SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-356

IN THE MATTER OF :
:
KENNETH VAN RYE, :
:
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: January 8, 1992

Decided: February 25, 1992

Regina R. Ford appeared on behalf of the District IIA 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 a recommendation for public discipline made by the District IIA Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1979. He is a sole practitioner in Elmwood Park, Bergen County. Effective August 12, 1991, respondent was suspended for three months for (1) minor recordkeeping violations; (2) failure to submit a written, formal accounting for rents collected in behalf of a client; (3) falsely certifying to a mortgage company that he was holding the entire deposit monies in escrow; (4) improperly witnessing and notarizing a false signature on a mortgage and (5) through his silence, misrepresenting to a credit union's general manager that

the signature on the loan documents was his client's (respondent had a power of attorney to sign the client's name; instead of signing the documents as her attorney-in-fact, he had someone else sign the client's name thereon and then notarized that person's signature as being the client's). In recommending only a three-month suspension, the Board considered respondent's lack of evil motives and his genuine desire to help the client. The Court adopted the Board's findings and recommendation for discipline.

Although respondent's temporary suspension expired on November 12, 1991, he has not yet applied for reinstatement to the practice of law.

* * *

The facts of this matter are as follows:

In April or May 1987, respondent was contacted by Kenneth Bohannon, a financial planner, to represent Bohannon and two of his clients, Robert Guempel[1] and Samuel Mills, in the purchase of a house in Cranford, New Jersey. At that time, the buyers had already signed a contract of sale, without the benefit of legal counsel. Respondent agreed to represent them in the transaction.

Upon reviewing the contract, respondent discovered that it did not contain a mortgage contingency clause. After respondent successfully negotiated the inclusion of such clause, he set out to attempt to obtain mortgage financing in behalf of his clients. For reasons not relevant to these proceedings, this task proved to be

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[1] The grievant in this matter is Thomas Demarest, Esq., Guempel's attorney.

arduous. By way of example, one problem concerned the income verification of Mills, a professional football player with the New Orleans Saints. In any event, the difficulties with the financing led to numerous time-of-the-essence letters by the sellers' attorney and, at one point, to a suit for specific performance filed by respondent in the buyers' behalf, in the face of the sellers' cancellation of the agreement of sale. Ultimately, respondent was able to arrange for a short-term mortgage loan from the Community Guardian Bank ("the bank"). The loan consisted of a six-month balloon mortgage for $110,000, due and payable on November 1, 1988. In the interim, respondent was to continue to seek long-term financing, to be effective at the expiration of the balloon mortgage.

In early March 1988, one year after the execution of the agreement of sale, the parties were finally ready to close title. On March 8, 1988, Guempel and his wife went to respondent's office for the scheduled closing of title. Guempel and his wife signed all closing documents, which bore no other signatures at that time. Absent that day were the sellers as well as Mills and his wife, and Bohannon and his wife. The Bohannons would be arriving late because of a prior committment. The reason for the sellers' absence was their refusal to close title unless the buyers agreed to pay them $3,500 to $5,000 for carrying costs incurred during the long intervening period between the contract and the closing.

The night before the closing, respondent was informed by Bohannon that Mills was refusing to proceed with the purchase;

Mills wanted to be let out of the deal and to have his $15,000 deposit returned. On the day of the closing, Guempel was informed by Bohannon, during a telephone conversation, that Mills was unwilling to continue to participate in the deal. Bohannon and Guempel both concluded that they did not have the means to contribute Mills' share in his stead. Bohannon then suggested to respondent that he, respondent, become a partner in the transaction. Respondent considered the proposal, knowing that he would have to liquidate some assets in order to be able to join in the deal. After giving it some thought, respondent agreed to be a one-third owner of the property. Respondent, now a partner in the business venture, did not advise Bohannon, Guempel or Mills to retain separate counsel. Thereafter, respondent telephoned Mills in New Orleans to determine whether Mills, in fact, wished to bail out. Mills assured respondent that he did. Mills also voiced to respondent his concern that he not lose the $15,000 deposit. According to respondent, he and Mills talked about the best alternatives to proceed with the closing on that day. When respondent informed Mills that Mills had to sign some closing documents, Mills told respondent that he would be coming to New Jersey the following week. Respondent testified that, at that juncture, he suggested that Mills give him a power of attorney to sign the documents and that respondent, in turn, would indemnify Mills for any potential losses:

> I told him that I had an indemnity agreement for him and had a Power of Attorney for him that had to get signed because we had to finish the closing because the bank was going to want everything to be done or he would have to

