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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-241

IN THE MATTER OF :
:
DOUGLAS R. CLARK :
:
AN ATTORNEY AT LAW :

Decision

Argued: September 12, 2002

Decided: January 21, 2003

Stuart M. Lederman appeared on behalf of the District X Ethics Committee.

Respondent did not appear for oral argument.

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

This matter was before us based on a recommendation for discipline filed by the District X Ethics Committee ("DEC"). The four-count complaint charged respondent with misconduct stemming from a business transaction with a client. Specifically, respondent was charged with a violation of RPC 1.1(a)(gross neglect), RPC 1.7(a)(conflict of interest), RPC 1.8(a)(prohibited business transactions with clients), RPC 8.1(b)(failure to cooperate with disciplinary authorities) and RPC 8.4(a)(violation of the Rules of Professional Conduct).

Respondent was admitted to the New Jersey bar in 1968. He currently lives in Vermont. He previously maintained an office for the practice of law in Hamburg, Sussex County. He has no history of discipline.

Respondent did not appear at the DEC hearing. The record contains two letters from him to the DEC, stating that he had sent a letter of resignation to the New Jersey Supreme Court in 1996, has not practiced law since and has no intention of doing so in any jurisdiction. Respondent added that he did not have the financial resources to travel to New Jersey for the DEC hearing.

According to the hearing panel report, the Office of Attorney Ethics ("OAE") was unable to confirm that respondent had properly resigned from the New Jersey bar. Our communication with the OAE revealed that, although respondent sent a letter of resignation, he failed to follow the requirements of R.1:20-22. He, therefore, remains a member of the New Jersey bar. The New Jersey Lawyers' Fund for Client Protection report indicated that respondent has been ineligible to practice law since September 15, 1997.

By letter dated August 15, 2002 we advised respondent that he is still a member of the bar and that our review of this matter would proceed as scheduled.

* * *

During the time in question, respondent was a partner in the firm of Busche, Clark, Leonard and Honig. Respondent's law partners and Honig (a former law partner) were the only general partners in a business enterprise known as Village Center Development Associates ("VCDA"). Respondent represented the grievant herein, Robert Cerutti, in a

number of matters, dating back to the 1970s.[1]

Count One (The Restaurant Franchise Purchase)

In 1985 Cerutti purchased three restaurant franchises. He was represented by respondent in those transactions. Thereafter, in late 1985 or early 1986, Cerutti decided to purchase four additional franchises through his company, VC Inc., a corporation formed by respondent. Respondent and his business partners wanted to invest in the project. Each of the four attorneys invested $125,000 through VCDA, giving them an eighty-percent interest in the venture.[2]

Respondent represented both VCDA and Cerutti in the transaction. No written agreement was executed between the parties to the transaction and Vernon Enterprises (an entity formed by VCDA and VC Inc. in late 1986), setting forth their respective rights, duties or liabilities. The ethics complaint alleged that the transaction "was unfair and unreasonable since none of the terms and conditions were set forth in writing, nor in the form of a legally enforceable agreement."

Respondent did not advise Cerutti to consult with independent counsel or obtain Cerutti's consent to the dual representation.

The complaint charged respondent with a violation of RPC 1.7(a) and RPC 1.8(a).

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[1] Richard E. Honig left the firm in 1984. He represented Cerutti prior to respondent's involvement.

[2] VCDA's interest in the venture was later changed to seventy-two and three-quarters percent.

Count Two (The Land Purchase)

In the fall of 1986 VCDA agreed to sell twenty-six acres of unimproved land in Vernon Township to a company owned by Cerutti, Vernon Industrial Park ("VIP"), for $250,000. Respondent had drafted the documents to form VIP. Respondent represented VCDA and VIP in connection with the sale and purchase of the twenty-six acre tract. There was no written contract setting forth the terms of the transaction. Cerutti paid $10,000 toward the purchase price.

Here again the ethics complaint alleged that the "transaction was unfair and unreasonable" because the terms and conditions were not set out in a writing or a legally enforceable agreement.

