

✓ SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-256

IN THE MATTER OF :
CHESTER A. JUST, :
AN ATTORNEY AT LAW :

Decision of the
Disciplinary Review Board

Argued: December 21, 1994

Decided: March 31, 1995

Robert J. MacNiven appeared on behalf of the District VIII Ethics Committee.

Frederick J. Dennehy appeared on behalf of respondent.

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

This matter was originally before the Board based upon a recommendation for a private reprimand (now admonition) filed by the District VIII Ethics Committee (DEC), which the Board determined to hear pursuant to R.1:20-4(f)(2). The complaint alleged that respondent violated RPC 1.2(d) (counseling or assisting a client in conduct the attorney knows to be illegal, criminal or fraudulent), RPC 4.1(a) (truthfulness in statements to others) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1961. At the time of the within misconduct he was engaged in private practice in Edison, Middlesex County. He has no history of discipline.

Some weeks prior to April 18, 1986, respondent was retained by Judith Tobajka, the daughter of Ethel Dorothy Giacchi, in connection with the preparation and execution of a deed transferring property owned by Ms. Giacchi to Ms. Tobajka. Respondent had not previously represented Ms. Tobajka. According to respondent, Ms. Tobajka did not provide him with any information about the existence of other family members; she merely asked him to prepare the deed, which he did.

Ms. Giacchi purportedly signed the deed on April 18, 1986, while she was a patient at Middlesex General Hospital (now Robert Wood Johnson University Hospital). Ms. Giacchi was a patient in the coronary care unit, after she suffered a second heart attack. Her signature was witnessed and acknowledged by respondent. Two months later, Ms. Giacchi died. Thereafter, respondent represented Ms. Tobajka in litigation arising from allegations of an improper transfer of Ms. Giacchi's estate assets to Ms. Tobajka. That litigation was ultimately settled. The within matter arose out of questions regarding Ms. Giacchi's signature on the April 18, 1986 deed.

Two nurses who were on duty at Middlesex General Hospital on the evening that the deed was signed testified before the DEC. Although they had little or no independent recollection of Ms. Giacchi, they were able to refresh their recollections by relying on notes they and other hospital employees had made on the evening in question. Both nurses testified as to Ms. Giacchi's condition that evening. One nurse testified as follows:

Well she had numerous tubes to support her, she had a trach which is a tube was attached to that, tube machine that is called a ventilator [sic] to help her breathe, she had other tubes, a feeding tube, a catheter that went into her bladder, she -- I had noted reading someone else's notes that she wrist had [sic] restraints on her.
[T12-13]¹

According to both nurses, Ms. Giacchi was not verbally responsive and was unable to respond to simple commands, such as a request to move a finger or squeeze a hand, although she moved her upper extremities. Further, her pupils were unequal and unresponsive, indicating some problem with her brain. According to the nurses' notes, Ms. Giacchi further "had an elevated BUN and creatine which puts her in a prerenal state and that can cloud her mental status" (T51). The nurses added that, had there been any change in Ms. Giacchi's condition on the evening in question, such change would have been noted on her chart. No change was recorded, however.

Respondent's testimony as to what ensued that evening and as to Ms. Giacchi's condition was quite different from that of the nurses on duty:

Q. Now when you got into the room did you have any conversation with the mother, do you remember?

A. I don't recall speaking to the mother. Speaking was done by [Ms. Tobajka] and [Ms. Tobajka] communicated with her mother in a very loving manner. I recall specifically that she referred to her mother as mother rather than mom, and she introduced me to her mother and to the effect that this is Mr. Just, he has prepared the deed, I should point out that [Ms. Tobajka] had advised me that she had told her mother in advance that she was coming in with the deed to be executed. And her mother acknowledged to me that she recognized me as the person

¹ T refers to the transcript of the hearing before the DEC on July 28, 1993.

who prepared the deed and who was there to have her execute it.

Q. And in what way did she acknowledge who you are?

A. By moving her head and by raising her hand or --

Q. If you have a specific recollection, Mr. Just. Do you have a specific recollection?

A. By making an impression upon me which left no doubt in my mind that she recognized, she comprehended, she understood. And she was lucid and she was not in any oxygen tent, she was in bed, she was propped up on her side and that is how I saw her.

Q. And in what manner was the deed signed by her?

A. I told [Ms. Tobajka] and explained to [Ms. Tobajka] that her mother has to sign the deed at the place where I indicated with my finger and also showed the mother that this is where the deed was to be signed, and there was some other conversation about the fact that whether she understood that this was the deed that she had asked to be prepared and so on and [Ms. Tobajka] communicated that to her. And I handed the document to [Ms. Tobajka], I believe, to hand to her mother and the mother had a pen, also, and [Ms. Tobajka] was handing it to her mother and my recollection is that she asked me whether or not it was okay if she helped her mother and I said of course, yes or okay, words to that effect. With that [Ms. Tobajka] stepped between myself and her mother and leaned over the bed and within a matter of moments she turned around and she handed me the document and I looked at the document and I saw the signature on there. And that was it. And there was no more to it.

Q. How far from the mother were you when [Ms. Tobajka] and the mother were in the process of administering the signature on the document?

A. The distance between myself and -- four feet, [Ms. Tobajka] interposed between us.

Q. And how long did you stay in the hospital thereafter?

A. After seven years --

Q. If you don't recall just say you don't recall.

A. Approximately ten minutes.

Q. Did you have any conversation with [Ms. Tobajka] as to whether or not she had actually assisted her mother in signing the deed or did you just assume that she did because of the mother's condition?