> sit for a whole closing with me and sign all the documents. He tells me, I don't want anything to do with it. He said, I want my money. I said, if you are not going to sit through all of the closing documents, you can't have your money.
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> . . .
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> The final conversations at that point were that he'll do whatever he has to do to get his money. I told him that I had the Power of Attorney then if he wasn't going to sign all those documents and the indemnity agreements, where I would hold him harmless on the transaction we had to refinance. It was only a six-month note anyway and we would do it.
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> [2T 119-122][2]

Consistent with their alleged understanding, respondent prepared an indemnification agreement. Exhibit R-5.[3] Mills, however, testified that he was unaware that his withdrawal from the deal would not extinguish his liability as obligor under the mortgage.

Having Mills' consent to do what was necessary to proceed with the closing and seemingly having resolved the price dispute with the sellers, on the next day, March 9, 1988, respondent attended the closing held at the office of the sellers' attorney, A. Crew Schielke. At that time, a minor problem arose with the names of the grantees on the deed. Relying on the title binder and on the contract of sale, Schielke had prepared the deed listing Bohannon, Guempel, Mills and a Frank Bender as grantees. Bender, however,

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[2] 2T denotes the transcript of the DEC hearing of the June 26, 1991.

[3] Although the copy in evidence is unsigned, respondent testified that Mills had signed the indemnification agreement.

was not one of the purchasers. There is reference in the record that the reason Bender had been named in the contract was to avoid the payment of broker's commission. According to Bohannon, because Bender had been one of the prior owners of the property, listing Bender as buyer would avoid the sellers' obligation to pay a real estate commission.[4] In any event, as noted above, the deed contained Bender's name as grantee. Exhibit C-9. According to respondent, upon learning of this fact, he informed Schielke that Bender was not one of the purchasers; Bender's name was then deleted from the deed while respondent was still in Schielke's office. Although Schielke professed no recollection of this change, he conceded that it could have happened. Respondent, in turn, vigorously testified that "there [was] no doubt in [his] mind" that Bender's name had been removed at Schielke's office, with Schielke's knowledge. 2T 136.

According to respondent, following the execution of the closing documents by the sellers and by Bender and Guempel, he withheld forwarding them to the bank because Mills was still in New Orleans and respondent did not have a power of attorney to sign them in Mills' behalf. Respondent did, however, disburse the mortgage proceeds, notwithstanding the fact that Mills' name appeared on the mortgage documents and that they remained unsigned

[4] Although it is not known why naming Bender as a buyer would accomplish the stated purpose, the fact that Bender's name appeared on the contract or the deed is not relevant to these proceedings. The record alludes to it for background purposes only, in order to assess the alleged improper conduct by respondent, following his discovery of Bender's name on the deed.

either by Mills or by respondent, as Mills' attorney-in-fact.

Respondent testified that, although he disbursed the mortgage monies, he withheld sending the mortgage documents to the bank until Mills signed the power of attorney. This was not accomplished until April 4, 1988, approximately four weeks after the closing. On that day, Mills went to respondent's office to pick up a check representing one-half of his deposit; the remaining one-half was to be paid after permanent financing was obtained. Mills also signed the power of attorney at that time. Exhibit C-3. Although respondent was not at his office when Mills and his wife signed the power of attorney, respondent subsequently notarized their signatures. Thereafter, according to respondent, he signed the mortgage documents and forwarded them to the bank. In response to a question posed by the hearing panel, respondent testified that the bank did not complain about the untimeliness of the remittance.

The documents show that respondent did not sign them as Mills' and his wife's attorney-in-fact but, rather, wrote in their names as if they had signed the documents themselves. Respondent then notarized the "signatures." Asked why he had chosen this procedure when he had a valid power of attorney, respondent confessed that he did not learn the proper way to sign under a power of attorney until he consulted with counsel after the filing of the ethics grievance. 2T 169-170.

Respondent did not formally inform the bank that he had been substituted for Mills in the transaction. He testified, however, that he had subsequently so advised a bank officer, David Geibel,

at the time that he sought refinancing, and that Geibel had replied ". . . when you refinance it, it will be all over, so just get it done and so on and so forth and there will be no additional documents on it. No writings." 2T 168.

Ronald Patierno, now a Vice-President with the bank, testified at the DEC hearing. It was his testimony that his review of the bank's file did not show any evidence or writings that the bank had consented to the substitution of respondent for Mills. The presenter explained, however, that Patierno's employment with the bank might have pre-dated the transaction.