Respondent did not advise Cerutti to consult with independent counsel and did not request that Cerutti consent, in writing, to the dual representation.

At one point, the restaurant franchises purchased by VC Inc. and VCDA fell into debt. Respondent and his partners refused to infuse further capital. That decision jeopardized Cerutti's original three franchises, which were cross-guaranteed. Cerutti, therefore, advanced $20,000 of his own funds to save the restaurants.[3] Cerutti testified that the partners in VCDA had agreed to reimburse him for their eighty percent share of the $20,000. There was no written agreement covering this alleged understanding. Thereafter, Honig sent a letter to Cerutti, stating that they had applied the money they owed Cerutti toward the balance that VIP (Cerutti's company) owed to VCDA for the purchase of the twenty-six-acre tract. That decision was unilaterally made and contrary

[3] The hearing panel report mistakenly stated that respondent supplied the $20,000.

to Cerutti's wishes.

The complaint charged respondent with a violation of RPC 1.7(a) and RPC 1.8(a).

Count Three (Negligence)

As noted above, respondent failed to provide written agreements between Cerutti and VCDA. The absence of legally enforceable contracts not only placed Cerutti's investments at risk, but, according to Cerutti's testimony, caused him to lose substantial sums of money.

The complaint charged respondent with a violation of RPC 1.1(a) and RPC 8.4(a).

Count Four (Failure to Cooperate with the DEC)

By letters dated January 23 and February 9, 1998 the DEC investigator requested that respondent reply to the allegations contained in Cerutti's grievance. Respondent failed to reply to the allegations.

In his answer to the complaint, respondent denied receipt of the January 23, 1998 letter. As to the second letter, respondent claimed that he wrote to the investigator on February 12, 1998, stating that he would reply to the investigator's February 9, 1998 letter (which requested a reply to the investigator's January 1998 letter), as soon as a copy of the latter was provided to him.

The presenter did not proceed with this count of the complaint at the DEC hearing, based on the investigator's unavailability to testify. The DEC, however, considered respondent's failure to appear at the hearing as part of that charge.

The complaint charged respondent with a violation of RPC 8.1(b) (failure to cooperate with disciplinary authorities).

* * *

Cerutti's testimony indicated that there were at least two other transactions similar to those in question, but not cited in the complaint, in which respondent engaged in a conflict-of-interest situation. The presenter made a motion to amend the complaint to conform to the evidence. The hearing panel reserved its decision, but made no reference to it in the hearing panel report. The presenter noted respondent's multiple violations, pointing to the "sub transactions" within the transactions at issue and the long span of the misconduct – 1983 through 1990. The presenter urged the DEC to recommend respondent's disbarment.

* * *

The DEC found Cerutti's testimony credible. With regard to count one, the DEC determined that respondent

> left the Grievant in a situation where he was truly not been [sic] represented any [sic] legal capacity by the Respondent despite the Respondent having a fiduciary, and ethical obligation to do so. At the same time the Respondent was also representing his partners and his company, VCDA with many interests in conflict with the other 'clients.'. . .[4] As set forth above, the Respondent did not obtain the consent of any of his clients to proceed in the fashion that he did. The inference drawn by this panel was that the Respondent was putting his interests first, ahead of his own client for nothing more than the prospect of financial gain.
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> [Hearing panel report at 6-7]

[4] It is not clear from the record if respondent acted as the attorney for Busche, Leonard and Honig or if he was simply their spokesperson.

The DEC found a violation of RPC 1.7(a) and RPC 1.8(a).

Similarly, as to count two, the DEC stated as follows:

> Due to this flagrant violation, the Grievant suffered harm which could have otherwise been prevented by minimal efforts of the Respondent. He abandoned his obligation to his client for the prospect of his own potential gain. He did not obtain a waiver, nor did he steer his client to outside counsel for an unbiased opinion. He failed to draft documents to protect the rights of his client, namely a real estate contract and financing agreement. The $20,000 payment for the restaurant venture debt, was arbitrarily applied to a separate and distinct transaction without the client [sic] consent.
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> [Hearing panel report at 9]

Here, too, the DEC found that respondent violated RPC 1.7(a) and RPC 1.8(a).

