares was intended to compensate Tucker for his down payment to Em Gee, the assignor of the mortgage.

Subsequent to the closings, a fourth investor, Ben Botwick, became a partner in the three transactions. Botwick then paid $13,982.21 to each Tencer, Zuckerberg and Tucker, the sum required to reduce each party's interest from thirty-three percent to twenty-five percent. Thus, without making any investment, Tucker ended up with a twenty-five percent interest in each of the two real properties and in the mortgage, in addition to $23,315.54 in cash ($9,333.33 from the assignment of the mortgage plus $13,982.21 from Botwick). If respondent's testimony is to be believed, respondent ended up with nothing or very little. Allegedly, the $8,333.33 sum that he received from the assignment of the mortgage was mostly offset by his payment of $6,000 for the 227 Park Avenue property's liabilities, as seen below.

The 227 Park Avenue limited partners recovered their initial investments in both the 133 North Maple Avenue and the 227 Park Avenue buildings, when the properties were sold for $31,000 and $59,000, respectively. Respondent testified that he received no monies from the sale of the 227 Park Avenue property. To the contrary, respondent asserted, he actually had to come up with $5,000 to $6,000 of his own funds to pay for the property's liabilities, for which he did not seek contribution from the limited partners.

* * *

Sometime in November 1983, Victor C. Otley, Jr., one of the grievants, was retained by the accounting firm of which Botwick was a partner to examine the terms of the transactions concerning the two apartment buildings and the assignment of the mortgage. The consultation with Otley had been prompted by the investors' discovery that the back taxes on the property subject to the assignment of mortgage amounted not to $17,000, as they had been led to believe, but actually to $90,000.

Following his review of the transactions, Otley telephoned respondent on November 23, 1983 to inquire, among other things, if Tucker had paid his share. According to Otley, respondent replied that Tucker had given him cash. On November 28, 1983, Otley, Zuckerberg, D'Agostino and two partners in the accounting firm met with respondent and with one of the senior partners in respondent's law firm, Jerome Vogel, whom Otley had contacted. Otley testified that he again had asked respondent whether Tucker had paid his share and that respondent had replied that Tucker had given him cash, which had been used to pay for expenses in connection with the properties.

Respondent did not dispute Otley's testimony. At the DEC hearing, the following exchange took place between the Master and respondent:

A. So then he, I believe, asked -- he asked me then -- and he became very aggressive.

Q. Otley?

A. Otley. This is -- I would say he had a definite litigating mind, prosecutorial mind. That's where he is coming from in my exposure, the limited exposure to Otley

was that way.
And he said, 'Did Tucker pay for his share?' I said, 'As far as --' now I'm thinking I'm a businessman at this point, I'm a general partner cause he is asking me his share. Now I'm talking about -- I said, 'You're talking about the limited partnership transaction?' So he says, 'Yeah.' So I said, 'As far as I'm concerned, yes," because --

. . .

And I said -- and at that point in time now I'm coming from I am the general partner, I'm a shareholder, I knew what transpired. You must understand this is happening very quickly because Otley is not giving you the luxury -- it's like a machine gun. He is just coming at me. And I related that because that's what's happening here. And Mr. Vogel is not in any way tempering, slowing this down, nor did he have to. But I'm just saying that -- you're sitting there, Mr. Otley and I'm here. And it's wing, wing, wing, wing. And I'm saying, gee, you know, as far as I'm concerned he paid his share. He said, 'Did he pay cash?' And in my mind I'm thinking myself -- again, I'm thinking as a business, general partner and I said, it's none of their business, really. So I said --

. . .

I first said, yes. Then Mr. Miller at the end said, 'You mean he paid all cash and the deposit?.' 'No.' Because he said something about, you know, you have to declare -- I don't know, there's a statute of $10,000 cash has to do -- to go --

Q. Internal Revenue report.

A. I said, 'No, he didn't pay the cash.' I said, 'Look, as far as I'm concerned I had a business dealing with Mr. Tucker and we leave it that way.' As far as I'm concerned it was left.

Q. So you're saying then you said yes?

A. Initially I said yes.

Q. Initially you said yes. And then you qualified it as far as cash but you really meant no. Is that what you're saying?

A. Yeah. Well, I originally said yes because I was thinking well, I'm not thinking of legal, I'm thinking business. We're dealing with arms-length with business. What's the difference, I'm saying to myself.