Sometime after the closing, respondent altered the deed to delete Mills' name therefrom and inserted his name as one of the grantees. Exhibit C-10. Respondent had not recorded the prior deed naming Bohanna, Mills and Guempel as grantees. The newly altered deed was recorded on October 19, 1988. Neither Schielke nor the bank was aware of this change on the deed to reflect respondent's ownership. Asked why he had altered the deed, respondent conceded that "it was pretty stupid."

Eventually, Guempel became increasingly dissatisfied with the business venture. According to respondent, notwithstanding the fact that it was crucial to secure long-term financing, Guempel refused to sign the numerous mortgage applications that respondent had sent him. Between August 1988 and January 1990, respondent sent several letters to Bohannon and Guempel, enclosing mortgage applications and advising them that the bank was threatening to foreclose on the balloon mortgage, which had expired in November

1988. See Exhibits R-8 through R-13. Ultimately, the bank instituted foreclosure proceedings. Shortly thereafter, by deed dated February 5, 1990, Guempel conveyed his interest to Bohannon and respondent, following negotiations between Guempel and Bohannon for the return of Guempel's $15,000 deposit. Guempel was neither represented by an attorney in that transaction nor advised by respondent to retain independent counsel. Respondent explained that he did not believe it necessary to so advise Guempel became Guempel had a personal attorney, Thomas Demarest, who was also a friend and neighbor of Guempel, and with whom respondent had had some conversations prior to the March 9, 1988 closing. Guempel, in turn, testified that he considered respondent his attorney in the latter transaction, "in a sense that I didn't look for one, another one, that I would normally use for a real estate transaction, because [respondent] was an attorney." 1T 132[5]. Respondent did not advise Guempel that his liability under the mortgage and note would not be extinguished by the divestiture of his ownership interest in the property. Respondent, in turn, contended that Guempel was fully aware of this fact, being a sophisticated businessman with considerable experience in real estate transactions.

The complaint for foreclosure filed by the bank listed Guempel and his wife, Mills and his wife, and Bohannon and his wife as defendants. Guempel was served with the foreclosure complaint, but

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[5] 1T denotes the transcript of the DEC hearing of June 25, 1991.

Mills was not, service having been made on Bohannon's wife for all defendants in the suit. Fortunately for Mills, after the bank became aware of the fact that he was not one of the owners, it removed Mills' name from the suit. Soon thereafter, respondent and Bohannon were able to pay off the balloon mortgage, to no one's detriment.

* * *

At the conclusion of the DEC hearing, the panel found that respondent (1) improperly witnessed the Millses' signatures on the power of attorney; (2) improperly dated the power of attorney March 1980, instead of April 4, 1988; (3) did not advise the Millses that they continued to be obligated under the mortgage and the note; (4) did not inform the bank that he had substituted for the Millses in the transaction; (5) altered the deed to insert his name thereon; (6) did not advise Guempel to retain counsel at the time of the conveyance of his interest to Bohannon and respondent; (7) did not advise the Guempels that they remained liable under the mortgage; (8) did not advise Schielke that the Millses were no longer partners in the deal and, in fact, represented to Schielke that Mills could not attend the closing because he was in training camp; (9) signed the Millses' names on the closing documents on March 9, 1988, without the benefit of a power of attorney; and (10) disbursed the mortgage proceeds without the Millses' signature on the mortgage documents.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusions that respondent's conduct was unethical are fully supported by clear and convincing evidence. The Board is unable to conclude, however, that some of the DEC's findings are supported by the record.

Indeed, the DEC found that respondent had not informed the bank that he had substituted for the Millses in the transaction. While this is true, more properly, the DEC should have found that respondent did not notify the bank of that fact prior to the closing. Clearly, the correct procedure would have been for respondent to advise the sellers' attorney of this new development, seek and obtain the bank's consent thereto and then reschedule the closing. This he failed to do. But the record does not support a finding that respondent deliberately hid that fact from the bank after the closing. While it is true that there are no writings in this regard, respondent testified that, at the time that he sought long-term financing from the bank, some four weeks after the closing, he notified David Geibel, one of the bank officers, that he had replaced the Millses as one of the purchasers. To be sure, this notice was wholly inadequate. Obviously, respondent should have sought the bank's approval to the substitution, in writing, prior to the closing. In cannot be said, however, that respondent made a conscious and deliberate decision to perpetuate his initial failure to disclose the substitution to the bank and failure to

obtain its approval thereto.

