SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-104

IN THE MATTER OF

DAVID A. BIRCH,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: June 23, 1993

Decided: September 23, 1993

Peter A. Forgosh appeared on behalf of the District V-B Ethics Committee.

Respondent appeared pro se.

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

This matter was before the Board based upon an appeal by Judith Gildawie and Lynn O'Rourke ("grievants") from a post-hearing dismissal of a complaint charging respondent with violations of RPC 1.2(d) (assisting a client in conduct that the lawyer knows is illegal, criminal or fraudulent), RPC 1.7(a) (conflict of interest), and RPC 1.8(a) (ownership, possessory, security or other pecuniary interests adverse to a client). Following a review of the appeal, the Board determined to bring the matter on for a hearing.

Respondent was admitted to the New Jersey bar in 1973. He is engaged in the practice of law in South Orange, Essex County, New Jersey. He has no prior discipline.

Grievants and respondent had known each other for approximately thirty-five years and had "mutual cousins." In 1985, grievants contacted respondent to obtain the name of an attorney to represent them in the purchase of a house. Respondent indicated to them that he would act as their attorney. Grievants, who were single parents, explained to respondent that they desired to purchase a house jointly. Because, however, they had insufficient funds to provide a down payment on the house, O'Rourke's employer, Rajender K. Arora, M.D., had agreed to supply the down payment in return for an equity interest in the property. It appears that the parties intended to purchase the property as tenants-in-common.

Respondent met with Dr. Arora and grievants at Dr. Arora's office to discuss the terms of the transaction. The parties indicated to respondent that Dr. Arora would be providing the down payment and that grievants would be solely responsible for the debt service on the mortgage and the real estate taxes. Thereafter, respondent prepared a tenancy-in-common agreement (Exhibit P-5), in September 1985, establishing the rights and obligations of all three parties. Respondent charged the parties $212.50, to which Dr. Arora contributed fifty percent and grievants contributed the balance.

Pursuant to the agreement, in exchange for a $7,800 down payment toward the total purchase price of $78,000, Dr. Arora would own a fifty percent interest in the property. Grievants would own a twenty-five percent interest each. The cost of all repairs exceeding $500 was to be apportioned pursuant to the parties' respective interests. The agreement further provided that grievants would have the exclusive right to occupy the property. After the beginning of the eighth year following the closing of title, grievants would have the option to purchase Dr. Arora's interest according to the terms and conditions set forth in the agreement. In addition, Section 4b of the agreement prohibited the sale, transfer, or encumbrance of each party's undivided interest in the property without the prior written consent of all three parties.

Respondent did not regard himself as the attorney for all three parties. He testified that he ". . . considered [himself] as acting as a scrivener, to try to put down in a legal format an agreement that they all had come to originally based upon that if there were any questions on what it meant that they didn't agree on -- they all would have to consult with someone independently" (T3/11/1992 168). He acknowledged, however, that the parties had expressed their wish that he represent them in the transaction. Respondent added that he had advised the parties to seek independent counsel, a contention disputed by grievants and Dr. Arora.

It appears that it was the parties' intention that the deed contain the names of all three parties, as tenants-in-common.

Nevertheless, after the mortgage company declined to extend a mortgage loan because of Dr. Arora's credit history, grievants had to secure the mortgage in their own names alone and, accordingly, Dr. Arora's name was omitted from the deed. This fact was allegedly unknown to Dr. Arora, who testified that he was not even aware that a closing of title had taken place on December 30, 1985. He indicated that he had learned from O'Rourke that his name was not on the deed.