Q. But Mr. Noto, when you look at it now it appeared that you lied.

A. Oh, I don't view it as a lie.

Q. No. No. But I'm saying when you look at it now, someone looking at it in a vacuum now it appears that you lied.

A. Except that it must be understood that when the transactions -- first of all, I was not acting as an attorney at that time. I was dealing as a businessman. Secondly, I am not lying because as far as I was concerned it was between me and Tucker and none of their business. And that's where I'm coming from.

[T7/31/1991 54-57]

Respondent conceded to the Master, however, that he now understands how his answer to Otley could have been misleading (T7/31/1991 84). Indeed, Otley testified that to him "cash" meant "paper cash money" (T8/1/1991 22).

Following prolonged litigation by Zuckerberg, Tencer and the accounting firm of which Botwick was a partner against Tucker, respondent and others, a settlement was reached on the eve of the trial. The settlement was conditioned upon the payment of $102,000 to the plaintiffs: $50,000 by respondent, $42,000 by respondent's insurance carrier and $10,000 by Tucker. Tucker's payment was guaranteed by respondent. Ultimately, respondent had to pay $60,000 to the plaintiffs, after Tucker failed to pay his $10,000 share of the settlement.

At the conclusion of the DEC hearing, the Master found that respondent had (1) "breached the fiduciary obligation of an escrow agent when he, without authorization from the Zuckerberg Group,

released those monies to Tucker to allow Tucker to purchase the Assignment for $10,000" (Opinion at 35); (2) misrepresented to Otley and to certain principals and/or their representatives at the closing that Tucker had paid his share; (3) failed to disclose to his partners in the 227 Park Avenue partnership that he was a shareholder in Chamm I, the seller of the property to the partnership, and that he would be acquiring the corporate stock for $10,000 before selling the property to the partnership for $55,000; (4) failed to advise the Zuckerberg group of his financial interest in the assignment of the mortgage and of Tucker's intention to use the group's money to purchase the assignment.

The Master did not find clear and convincing evidence that respondent (1) was involved in a conflict of interest situation in either the purchase or the sale of the 227 Park Avenue property; (2) failed to safeguard the funds of the 227 Park Avenue partnership by utilizing a portion of the funds to buy the stock in Chamm I; (3) misrepresented the amount of the back taxes on the property subject to the assignment; and (4) failed to report as income his proceeds from the transactions.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the Master's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence. The

Board is unable to agree, however, with some of the findings made by the Master.

The Master found that respondent had misused escrow funds when he released to Tucker funds that belonged to the Zuckerberg group without the group's authorization. The record, however, shows otherwise. The closing took place on October 3, 1983; the certified checks were delivered to respondent on October 4; and on October 5, respondent released the funds to Tucker. At that time, the conditions of the escrow agreement had already been satisfied. Accordingly, it cannot be said that respondent's release of the funds to Tucker on October 5 was premature.

Additionally, the record does not support a finding, to a clear and convincing standard, that respondent failed to disclose to the limited partners that he was a shareholder in Chamm I or that he had paid only $10,000 for the corporate stock. Respondent testified that he had revealed his interest in Chamm I to the partners. His testimony was corroborated by the affidavit of Jeffrey Rotenberg, who acted as the attorney-in-fact for his parents, Sandy Dworkin and Herman Rotenberg. The affidavit states that Dworkin and Rotenberg were aware of respondent's ownership interest in Chamm I. Attachment O-2 to Answer. Another limited partner, Louis Iovine, also submitted an affidavit stating, among other things, that respondent had disclosed his interest in Chamm I to him. Attachment O-1 to Answer. The Board is, therefore, unable to agree with the Master in this regard. Similarly, the record contains no clear and convincing evidence that respondent

either disclosed or did not disclose to the limited partners the purchase price of the corporate stock.

In the same vein, the Board is unable to conclude that respondent breached a duty owned to the Zuckerberg group by failing to reveal that he had an interest in the assignment of the mortgage or that Tucker would be using the investors' money to buy the assignment, as found by the Master. The Board did not find any evidence that Tucker used the investors' funds to purchase the assignment. The money he used was his alone. The closing had already taken place and the money no longer had to be kept in escrow. The funds Tucker used were his profit from the assignment of the mortgage to the group. In addition, if respondent was not acting as the attorney for the Zuckerberg group in the transactions or as a fiduciary -- his sole duty was to keep the escrow monies intact until the closing, which he did -- then there was no obligation on his part to disclose to the group his interest in the assignment of the mortgage.