Similarly, the finding that respondent misrepresented to Schielke, at the closing, that Mills was not present because he was in training camp is not based on clear and convincing evidence. During his cross-examination by respondent, Schielke conceded that respondent's statement that Mills was in training camp might have been made in connection with the receipt of a time-of-the-essence letter that scheduled a prior closing date.

Also, the DEC's finding that respondent did not advise Mills that he remained obligated under the mortgage is at odds with the evidence in the record. Respondent testified that he explained the indemnification agreement to Mills, a copy of which was introduced into evidence. Mills also admitted that he did not remember much about the transaction.

More significantly, the Board's careful reading of the relevant parts of the DEC transcript (2T 180-198) did not uncover any testimony by Schielke that he had seen the Millses' signatures on the closing documents on March 9, 1988, the closing date, as found by the DEC. The Board was unable to agree with the DEC in this regard, finding that the record before it does not support the DEC's conclusion.

Guempel, too, was asked whether the Millses' signatures were on the documents when he signed them. Guempel, however, signed the documents at respondent's office the day before the closing, March 8, 1988. He testified that the documents were blank when he signed. Accordingly, the record does not clearly and convincingly

reflect that respondent signed the Millses' names before he obtained the power of attorney. Indeed, respondent testified that he waited until April 4, 1988, the day that the Millses signed the power of attorney, to write in their names on the documents. The DEC's conclusion that respondent must have signed the Millses' names before he obtained the power of attorney because otherwise the bank would have complained about the delay in remitting of the closing documents, while logical, is not supported by clear and convincing evidence. Ronald Patierno, the bank's new vice-president, did not testify about the exact date the bank received the documents after the closing. Respondent, in turn, testified that the bank did not complain about the delay in forwarding the documents, presumably because of the alleged internal turmoil that the bank was experiencing with some of its officers.

It is unquestionable, however, that the balance of the DEC's findings are fully supported by the record. Respondent (1) did not advise Schielke or the sellers of his substitution for the Millses; (2) improperly dated the power of attorney March 1988, instead of April 4, 1988; (3) improperly notarized the Millses' signatures on the power of attorney; (4) did not advise Guempel, Bohanon or Mills to seek independent counsel, after he entered into a business relationship with them; (5) did not advise Guempel to obtain separate legal representation after Guempel decided to convey his interest to Bohanon and respondent; (6) did not seek the bank's consent to his substitution for the Millses prior to the closing; (7) disbursed the mortgage proceeds without the Millses' signatures

on the documents or without having the bank's approval to his substitution for the Millses and (8) altered the deed to delete Mills' name and included his own, having replaced Mills as one of the partners.

Of respondent's acts of misconduct, the most serious was his disbursement of the mortgage monies. When he released the funds without having the power of attorney to sign the documents in behalf of the Millses, the risk was obvious. The bank had issued a commitment to all three partners, Bohannon, Guempel and Mills. The bank fully expected all three to become obligors under the mortgage and note. For a variety of reasons, the Millses might not have given respondent the power of attorney, in which case only Bohannon and Guempel became responsible for the mortgage obligations. Similarly, if respondent intended to substitute for the Millses in their mortgage obligations, then he should have obtained the bank's approval to the substitution prior to the closing. In prematurely disbursing the mortgage proceeds, respondent breached his duty owed to the bank as its agent. An attorney's professional obligation may reach persons who have reason to rely on him even though they are not, strictly speaking, clients. In re Katz, 90 N.J. 272, 284 (1982), citing In re Lambert, 79 N.J. 74, 77 (1979). Fortunately, respondent ultimately signed and forwarded the mortgage documents to the bank, albeit late.

Fortunately for the Millses also, respondent and Bohannon paid off the balloon mortgage, thereby extinguishing the Millses'

liability thereunder. Despite the existence of an indemnification agreement between respondent and the Millses, the latter remained obligated to the bank and, for a number of reasons, might not have been able to obtain financial redress from respondent under the indemnification agreement.

Fortuitously, however, no party sustained any financial injury: the Millses and the Guempels received their deposit monies back, as agreed, and the bank received its benefit of the bargain when respondent and Bohannon paid off the balloon mortgage. The Board has further considered the absence of venality on respondent's part as a mitigating factor. After prolonged strife between the sellers and the buyers, which resulted in numerous time-of-the-essence letters and a lawsuit for specific performance, and faced with the Millses' refusal to proceed with the transaction, respondent's ensuing acts of misconduct, while not condonable, do not point to any evil motives on his part. It is within the context of the exigencies of the situation that respondent's conduct must be evaluated and that the appropriate measure of discipline must be assessed.