Respondent, however, testified otherwise. According to respondent, all parties had agreed that the deed would list only grievants as tenants-in-common and that, later on, at an unspecified date, when it "seemed necessary, prudent, wise," a new deed would be prepared naming Dr. Arora's name as grievants' cotenant. Respondent's testimony was in direct contradiction with Dr. Arora's, who insisted that he was unaware that his name would not be listed on the deed and that, upon so discovering, he placed numerous unreturned telephone calls to respondent to discuss his concerns (<u>See</u> Exhibit P-6). Dr. Arora testified that, ultimately, he had a conversation with respondent, at which time he informed respondent that, because his name was not on the deed and because he was not permitted to claim a deduction for the real estate taxes in his tax returns, he wished to have his investment in the property returned to him. Dr. Arora added that the tenancy-in-common agreement drafted by respondent did not reflect entirely his understanding of the terms of the transaction. It was his belief, for instance, that the agreement would provide for his right to claim a deduction for one-half of the real estate taxes and that the payment of such was also to be apportioned among the parties, according to their respective interests. Dr. Arora had no recollection of signing the agreement and explained that, if he had signed it, he certainly had not read it because he would have become aware of the discrepancy between the terms contained in the agreement and the understanding of the parties.

According to Dr. Arora, he eventually became frustrated with his inability to reach respondent or to otherwise resolve this matter. He then retained an attorney to accomplish either the inclusion of his name on the deed or the return of the down payment and other costs. A series of letters between this attorney and respondent ensued, whereupon respondent proposed that he, respondent, purchase Dr. Arora's interest in the property. In July 1986, respondent paid Dr. Arora $10,875 for the acquisition of Dr. Arora's interest in the property. Despite respondent's close relationship with grievants and the clause in the tenancy-in-common agreement prohibiting the transfer of any party's interest in the property without the written consent of all cotenants, respondent did not obtain grievants' written consent thereto. In fact, grievants claimed that they had no knowledge whatsoever that respondent and Dr. Arora were negotiating respondent's purchase of

Dr. Arora's interest in the property and that they did not learn of this event until September 8, 1986, when respondent wrote grievants a letter informing them that he had acquired Dr. Arora's interest. In that letter, respondent indicated that, "as you have probably heard, Dr. Arora has signed all of the appropriate papers giving up whatever claim, if any, he may have had to the property." The letter further recited:

> I gave back to the doctor all of the money which he advanced, plus some interest on his investment for a total of $10,875 as of August 1, 1986. As a friend I think that our relationship would be best structured as a simple second mortgage on the house rather than for me to be your partner as was the doctor. In that way the property is yours absolutely with no other owners, no complicating splitting or sharing agreements, etc.
>
> All that remains to be worked out is what sort of mortgage agreement we should agree to. Because of family responsibilities, college expenses, etc., I would prefer not to go beyond a five year term. Within that general constraint the terms are really up to you. My cost of funds on my home loan are 11 1/2% per year floating (i.e. adjustable rate.) If you are able to pay (and want to pay) monthly, I would like to make 1/4% over my costs. Your monthly payment can be anything from zero to the full amount needed to amortize the loan over five years - roughly $205.00 per month.
>
> If you pay nothing monthly, your balloon payment after five years would be roughly $20,000 which you could pay by either refinancing your present first mortgage or taking out a home equity loan with the bank. If you pay $205 per month, there would be no

> payment after five years. Any payment amount less than $205 per month would result in a balloon payment of some lesser amount at the end of the term. You must decide which you can afford and want to pay and let me know your decision so that I could draw up the necessary mortgage documents.
> [Exhibit P-7]

When grievants did not respond to respondent's proposal contained in that letter and also in a series of subsequent letters between respondent and Gildawie's matrimonial lawyer — in which respondent remarked that grievants would "wind up going broke trying unsuccessfully to defend their unjust enrichment" (Exhibit P-21) — respondent filed a lawsuit in 1990, seeking the declaration of his fifty percent interest in the property or a judgment for compensatory damages and counsel fees (Exhibit P-23). Unable to afford substantial litigation expenses and counsel fees, grievants ultimately agreed to pay respondent $11,500 in August 1990 (Exhibit P-25).

