SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-033

IN THE MATTER OF :
SHARON R. AUERBACHER :
AN ATTORNEY AT LAW :

Decision

Argued: April 16, 1998

Decided: September 28, 1998

Roger A. Hauser 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 on a recommendation for discipline filed by the District IIA Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1986 and maintains an office for the practice of law in Englewood, Bergen County. She has no prior ethics history.

The two-count complaint alleged violations of RPC 1.7 (conflict of interest,); RPC 1.8 (business relationship with client); RPC 1.9 (conflict of interest, former client); RPC 2.2 (acting as intermediary between clients); RPC 4.3 (dealing with unrepresented person: employee of organization); and RPC 5.5 (engaging in the unauthorized practice of law). The charges arose out of an agreement drafted and later arbitrated by respondent.

The grievant, Clifford Warren, first met respondent in May 1993. The meeting took place at his Florida business, Best Universal Copying and Printing, Inc., ("Best Universal"). Respondent's brother, Barry Lipman, worked as a typesetter for Best Universal. Warren testified that Lipman thought that the company's typesetting equipment was outdated and convinced Warren that the company should invest in a $20,000 state-of-the-art computer typesetter to replace its antiquated equipment. Warren explained that he and Lipman agreed to enter into a joint venture whereby Warren would contribute $15,000 and Lipman $5000 toward the purchase of the new equipment. The agreement called for the parties to share in the profits in an inverse relationship to their contributions because, according to Warren, Lipman was to become a sole proprietor operating the equipment on Best Universal's premises.

Seeking to reduce the venture to writing, Warren and Lipman requested that respondent draft the agreement. Unbeknownst to Warren, respondent was not admitted to practice law in Florida. Warren testified that respondent drafted the

agreement, which contained an arbitration clause. According to Warren, respondent unilaterally decided to include the arbitration clause and, without discussion, inserted her name as the sole arbitrator. Warren also testified that respondent never advised him to consult another attorney regarding the agreement.

Warren testified that Lipman selected, purchased and operated the new equipment at Best Universal. Within a short time, according to Warren, it became apparent that Lipman did not have the expertise required to operate the equipment. Warren contended that Lipman was a "hot-tempered individual" who became easily frustrated in his efforts to master the new typesetting equipment. On several occasions, Warren called respondent "to calm her brother down basically so some kind of communication can be - you know - we can have some form of communication between the two of us." Warren testified that his relationship with Lipman deteriorated over the first year that the new equipment was in place. Warren added the following:

> [Lipman] would, on many occasions throughout this year, throw his hands up and leave, not come in, and then all of a sudden come back a day or so later. A very, very frustrated individual.

Apparently, Lipman's work product was so poor that Warren began to send typesetting work out of the office. However, because Lipman received no salary under the agreement, his source of income dried up.

Warren also testified about the incident that led him to sever his relationship with Lipman. According to Warren, one day Lipman became irrational and confrontational with him in front of other employees. Warren requested that Lipman permanently leave the premises. Apparently, later that day, Lipman came back with his mother to intercede in his behalf. After some discussion, Warren agreed to take Lipman back. Meanwhile, Warren stated, Lipman was in another part of the office telling Best Universal employees that he intended to turn Warren in to various taxing authorities because of business irregularities. Not surprisingly, upon hearing that news, Warren forbade Lipman's return, scheduled for the following morning.

Lipman then sued Warren and Best Universal for damages caused by his removal from the premises. Both Warren and Lipman retained attorneys to represent them in the subsequent litigation, which eventually culminated in arbitration. Respondent acted as the arbitrator.

It appears that, at the time of the arbitration proceeding, questions surfaced about the propriety of respondent's role as arbitrator, given her relationship to Lipman and her involvement in drafting the agreement. The transcript of the arbitration proceeding, made a part of the record, reveals considerable dialogue among the attorneys present regarding respondent's relationship to Lipman and the agreement, as well as the propriety of her role as the sole arbitrator. No formal objections to respondent's role were made at that time. However, there was a request by Best Universal's attorney to have respondent disclose on the record her

relationship to the transaction and to Lipman. Respondent attempted to minimize the need for any disclosure, claiming that everyone was well aware that Lipman was her brother. She proceeded with the arbitration.

Warren summarized the arbitration proceeding as follows:

> Her decision was to award her brother fifty-two thousand dollars in punitive damages. There were several other - you know, she did not find me guilty of fraud, but she did find me guilty of conversion, she found me guilty of I think it was collusion. And with punitive damages, her award totaled in the neighborhood of fifty-two thousand dollars, plus she awarded herself twenty-five hundred dollars as an arbitration fee.

Warren also testified that he filed an ethics grievance against respondent in the state of Florida, which resulted in respondent's admission to the Florida ethics authorities that she engaged in the unauthorized practice of law and led to an agreement that she would not practice law in that state until licensed to do so. Warren also filed an ethics grievance with the New York ethics authorities, where respondent is also licenced as an attorney. According to Warren, the New York authorities did not pursue the matter.

For her own part, respondent testified that Warren pressed her to draft the agreement for the purchase of the new equipment because both he and Lipman wished to avoid the cost of retaining attorneys for that purpose. Respondent further testified that she was unfamiliar with the area of contract law and that she had resorted to her husband's business textbooks for aid in drafting the agreement.

Respondent insisted, however, that she did not act as an attorney for either party when drafting the agreement. She alleged that she had acted merely as a scrivener, jotting down the parties' understanding. Respondent asserted that it was Warren's idea to insert an arbitration clause in the agreement and that he insisted that she act as the sole arbitrator because he trusted her.