On the other hand, there is sufficient evidence in the record to conclude that respondent compromised the limited partners' interests when, without their knowledge or consent, he agreed to reduce the price of the two properties, not once, but twice: from $100,000 and $50,000 to $88,500 and $46,500, respectively, when Tencer asked for a reduction and, further, from $88,500 and $46,500 to $59,000 and $31,000, respectively, when he allowed Tucker to forego payment of his share.

Likewise, the record amply supports the finding that

respondent's representation of Chamm I, as seller, and of the partnership, as buyer, gave rise to a conflict of interest situation. Although the parties stipulated that respondent was not acting as the individual partners' attorney when Chamm I sold the property to the partnership, the simultaneous representation of Chamm I and of the partnership was obviously improper. Furthermore, at least one of the partners, Feldman, believed that respondent was acting as attorney for the individual partners. Because of respondent's close relationship with the partners and of his status as an attorney, he should have made it clear to them that he was not representing their interests and, in addition, should have advised them to obtain separate counsel.

Respondent created yet another conflict of interest situation when he represented the partnership in the sale of the two buildings to the Zuckerberg group and, at the same time, represented Tucker in the assignment of the mortgage transaction. It must be remembered that Tucker was also an investor in the Zuckerberg group, the buyer of the two buildings from the partnership. Accordingly, respondent represented one client (the partnership) in a business deal with another client (Tucker, whom he represented in the assignment of the mortgage transaction).

The Board agrees with the Master's conclusion that respondent falsely assured Otley that Tucker had paid his share of the transactions.

In sum, the Board finds that respondent (1) created a confict of interest situation when he represented both Chamm I and the

partnership in the sale of 227 Park Avenue property to the partnership and when he represented the partnership in a business deal with another client, Tucker. Respondent should also have made it clear to the partners that he was not acting as their attorney in both the purchase and the sale of the buildings and should have advised them to seek independent counsel; (2) misrepresented to Otley and Zuckerberg's representative, D'Agostino, that Tucker had paid his share and (3) breached a fiduciary duty to the limited partners when he substantially reduced the sale price of the properties without authority. In what the Board considers the most serious of his ethics violations, respondent put Tucker's and the buyers' interests above those of his partners. The above conduct violated DR 1-102(A)(4) and DR 5-105.

The Board agrees with the Master's dismissal of the balance of charges for lack of clear and convincing evidence.

* * *

There remains the issue of appropriate discipline. In cases involving conflicts of interest where the attorney has failed to recognize his or her obligation to the client, the discipline imposed has ranged from a public reprimand to disbarment. In re Humen, 123 N.J. 289, 302 (1991). See, e.g., In re Wolk, 82 N.J. 326 (1980) (attorney was disbarred for submitting a grossly exaggerated counsel fee affidavit to the court at the expense of an eight-year old paralyzed boy and for hoodwinking an elderly client in a business venture); In re Reiss, 101 N.J. 475 (1986) (attorney

was suspended for one year for exhibiting gross disregard of conflicts of interest with his clients, who were also his partners); In re Loring, 62 N.J. 336 (1973) (attorney was publicly reprimanded for, among other improprieties, engaging in a conflict of interest situation when he represented clients at a closing, while pressing adverse lien on his own behalf on the proceeds of the sale); and In re Nichols, 95 N.J. 126 (1984) (public reprimand was imposed for involvement in the purchase of the client's house while continuing to represent the client in two matters, as well as for renting the property to a third party without authorization from the absent owners and misrepresenting the property's ownership to the tenants).

The Board considered numerous and compelling mitigating circumstances: (1) respondent was not personally enriched by the transactions; (2) his prior disciplinary record is unblemished; (3) he was a young lawyer at the time of these events, although he was not a young man; (4) the limited partners were able to recover their initial investment; (5) respondent has suffered considerably, both emotionally and economically, as a result of his wrongs; and (6) very significantly, it took an inordinate length of time to prosecute this matter. The unethical acts occurred in 1983; the grievance was filed in May 1985; it was not until three years later that an investigative report was issued, a delay to which respondent did not contribute in any way.

Based on the foregoing, the Board is of the view that a public reprimand constitutes adequate discipline for respondent's ethics

infractions. The Board unanimously so recommends. But for the strong mitigating factors cited above and, in particular, the age of this case, In re Verdiramo, 96 N.J. 183(1984), the Board would have recommended more severe discipline. Three members did not participate.

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

Dated: 4/2/1992 By: Raymond R. Trombadore

Raymond R. Trombadore
Chair
Disciplinary Review Board