The discipline imposed in cases involving conflict of interest situations has ranged from a private reprimand to disbarment, depending on the gravity of the unethical conduct and the motives underlying the attorney's improprieties. <u>See</u>, <u>e.g.</u>, <u>In re Hughes</u>, 114 <u>N.J.</u> 612 (1989) (public reprimand); <u>In re Hurd</u>, 69 <u>N.J.</u> 316 (1976) (three-month suspension); <u>In re Gallop</u>, 85 <u>N.J.</u> 317 (1981) (six-month suspension); <u>In re Griffin</u>, 121 <u>N.J.</u> 245 (1990) (one-

year suspension); In re Humen, 123 N.J. 289 (1991) (two-year suspension); and In re Wolk, 82 N.J. 326 (1980) (disbarment).

Here, respondent not only created a conflict of interest situation by entering into a business relationship with Bohannon and Guempel without advising them to obtain separate counsel and by not urging Guempel to secure independent legal advice when he subsequently conveyed his interest to Bohannon and respondent, but he also executed the jurat on the power of attorney signed outside his presence, altered the deed to delete Mills' name therefrom and inserted his own, as the new partner in the venture, and disbursed the mortgage funds without first obtaining either the Millses' power of attorney to sign the documents in their behalf or the bank's consent to his substitution for Mills.

Respondent's conduct was similar to that displayed by the attorney in In re Barrett, 88 N.J. 450 (1982), who was suspended for a period of three years. There, the attorney engaged in a conflict of interest situation by obtaining a $13,000 loan from a client, to be secured by a second mortgage on the attorney's property. The attorney did not advise the client to seek independent counsel and failed to see that the mortgage was delivered to the client and recorded. In addition, the attorney took a jurat out of the presence of his client and, more seriously, altered a proposed form of divorce judgment to include an award for counsel fees. He did not obtain his adversary's consent to the change prior to submitting the judgment for the court's signature.

Barrett is distinguishable from this matter on several

grounds. In Barrett, the attorney also preparedd an affidavit for his client's signature, signed the client's name on the affidavit, had his secretary notarize it and then filed it with the court. More seriously, the attorney filed a criminal complaint against a party to coerce settlement of a client's claim for fraud against that party. Another significant distinction between the alteration in Barrett and in this matter is that, in Barrett, the judgment was submitted surreptitiously, prompted by evil motives on the attorney's part. Here, respondent's insertion of his name on the deed was not intended to defraud his partners or the bank. The Board was persuaded that respondent's act was the result of poor judgment and not of venality. Although the alteration of the deed inured to respondent's benefit, it was unmarked by the pattern of self-dealing, deceit and dishonesty frequently associated with conduct involving fabrication and forgery of documents. As mentioned above, respondent characterized his actions as very foolish. The Board agrees with respondent's assessment of his conduct, having failed to perceive any nefarious motive on his part.

In the Board's view, respondent's alteration of the deed is more analogous to the conduct exhibited by the attorney in In re Robbins, 121 N.J. 454 (1990). In that case, to advance his own interest, Robbins "signed" his client's name on a deed that he subsequently submitted to the planning board. Robbins also signed the acknowledgement on the deed in his capacity as attorney-at-law. He did not inform the planning board that the signatures on the

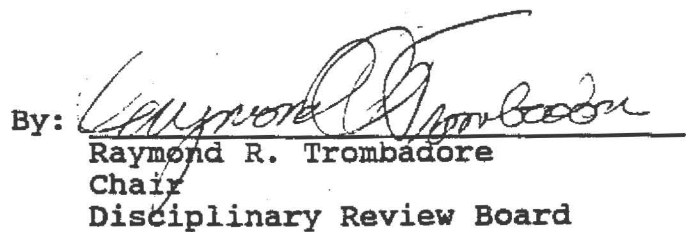
deed were not genuine and that the jurat had been improperly taken. The Board recommended that Robbins receive a public reprimand. The Court agreed.

Respondent's misconduct in this real estate transaction was inexcusable. Taken in conjunction with his prior brush with the disciplinary system, the totality of the conduct displayed in this matter warrants a suspension for a period of two years. Said suspension should be prospective and not retroactive to November 12, 1991, when respondent was eligible to petition for reinstatement to the practice of law. The Board's majority so recommends. One member would vote for disbarment. One member did not participate.

The Board majority also recommends that respondent be cautioned that any future breaches of his ethics responsibilities will be met with disbarment.

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

Dated: 2/25/92

By: 

Raymond R. Trombadore
Chair
Disciplinary Review Board