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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 99-339

IN THE MATTER OF

MARK H. WATSON

AN ATTORNEY AT LAW

Decision

Argued: November 18, 1999

Decided: February 22, 2000

Gary N. Elkind appeared on behalf of the District IV Ethics Committee ("DEC").

Robert N. Agre appeared on behalf of respondent.

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

This matter was before us on a recommendation for an admonition filed by the District IV Ethics Committee, which we determined to bring on for a hearing. The formal complaint charged respondent with violations of *RPC* 1.7(a), (b), and (c) and *RPC* 1.9(a) and (b) (conflict of interest).

Respondent was admitted to the New Jersey bar in 1965. He has no disciplinary history.

* * *

The presenter and respondent's counsel entered into a stipulation of facts. According to the stipulation, in 1986 respondent represented grievants Daniel J. and Sarah P. Romano[1] in a dispute with their partner in the operation of a restaurant known as the HiNella Inn. Because the Romanos and their partner were not able to resolve their differences, the Romanos sold their interest in the business to the partner. Respondent represented the Romanos in that sale. The stock purchase agreement and the agreement of sale were signed on December 30, 1986 and the closing took place on March 23, 1987.

Before the closing, the Romanos expressed to respondent their interest in investing the proceeds of the sale in another restaurant. Respondent, aware that Joseph Moffa, the owner of a restaurant known as Moffa's Farms, was interested in selling it, took the Romanos to see that restaurant on January 8, 1987, two months before the closing of the HiNella Inn. In addition to his law practice, respondent was a licensed real estate agent employed by the Ostroff Group, a real estate brokerage. Three days earlier, on January 5, 1987, respondent had sent to an attorney for Joseph Moffa a thirty-day listing agreement naming the Ostroff

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[1] Although the misconduct in this matter occurred in 1986 and 1987, the Romanos did not file a grievance until September 27, 1997.

Group as the listing agent. Moffa signed the listing agreement on January 12, 1987. Respondent, thus, assumed the duties and responsibilities of the listing agent for Moffa's Farms. As seen below, however, respondent continued to represent the Romanos in certain aspects of the *Moffa to Romano* transaction.

On or about January 16, 1987 the Romanos offered to purchase Moffa's Farms for $550,000. The stipulation does not mention the actual purchase price. On that same date respondent prepared an agreement of sale and sent a copy to the attorney for Moffa's Farms and to another attorney as "intended attorney" for the Romanos. Respondent told the Romanos that, due to a conflict of interest, he could not represent them in the Moffa's Farms purchase.

On or about February 4, 1987 the Romanos retained the "intended attorney" to represent them in the transaction. That attorney and the Moffa's Farms attorney reviewed and revised the agreement of sale on behalf of their respective clients, who signed the agreement on February 21, 1987. The closing took place on April 15, 1987.

The stipulation recites that, while the Moffa's Farms sale was pending, respondent assisted the Romanos in the following manner:

A. Respondent helped the Romanos present a loan application to Moffa's existing bank;

B. Respondent accompanied the Romanos on their application to Gloucester Township on April 13, 1987 for a transfer of the liquor license;[2]

C. Respondent ordered an engineer's report;

D. Respondent prepared a Certificate of Incorporation for the new company (LaCasa Romano, Inc.) that would own and operate the business at Moffa's Farms; and

E. Respondent requested a list of equipment assets and liabilities from Moffa's Farms.

Respondent did not bill the Romanos for the above services, claiming that they had been performed "as a courtesy" to the Romanos. All of the legal work for which respondent billed the Romanos from January through April 1987 related to services extraneous to the Moffa's Farm purchase.

The stipulation contains the following provision regarding respondent's conduct:

> It is stipulated that Mr. Watson's representation of grievants in their sale of a business while simultaneously acting as listing agent for the seller in a transaction in which the grievants were the purchasers; in forming a new corporation on behalf of the grievants to operate the business they were in the process of purchasing, while simultaneously acting as listing agent for the sellers of the business; and in the performance of certain services on behalf of the grievants, even though grievants at all times noted had their own independent counsel, []and Moffa's Farms also had their own independent counsel, [] created an appearance of impropriety in violation of R.P.C. 1.7(c)(2).

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[2] Indeed, the DEC investigator's report contains as an exhibit the minutes of the April 13, 1987 Gloucester Township Council meeting, which reflect that respondent represented the Romanos at that meeting in connection with their application for the liquor license transfer.