With regard to the allegations of gross neglect, the DEC determined that respondent "knew, or should have known, that his interests were at times similar to, but others completely adverse to those of his client, the Grievant." In the DEC's view, respondent's lack of protection for Cerutti was "painfully evident" and arguably a "willful disregard" for his rights, in violation of RPC 1.1(a).

The DEC did not find clear and convincing evidence of a violation of RPC 8.4(a).

As noted above, the presenter did not proceed with count four, based on the unavailability of the DEC investigator to testify. The DEC, however, found that respondent had violated RPC 8.1(b), based on his failure to cooperate with the DEC during the investigation and failure to appear at the hearing.

The DEC recommended a term of suspension from three to six months.

* * *

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

Because the hearing panel report made no mention of the presenter's motion and the complaint did not give respondent any notice of the new charges, our review was confined to the allegations of the complaint.

With respect to count one (the restaurant franchises), respondent's company, VCDA, entered into a business deal with Cerutti, a client of respondent. Respondent represented both VCDA and Cerutti's company, VC Inc., in that transaction. Respondent had to recognize that, although VC Inc. and VCDA had a common interest – the success of the restaurants – their differing ownership percentages as well as the involvement of Cerutti's other three restaurants led to a high probability that their interests would ultimately conflict. In light of respondent's interest in VCDA, he should have advised Cerutti to seek independent counsel and should have obtained his written consent to the dual representation. This conduct violated RPC 1.8(a). Furthermore, respondent never asked for Cerutti's consent to the representation of VCDA and VC Inc., as required by RPC 1.7(a).

In count two, respondent admitted in his answer that, in connection with the land purchase, "Cerutti did not get a written consent to the transaction and/or his waiver of independent counsel in connection therewith," but asserted that, under the circumstances, the absence of a writing was, at most, a technical violation of the rule. Respondent's

argument has no merit. Given respondent's interest in VCDA, as well as the inherent conflict of interest in the relationship between buyer and seller, his violation here was not merely "technical." He made no attempt at compliance with the rule: he failed to advise Cerutti to seek independent counsel; he failed to obtain his consent to the representation, in writing; and he failed to set out the terms of the transaction, in writing. Furthermore, aside from the improper business transaction with Cerutti, the conflict between VC Inc. and VCDA as buyer and seller should have been apparent to respondent. In fact, if the transaction between VC Inc. and VCDA had been more complicated, respondent would have been prohibited from representing both sides. "[A]n attorney may not represent both the buyer and the seller in a complex commercial real estate transaction even if both give their informed consent." Baldasarre v. Butler, 132 N.J. 278, 296 (1993). Hence, we found that respondent violated RPC 1.7(a) and RPC 1.8(a), as charged in count two.

As to count three, respondent undeniably neglected his responsibilities to Cerutti. By failing to reduce to writing the agreements between Cerutti and VCDA, respondent exposed his client to harm by not specifying the terms of the transactions and the parties' accompanying responsibilities. In addition, as pointed out by the presenter, the land purchase would have fallen within the statute of frauds and required the preparation of a writing memorializing the transaction. Furthermore, Cerutti testified that his dealings with VCDA caused him enormous financial losses that resulted in ongoing civil litigation.[5]

[5] William L. Gold, Cerutti's attorney in the civil suits arising from these transactions, testified below. Gold supplied the DEC with portions of respondent's deposition transcript. The DEC

As to count four, the presenter did not proceed with the allegation that respondent failed to cooperate with the DEC. The DEC, however, found that respondent had violated RPC 8.1(b), based on his failure "to cooperate in the investigation of this matter, with no documents being produced." We cannot agree with the DEC. In light of the lack of clear and convincing evidence that respondent deliberately ignored the investigator's letters, it cannot be found that he failed to cooperate with the investigator. The DEC, however, also found a violation of RPC 8.1(b) for respondent's failure to attend the hearing. That finding was correct. Pursuant to R.1:20-6(c)(2)(D), "respondent's appearance at all hearings is mandatory." His failure to attend the hearing, thus, violated RPC 8.1(b).