At the DEC hearing, grievants recounted their shock and distress upon discovering that respondent had purchased Dr. Arora's interest without notice to them, in violation of the tenancy-in-common agreement, and that respondent had proposed a second mortgage on the property, instead of an equity interest. In so doing, respondent arbitrarily and radically changed the structure of the transaction, to grievants' detriment. Indeed, both grievants testified that respondent was well aware of their dire financial situation and of their inability to make additional mortgage payments beyond the $700 monthly payment due on the first mortgage. According to O'Rourke, she became upset because

> we hired David to help to look after our interests. And he turns around and writes a letter, he buys out us without written consent, goes against an agreement that he drew up. And he said he paid money and I want it. He never showed proof he had paid anything to Dr. Arora. And he said he wanted this money, with these kinds of outrageous agreements on here.
>
> . . .
>
> . . . to tell you the truth it really -- it confused me and -- upset me and it frightened me -- because if I went to someone to protect my interest I went to David to protect our interest, and then when I got the letter to see what he did, he turned around behind our backs, without even asking us for written consent, turns around and says, I'm buying interest in your house, and then sends us the bill for that, and tells us he wants us to pay him. If he could do that, then who do you go to?
>
> [T3/11/1992 95,100-101]

O'Rourke added that she had not replied to respondent's letter of September 8, 1986 because, after she consulted with another attorney, she was advised that to acknowledge the letter might be construed as acquiescing to the deal.

Respondent's version of the events was different from grievants' and Dr. Arora's. He vigorously denied that Dr. Arora had not been informed that his name would not be on the deed. According to respondent, he had fully informed Dr. Arora that, although initially there would not be a recorded instrument showing his interest in the property, the tenancy-in-common agreement "created its own rights and responsibilities apart from the deed" (T3/11/1992 182-183). Respondent stated that he had explained to Dr. Arora that, sometime in the future, grievants would sign a deed reflecting Dr. Arora's interest in the property, as grievants' tenants in common. Respondent did not believe it "wise" to list Dr. Arora's name on the deed at the time of the closing because it "might cause the mortgage company to accelerate the payments on the home. . . making the note due and payable on sale of property" (T3/11/1992 190-191). It was, thus, with great surprise, according to respondent, that he received a letter from Dr. Arora, dated April 22, 1986 (Exhibit P-6), demanding that his name be placed on the deed or that his investment be returned. Respondent testified that, confronted with Dr. Arora's demands, including his insistence that he be allowed to claim a deduction for the real estate taxes in his tax returns, he then telephoned grievants and expressed his fear that Dr. Arora might file suit against grievants and respondent. Respondent felt that "the arrangement was breaking down, the relationship between the parties was crumbling at that point. . .," particularly after Dr. Arora retained an attorney. It was then, respondent went on, that he suggested to grievants that the only viable alternative was his purchase of Dr. Arora's interest in the property. According to respondent, grievants "liked the idea" (T3/11/1992 147); after the deal was consummated, respondent sent the September 8, 1986 letter to grievants, "confirming" the transaction. Although respondent asserted that grievants were aware of the transfer of Dr. Arora's interest in the property to him, he conceded that the September 1986 letter to grievants was the first notice given to them of his desire to "structur[e] [his] interest in debt rather than as an equity interest in the property" (T3/11/1992 153). Respondent maintained, at all times, that he had purchased Dr. Arora's interest to help long-time friends out of a difficult situation. In fact, in his letter to the DEC investigator, dated February 25, 1991, respondent alleged that he had bought Dr. Arora's interest "at [grievants'] urging" (Exhibit P-26). Respondent acknowledged, however, that he had exercised poor judgment in not obtaining grievants' written consent to the transaction.

* * *

At the conclusion of the ethics hearing, the DEC found that respondent had not violated RPC 1.7 (conflict of interest) because the parties' interests were not adverse. For the same reason, the DEC concluded that respondent's conduct had not violated RPC 1.8 (business transaction with clients); according to the DEC, respondent did not acquire an adverse interest to grievants', when he purchased Dr. Arora's share of the property. Lastly, the DEC found that respondent had not violated RPC 1.2(d) (assisting a client in conduct that the lawyer knows is criminal, illegal or fraudulent) when he assured the parties that he would record the property when the transaction was "old and cold." As stated in the hearing panel report, the DEC did not "feel that any fraud was committed on the mortgage company by handling the transaction in this matter. It is our opinion, based on the factual contentions and the proof submitted that what Mr. Birch was doing was securing Dr. Arora's equity position and not hiding secondary financing." Hearing Panel Report at 7. The DEC dismissed the allegations contained in the formal ethics complaint.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the evidence clearly and convincingly establishes that respondent's conduct was unethical. The Board recommends that the DEC's dismissal of the ethics charges be reversed and that a finding be made of a violation of the Rules of Professional Conduct. Although the Board is not convinced that respondent attempted to overreach O'Rourke and Gildawie by asking for a $205 monthly payment ($205 a month for five years adds up to $12,300, an amount not in great excess of $11,000, the price paid by respondent for Dr. Arora's interest), it is undeniable that respondent involved himself in a conflict of interest situation when he simultaneously represented Dr. Arora, on one side of the transaction, and O'Rourke and Gildawie, on the other side and, moreover, when he entangled his business dealings with his clients'.