According to the investigator's report and its exhibits, on May 13, 1992 the Romanos filed a legal malpractice action against both respondent and the attorney who represented them in the Moffa's Farms purchase. The complaint alleged that the Romanos, induced to purchase Moffa's Farms by misrepresentations made by respondent, were forced to place the restaurant for sale and to file a bankruptcy petition. That matter settled on the following terms: respondent's malpractice carrier paid its policy limits of $100,000 and the other attorney's carrier contributed an additional $10,000.

* * *

The DEC, accepting the factual statements and legal conclusions contained in the stipulation, characterized respondent's misconduct as an appearance of impropriety, rather than an actual conflict of interest.

The DEC recommended an admonition, considering, in mitigation, respondent's unblemished legal career of thirty-four years and the significant amount of time that had passed since the date of the misconduct, 1987.

* * *

Following a *de novo* review, we are satisfied by clear and convincing evidence that respondent committed ethics violations. His actions, however, amounted to more than a mere appearance of impropriety. Respondent engaged in a conflict of interest situation by assuming multiple roles in the *Romano* business transactions.

From late 1986 through March 1987 respondent represented the Romanos in the sale of their interest in the HiNella Inn to their business partner. As attorney for the Romanos, respondent was their fiduciary and was obligated to act in their best interests. At the same time, respondent was the listing agent for Moffa's Farms, a restaurant owned by Joseph Moffa. As listing agent, respondent was Moffa's fiduciary and was obligated to act in his best interest as well. "The broker was and is looked upon as a fiduciary and is required to exercise fidelity, good faith and primary devotion to the interests of his principal." *Ellsworth Dobbs, Inc. v. Johnson*, 50 *N.J.* 528, 553 (1967). Furthermore, respondent had a personal interest (his broker's commission) in the consummation of the *Moffa to Romano* transaction. Clearly, respondent involved himself in a conflict of interest situation. If problems with the HiNella Inn transaction surfaced, it might have been in the Romanos' interest not to proceed, while it may have been in Moffa's and respondent's interests for the sale to continue. Respondent's loyalties, thus, were impermissibly divided.

Attorneys have been cautioned against the dangers of participating as both an attorney and a real estate broker in the same transaction. In *In re Roth*, 120 *N.J.* 665 (1990), an attorney represented a paralegal employed by his law firm in a real estate purchase. Roth

suggested that he act as the paralegal's attorney and selling broker and that he apply his share of the real estate commission to reduce the purchase price. The Court discussed the conflict of interest issue as follows:

> Both disciplinary tribunals [the DEC and DRB] found that respondent's acting as attorney and broker in the same transaction created a conflict of interest. Although our courts have never before addressed that precise issue, related judicial and legislative determinations persuade us that that conclusion is correct. Situations in which an attorney acts also as broker are fraught with possible conflicts. . . . Regardless of whether he or she is licensed as a broker, when an attorney seeks a real estate commission for his or her efforts on behalf of a client, the danger of conflict, actual, potential, or perceived, is great.
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> [ *In re Roth, supra,* 120 *N.J.* at 675]

Although the Court found that Roth had engaged in an impermissible conflict of interest, it imposed no discipline, based on the following factors: the lack of notice to the attorney that this sort of conduct was unethical, the absence of venality on the attorney's part, the full disclosure made by the attorney to all interested parties and his intention to apply his share of the real estate commission to reduce the purchase price to be paid by his paralegal, showing that he did not act out of self-interest.

Similarly, an attorney who charged clients both an attorney fee and a real estate brokerage commission was found guilty of a conflict of interest. *In re Hinnant*, 121 *N.J.* 395 (1990). Although that case focused on the charge of overreaching, Hinnant acted as both attorney and real estate broker. Hinnant and his clients signed an agreement in which the clients agreed to pay Hinnant seven percent of the purchase price of any investment property the clients bought. After another broker showed the clients property, they agreed to pay

Hinnant, in addition to seven percent of the purchase price, twenty-five percent of any reduction in the price Hinnant could negotiate. Hinnant billed the clients almost $18,000 for their purchase of property, which cost $91,526. After a fee arbitration committee determined that Hinnant was entitled to a fee of only $2,500, the disciplinary system found him guilty of overreaching and conflict of interest. In its consideration of the matter, we discussed the conflict of interest issue as follows:

> Respondent's interests as a broker and negotiator were in conflict with his role as an attorney. He stood to profit from the successful completion of the transaction, regardless of the problems to his clients. Respondent, in such an arrangement, could not 'render the free and loyal representation to which a client is entitled.' *In re Krakauer*, 81, *N.J.* 32, 39 (1970). *See, also, Opinion* 312, 98 *N.J.L.J.* 646 (1975).
> [*In the Matter of Ollen B. Hinnant*, DRB Docket No. 86-302 (1989), DRB Decision at 7]

The Advisory Committee on Professional Ethics ("ACPE"), too, has cautioned attorneys against the conflict of interest that arises when an attorney participates as both a broker and attorney in the same transaction. In *Opinion* 312, 98 *N.J.L.J.* 646 (1975) and *Opinion* 514, 111 *N.J.L.J.* 392 (1983), the ACPE determined that, because of the inherent conflict of interest, even with full disclosure an attorney cannot participate as a broker and, at the same time, as a lawyer for either buyer or seller in a real estate transaction.

Here, although the Romanos were ostensibly represented by separate counsel in some aspects of their purchase of Moffa's Farms, respondent performed the following substantial legal services for them in connection with that transaction: (1) helped them present a loan application to Moffa's bank; (2) represented them before the Gloucester Township council

on their application for a transfer of the liquor license; (3) ordered an engineer's report; (4) prepared a certificate of incorporation for their new corporation that would own and operate Moffa's Farms; and (5) requested a list of equipment assets and liabilities from Moffa's Farms. Moreover, respondent prepared the agreement of sale between Moffa's Farms and the Romanos. Indeed, the stipulation acknowledges that respondent continued to represent the Romanos during the time of the *Moffa's Farms* transaction, because it provides that the legal work for which respondent billed the Romanos from January through April 1987 was exclusive of the *Moffa's Farms* purchase. While brokers often provide some assistance, such as helping with the loan application, as a convenience to the parties, respondent's services went well beyond his capacity as a broker. We find that he was acting as attorney for the Romanos, the buyers, at the same time that he was acting as broker for the seller, Moffa. Respondent, thus, violated *RPC* 1.7 (a) and (b) (conflict of interest), as well as the prohibition against participating as broker and attorney expressed in *Roth* and *Opinions* 312 and 514, *supra*.

In sum, respondent engaged in a conflict of interest in two respects: (1) he represented the Romanos in the sale of the HiNella Inn at the same time that he was the broker for the seller in the Moffa's Farm transaction in which the Romanos were the buyer and (2) he performed legal services for the Romanos in their purchase of Moffa's Farm while he was the broker for the seller. Although the complaint charged respondent with violations of *RPC* 1.9(a) and (b), and of *RPC* 1.7, the more applicable rule is *RPC* 1.7. *RPC* 1.9 deals with

conflict of interest involving former clients.[3] Here, the Romanos were still respondent's clients at the time of the misconduct.

Ordinarily, in the absence of egregious circumstances or serious economic injury to the client, a reprimand is appropriate discipline for an attorney who engages in a conflict of interest. *See In re Berkowitz*, 136 *N.J.* 134, 148 (1994). Although the Romanos ultimately sustained serious economic injury, the record does not contain clear and convincing evidence that the injury was caused by respondent. Moreover, more than twelve years have elapsed since the misconduct occurred. In addition, respondent has enjoyed an unblemished legal career of thirty-four years. We, thus, unanimously impose a reprimand for respondent's actions. One member did not participate.

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[3] It should be noted that, even if respondent had not acted as the Romanos' attorney in the *Moffa's Farms* transaction, his conduct might still have amounted to a conflict of interest. *RPC* 1.9(a)(1) provides that:

> A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation with the former client.

Here, the matters were substantially related.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 2/22/2000

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

*SUPREME COURT OF NEW JERSEY*

## *DISCIPLINARY REVIEW BOARD*
## *VOTING RECORD*

**In the Matter of Mark H. Watson**
**Docket No. DRB 99-339**

**Argued: November 18, 1999**

**Decided: February 22, 2000**

**Disposition: Reprimand**

| Members | Disbar | Suspension | Reprimand | Admonition | Dismiss | Disqualified | Did not Participate |
|---|---|---|---|---|---|---|---|
| Hymerling | | | x | | | | |
| Cole | | | x | | | | |
| Boylan | | | x | | | | |
| Brody | | | x | | | | |
| Lolla | | | x | | | | |
| Maudsley | | | x | | | | |
| Peterson | | | | | | | x |
| Schwartz | | | x | | | | |
| Wissinger | | | x | | | | |
| **Total:** | | | 8 | | | | 1 |

Robyn M. Hill 3/14/00
Robyn M. Hill
Chief Counsel