It is well-settled that, "in cases involving a conflict of interest, absent egregious circumstances or serious economic injury to the clients involved, a public reprimand constitutes appropriate discipline." In re Berkowitz, 136 N.J. 134, 148 (1994). Here, Cerutti testified that, due to his dealings with VCDA, he lost significant equity in his properties. In addition to the client's serious economic injury, respondent's failure to protect Cerutti's interests and to appear at the DEC hearing must be viewed as egregious circumstances.

Under these circumstances, numerous cases support a short-term suspension. As an example, in In re Butler, 142 N.J. 460 (1995) a three-month suspension was imposed where the attorney failed to inform his clients, the sellers, of the buyers' contract to sell

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reviewed excerpts of approximately 400 pages of the transcript. The DEC found the information therein consistent with Cerutti's testimony and, therefore, did not admit the transcript into evidence.

the property to a third party, executed before closing of title with the attorney's client, and represented both parties in negotiating a contract of sale and in a modification of its terms.

A three-month suspension was also imposed in In re Hurd, 69 N.J. 316 (1976). There, the attorney arranged a loan transaction in which his friend, who was unsophisticated in business transactions, transferred property to Hurd's sister for approximately twenty percent of its value. Hurd's previously unblemished twenty-two-year career was a mitigating factor taken into account.

More serious discipline was imposed in In re Feranda, 154 N.J. 4 (1998) (six-month suspension imposed where the attorney, who was both a tax attorney and a certified public accountant, engaged in a conflict of interest by simultaneously representing two parties to a real estate transaction. The attorney also failed to safeguard the client's funds, pending completion of the transaction. The harm to the client and the attorney's denial of wrongdoing led to the suspension.

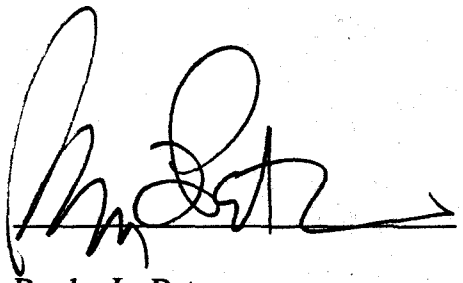
Similarly, a six-month suspension was imposed when an attorney took loans from a client without documentation and without advising the client to obtain independent counsel prior to entering into the loan. In re Shelly, 140 N.J. 501 (1995).

Here, we considered several mitigating factors. Respondent has been a member of the bar since 1968 and has no history of discipline. He allegedly does not practice law and has no intention of doing so in the future. In addition, the misconduct at issue took place roughly sixteen years ago. The passage of time has been considered a mitigating factor in conflict-of-interest cases. In Feranda, the discipline would have been greater,

but for the fact that the events had occurred ten years earlier.

In sum, as noted above, entering into a conflict of interest with a client will ordinarily merit a reprimand. In light, however, of respondent's other violations, including his failure to attend the DEC and Board hearings, and the financial losses to Cerutti, we were persuaded that a suspension is warranted. In determining the length of the suspension, we considered respondent's failure to protect his client from financial losses due to his loose, sloppy practices, as well as the fact that respondent viewed this as only a technical violation of the rule and refused to acknowledge his wrongdoing. We, therefore, unanimously determined to impose a six-month suspension.

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



Rocky L. Peterson
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Douglas R. Clark
Docket No. DRB 02-241

Argued: September 12, 2002

Decided: January 21, 2003

Disposition: Six-month suspension

Members	*Disbar*	*Six-month Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson		X					
Maudsley		X					
Boylan		X					
Brody		X					
Lolla		X					
O'Shaughnessy		X					
Pashman		X					
Schwartz		X					
Wissinger		X					
Total:		9					

Robyn M. Hill
Chief Counsel