Respondent admitted that, after the implementation of the agreement, Warren and Lipman called her on the telephone periodically with their disagreements and that she discussed those disagreements with the parties. According to respondent, when Warren and Lipman had their final falling out, Lipman sued Warren and his company for damages related to his dismissal. Respondent asserted, however, that she had wanted no part in arbitrating the case and had made that known to the Florida attorneys representing Warren and Lipman. Respondent further testified that Lipman's attorney had obtained an order in the Florida action brought by Lipman naming respondent as the sole arbitrator. According to respondent, she understood that the order required her to arbitrate the case. She later admitted, however, that the court order merely stated that her relationship to Lipman did not preclude her from acting as the arbitrator. Respondent conceded knowing that she could have recused herself at any time.

Finally, respondent portrayed Warren as a savvy businessman who took advantage of Lipman and manipulated respondent into both drafting the agreement and placing respondent in the uncomfortable position of having to arbitrate the case.

On the other hand, respondent portrayed herself as "perhaps foolish, naive, however you want to label it ." Respondent further explained the following:

> I still stand firmly that I did not indeed, draft this agreement, as would be my understanding of drafting an agreement, again, because I am not qualified to do so. I do nothing more than real estate closings, never have, never intended to. And, you know, I was advising them of this throughout the entire process, that I am not acting as an attorney.
>
> Again, as I stated with regards to the arbitration, it was decided by court order that I act as arbitrator. It never occurred to me to step down once presented with that court order. And my decision was based on evidence that was presented to me at the arbitration.

* * *

The DEC found a violation of RPC 5.5(a) for respondent's unauthorized practice of law in Florida, noting respondent's own admission to the Florida disciplinary authorities. The DEC also found a violation of RPC 2.2(c) for respondent's failure to withdraw as arbitrator after Warren requested her to do so. The DEC recommended a three-month suspension.

* * *

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

It is undisputed that respondent engaged in the unauthorized practice of law in Florida when she drafted the agreement. The parties resided in Florida; respondent met with the parties in Florida to discuss the agreement; the subject matter of the agreement was situated in Florida; and the agreement was drafted in part in Florida. Respondent's assertion that she was merely the scrivener has no merit. At a minimum, there was a reasonable expectation on the part of Warren and Lipman that she was acting as an attorney. It matters not that the parties did not contend that she had acted as their respective attorneys. The parties selected respondent to draft the agreement precisely because of her skills as an attorney. The expectation was that the agreement would be a better document for her input. In light of the foregoing, the conclusion is inescapable that respondent engaged in the unauthorized practice of law in Florida, an impropriety that she admitted to the Florida disciplinary authorities.

More troubling was respondent's role as arbitrator. Obviously, by the time the parties resorted to binding arbitration, their legal positions were so adverse and in such direct conflict that respondent should have bowed out. Because of her close relationship with one of the parties — her brother — the possibility that she could be impartial was virtually nonexistent. Even in the absence of formal objections

from the parties' attorneys, it was incumbent upon respondent to remove herself from the role as arbitrator when Warren requested that she step down. Certainly respondent should have been aware of her obligation when the other attorneys at the arbitration requested her to put her relationship to Lipman and the agreement on the record, prior to proceeding.

Another troubling aspect of this case was respondent's attempt to blame outside parties for her involvement. For instance, respondent initially asserted that the Florida order obligated her to conduct the arbitration. When faced with the reality that that order simply stated that she could not be precluded from acting as arbitrator based solely on her relationship to Lipman, respondent backpedaled and admitted that she could have recused herself at any time. Moreover, respondent must have known that, even in the face of a court order, she could have brought a motion before the court requesting that she be relieved from her responsibility as arbitrator. That she did not. In addition, respondent blamed Warren for dragging her into the drafting of the agreement. Respondent later blamed the other attorneys involved in the litigation, including Lipman's attorney, for her continued involvement in the case. Those assertions are not only without merit but also intended to place the blame where it does not belong.

As to the charge of a violation of RPC 1.7, the Board disagreed with the DEC's finding that respondent's conduct was not improper. Respondent clearly engaged in an impermissible conflict of interest. One Board member disagreed with

this finding believing that the Florida judge's approval of respondent as the arbitrator negated the existence of a conflict of interest. In that member's view, respondent's participation as an arbitrator constituted of, at most, an appearance of impropriety. While the express language of that rule addresses conflicts of interest between clients, the spirit of the rule was violated. Respondent assumed the role of arbitrator reserved for a neutral party, when unquestionably she could not have remained neutral to the case. She was the sister of one party and had drafted the agreement that was the subject of the arbitration. For these reasons, the finding that the spirit of RPC 1.7 was violated is inevitable.

Finally, the Board agreed with the DEC's dismissal of the balance of the allegations — violations of RPC 1.8, RPC 1.9 and RPC 4.3 — as inapplicable. The Board found the charge of a violation of RPC 2.2 as equally inapplicable.

Generally, in cases involving conflict of interest, without more, and absent egregious circumstances or serious economic injury to clients, a reprimand constitutes appropriate discipline. In re Berkowitz, 136 N.J. 134(1994). In Berkowitz, the Court observed that

> [t]he lawyer must have in mind not only the avoidance of a relation which will obviously and presently involve the duty to contend for one client what his duty to the other presently requires him to oppose, but also the probability or possibility that such a situation will develop. [Citation omitted].
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> [Id. at 143]

There is no indication in the record that respondent's decision in the arbitration proceeding caused Warren serious economic injury. Although the decision may, on its face, appear unfair or biased, no additional evidence in the record supports a finding in this regard. Accordingly, the Board unanimously determined that a reprimand is sufficient discipline for respondent's ethics violations. One member did not participate.

The Board also required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 9/25/98

LEE M. HYMERLING
Chair
Disciplinary Review Board