There seems to be no doubt that respondent did not merely act as a scrivener in the transaction, as he contended. When he was contacted by O'Rourke, he unambiguously indicated to her that he would be able to represent grievants. The record also leaves no doubt that it was the expectation of all parties that respondent act as their counsel and that, in fact, they relied on his status as an attorney to structure and complete the deal so as to benefit all parties.

It is, of course, true that, when multiple parties enter into a business transaction, such as, for example, the purchase by several individuals of property to be held as a tenancy-in-common, it is not always required that each party be represented by separate counsel. This is so because, in most instances, there is a unity of interest by the parties. Although a tenancy-in-common may not be strictly a business venture but, rather, an ownership in common of a specific asset, some of the parties' interests are common and the parties have the legal obligation to sustain and protect the common title.

Here, however, even though the parties were on the same side of the transaction, their interests, rights and obligations in the tenancy-in-common were adverse. For example, only grievants, as the cotenants in possession, were obligated to pay the mortgage and real estate taxes on the property. Dr. Arora, in turn, the cotenant out of possession, had provided the down payment only and had no obligation to pay the mortgage and the real estate taxes. Dr. Arora's rights of possession as a tenant-in-common had been eliminated by agreement; grievants had the exclusive right of possession and could rightfully have ousted Dr. Arora, if he sought to occupy the property as a tenant-in-common. Also, if Dr. Arora defaulted under the tenancy-in-common agreement by, for example, refusing to contribute to the repair and maintenance expenses exceeding $500, the only recourse available to grievants was to advance the payments in Dr. Arora's behalf or to force the sale of the property. Either remedy, however, was detrimental to grievants' interests because they had no means with which to pay the repairs or maintenance expenses and, in the event of a sale of the property, they would be forced to revert to their former arrangement of renting affordable housing, thereby facing the defeat of their common purpose, which was to live together, as sisters, in order to minimize their living expenses and to provide to their children a better living environment. In a sense, thus, there was no commonality of interests by the parties. Furthermore, because of respondent's long-standing friendship with grievants, the better practice would have been for respondent to advise Dr. Arora — better yet, insist — that he obtain independent counsel. Otherwise, how could Dr. Arora be completely assured that respondent would protect his interests with undivided loyalty? In fact, Dr. Arora, testified that "to me, [respondent and grievants] were cousins" (T/5/1/1992 18). Even respondent acknowledged that, as a close friend of grievants, he had a strong interest in the completion of the transaction because he wanted grievants to succeed in their endeavors.

The potential for a conflict of interest was, hence, obvious. At a minimum, the multiple representation created a serious appearance of impropriety. Respondent's conduct in this regard violated RPC 1.7, in light of his failure to make full disclosure of the circumstances of the representation to the parties and to obtain their consent thereto.

Respondent also violated RPC 1.8(a) when he entered into a transaction with O'Rourke and Gildawie without the safeguards required by that rule. To recapitulate, six months following the initial transaction, respondent acquired Dr. Arora's share in the property by returning to Dr. Arora the amount of his investment and other incidental costs. All parties agreed that the tenancy-in-common agreement prohibited the transfer of any party's interest without the written consent of all tenants-in-common. It is also undisputed that respondent did not obtain the parties' written consent. (There is a factual question as to whether grievants were even orally informed of the event; while respondent insisted that he so informed grievants and that, in fact, he bought Dr. Arora's share at their urging, grievants vehemently denied any knowledge of respondent's purchase of Dr. Arora's interest until at least September 1986, two months thereafter).