A. Of course I assumed that she did because she asked me and she leaned over and I turned around, I didn't specifically see if the mother had signed it or whether [Ms. Tobajka] had assisted her in signing it.

Q. Did you have any conversation with the mother after she signed it?

A. Not from what I recall in terms of anything significant. There were -- there was an extreme feeling of closeness between [Ms. Tobajka] and her mother and the feeling --

Q. I'm asking did you have any conversation?

A. Only maybe some pleasantries.

Q. Nothing that you can specifically recall?

A. No.

[T98-101]

Despite the fact that respondent did not actually see Ms. Giacchi sign the deed either alone or with her daughter's assistance, he witnessed Ms. Giacchi's signature and notarized the deed.

James R. Murphy, Esq., who represented Ms. Tobajka's sister in the litigation that ensued, also testified at the DEC hearing. (Ms. Tobajka did not testify.) According to Mr. Murphy, he had a telephone conversation with respondent on an unspecified date, during which respondent indicated to him that Ms. Giacchi was sitting in a chair at the time that she signed the deed. Mr. Murphy further testified about a piece of paper that was made a part of the complaint filed in the underlying civil matter. That paper, Exhibit J-2, bears Mrs. Giacchi's handwriting on May 16,

1986, approximately one month after she signed the deed. In contrast to Ms. Giacchi's signature on the deed, which is strong and clearly legible, her writing one month later is a barely discernible scrawl.

The DEC determined that respondent had violated RPC 4.1(a) and RPC 8.4(c). The DEC gave considerable weight to the testimony of the nurses and found "that the decedent at the time that the deed was executed was not competent to know and or understand anything that was going on at the time" (Transcript of hearing panel report at 142). The DEC further determined that the deed was executed with the assistance of or solely by Ms. Tobajka. The DEC recommended a private reprimand based upon respondent's lack of previous discipline.

CONCLUSION AND RECOMMENDATION

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

Respondent admitted that, because of the way in which Ms. Tobajka situated her body, he had been unable to determine if, in fact, Ms. Giacchi had signed the deed, albeit with her daughter's assistance, or if the daughter had acted independently.

In the past, private reprimands have been imposed where attorneys witnessed signatures and notarized documents that had

been signed outside of their presence. The discipline has been public where the misconduct involved more than one document, the attorney derived personal gain or directed a secretary to witness and notarize the signatures. See, e.g., In re Rinaldo, 86 N.J. 640 (1981) (public reprimand imposed where an attorney permitted his secretaries to sign two affidavits and a certification in lieu of oath, in violation of R.1:4-5 and R.1:4-8) and In re Conti, 75 N.J. 114 (1977) (public reprimand where the attorney's clients told his secretary that it was impossible for them to come to the attorney's office to sign a deed and instructed her to do "whatever had to be done" to record the deed. The attorney had the secretary sign the clients' names on the deed. He then witnessed the signatures and took the acknowledgement).

This case, however, is far more serious than Rinaldo and Conti. Respondent not only affixed his jurat on the deed despite not having observed the grantor actually sign it, but also facilitated a questionable conveyance, as demonstrated by the lawsuit that followed. Even if the conveyance had been entirely in accordance with Ms. Giacchi's wishes - a circumstance not disclosed by the record - it was still respondent's duty to ensure that she was capable of understanding the nature and consequences of her actions. The testimony of the two nurses, who had no motivation to lie, was clear and credible. Ms. Giacchi did not have the physical ability to sign the deed, even with her daughter's assistance. Further, based on the nurses' testimony, if Ms. Giacchi was conscious, it is doubtful that she had the mental capacity to

comprehend the nature of her actions. Respondent should have known these facts simply by observing her condition. Although respondent did not perpetrate the forgery himself and might not have been an accomplice to a potentially fraudulent conveyance in the sense that other legitimate parties were divested of ownership rights, it is undeniable that a questionable conveyance took place with his assistance. Even if, in fact, it was Ms. Giacchi's wish to convey her property to Ms. Tobajka, there was still a deceitful aspect to the conveyance. Through his actions, respondent led the world to believe that Ms. Giacchi was able to comprehend the nature of the transaction, that she was mentally competent and that she, in fact, signed the deed. Given the hospital records and the nurses' testimony, it is evident that Ms. Giacchi did not have the requisite capacity.

Even assuming, as respondent's counsel has argued, that the hospital records are not conclusive as to Ms. Giacchi's condition and that she was competent to execute the deed, respondent's conduct was still improper. He took no steps that evening to ascertain from any hospital personnel what Ms. Giacchi's physical and/or mental state was at that time. Although he testified that he advised Ms. Giacchi about the nature of the transaction, he admitted that he received no response from her. Respondent had a duty to obtain more information about Ms. Giacchi's physical and mental capacity before she signed the deed.

Respondent also took an improper jurat. Because of the positioning of Ms. Tobajka's body, respondent did not witness Ms.

Giacchi's signature. This notwithstanding, he took the acknowledgment on the deed without placing her under oath. The taking of an oath should always be done with utmost seriousness and faithfulness. Of course, the jurat must be executed with absolute honesty. Immerman v. Ostertag, 83 N.J. Super. 364 (1964).

Respondent's conduct with respect to the deed was a serious breach of duty. Accordingly, a six-member majority of the Board recommends that he be suspended for a period of three months. One member dissented, believing that the matter should be dismissed. Two members did not participate.

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

Dated: 3/31/75

By: 

Raymond R. Trombadore
Chair
Disciplinary Review Board