By buying Dr. Arora's share in the property, respondent acquired an ownership interest that was adverse to grievants. Because of the peculiar nature of the transaction, Dr. Arora's and grievants' interests were not altogether common; each party had different rights and obligations. More significantly, the parties' interests could not have been more adverse when respondent informed grievants that, instead of an equity interest in the property, he expected to be given a second mortgage thereon. In fact, the parties' interests were so adverse that ultimately their reciprocal relations were the subject of an unpleasant lawsuit. As proposed by respondent, the relationship between the parties would have been one of mortgagor/mortgagee, or obligor/obligee. The parties would no longer be on the same side of the transaction: they would clearly be on opposite sides of the transaction. Hence, by failing to make full disclosure to grievants of the circumstances of the representation and to explain the terms of the transaction to them, in detail, by failing to insist that they retain separate counsel, and by failing to obtain the written consent to the representation, respondent violated <u>RPC</u> 1.8(a).

Respondent also violated <u>RPC</u> 1.2 and <u>RPC</u> 8.4(a) when he counselled his clients to change the deed at a later date to reflect Dr. Arora's ownership in the property, thereby attempting to defraud the bank. With the knowledge that the bank had rejected Dr. Arora's application for a mortgage loan, respondent intended to violate the provisions of the mortgage prohibiting the transfer or sale of any part of the property or any interest therein without the lender's prior written consent. In such situations, the bank would invoke the "due on sale" clause of the mortgage, whereupon the mortgage loan would be in default and all monies secured by the mortgage would be immediately due. In that case, foreclosure would surely ensue because of grievants' inability to meet the lender's demands. Similarly, in proposing to secure his interest in the property by a second mortgage thereon, respondent intended to violate the clause prohibiting secondary financing without prior approval of the lender.

Lastly, respondent violated RPC 8.4(c) when he failed to disclose to the bank Dr. Arora's ownership interest in the property, contemplated in the cotenancy agreement. Although the complaint did not specifically charge respondent with a violation of RPC 8.4(c), it is undisputed that respondent did not reveal Dr. Arora's interest to the bank. The complaint is, thus, deemed amended to conform to the proofs.

Also disturbing was the fact that respondent assisted Dr. Arora in violating the terms of the tenancy-in-common agreement, when the transfer of Dr. Arora's interest was accomplished without the written consent of grievants. Compounding that impropriety are the facts that respondent himself drafted the agreement and that he acquired a financial stake in the transaction. Grievants had every reason to feel betrayed. Their own lawyer, who had been retained to draft a tenancy-in-common agreement to protect their interests, assisted their cotenant in violating the agreement. Worse yet, he made himself a party by purchasing their cotenant's interest without their written consent and then changed the terms of the tenancy-in-common agreement by asking grievants to execute a second mortgage, all to grievants' detriment.

There remains the issue of appropriate discipline. Cases involving conflicts of interest, where the attorney has failed to recognize his/her obligation to the client, have resulted in discipline ranging from a private reprimand to disbarment. See In re Hughes, 114 N.J. 612 (1989) (attorney publicly reprimanded for extracting a $22,500 personal loan from a client with whom he shared an intimate personal relationship, without fully explaining to the client the dangers of the representation and advising her to seek independent counsel). See also In re Reiss, 101 N.J. 475 (1986) (attorney suspended for one year for exhibiting gross disregard of conflicts of interest with his clients, who were also his partners) and In re Humen, 123 N.J. 289 (1991) (serious conflict of interest situations, by entangling business concerns with those of client, also a friend, merited a two-year suspension).

After consideration of the relevant circumstances, including respondent's lack of evil motive and his desire to help his friends of long-standing, a six-member majority of the Board is of the view that a public reprimand is sufficient discipline for respondent's ethics transgressions. Two members agree with the measure of the discipline, but believe that respondent did not violate RPC 1.7. In those members' opinion, the evidence did not clearly and convincingly show that respondent failed to explain the circumstances of the representation to the parties and to advise them to retain independent counsel. One member would recommend a private reprimand. One member did not participate.

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

Dated: 9/25/95

By: Raymond R. Trombadore
Chair
Disciplinary Review Board