SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-218

IN THE MATTER OF :
WILLIAM B. BUTLER, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 21, 1994

Decided: March 10, 1995

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

Arnold K. Mytelka appeared on behalf of respondent.

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 filed by Special Master Robert A. Gaccione. The one-count complaint charged respondent with a violation of RPC 1.7(c)(1) for representing both parties in negotiating a contract of sale and in further negotiating a modification thereto, and with violations of RPC 1.4(a) and (b) and RPC 8.4(c) for failing to inform his clients, the sellers, about the buyer's contract to sell the property to a third party, executed before the closing of title with respondent's clients.

Respondent was admitted to the New Jersey bar in 1967. He was a partner with Hooley, Butler, DiFrancesco and Kelly in Westfield,

New Jersey, at the time of the relevant events. He has no history of prior discipline.

This matter arose from respondent's dual representation of sisters Bernice M. Baldasarre and Margaret N. Neuman ("the sellers"), as sellers of a parcel of property, and the purchaser of the property, Paul M. DiFrancesco, Jr. In a subsequent lawsuit against respondent and DiFrancesco, the sellers alleged legal and equitable fraud against respondent, sought the rescission of the contract of sale to DiFrancesco and prayed for compensatory and punitive damages against both defendants. After a bench trial, the court dismissed the sellers' complaint and entered a judgment in favor of defendant DiFrancesco on his counterclaim seeking damages against the sellers for tortious interference with prospective economic advantage. The judgment also ordered the sellers to convey the property to DiFrancesco. On appeal, the Appellate Division reversed the trial court's decision, as more fully explained below.

The events leading up to the above lawsuit are as follows: Respondent had previously represented the sellers and their respective spouses in various real estate transactions and third-party disputes. The sellers had first met respondent when their father had consulted him about a legal matter. Thereafter, respondent represented the sellers as the beneficiaries and executrixes of their father's estate.

The sellers' father, Arthur Santucci, died in 1982 and bequeathed to his daughters a 40.55 acre tract in Warren Township,

Somerset County. The land was zoned for single-family residential use. A contiguous seven-acre parcel in Watchung Borough was also bequeathed to the sellers. Mr. Santucci's will directed that the Warren Township property be sold and the proceeds divided between the two daughters. In 1983, Paul M. DiFrancesco, Jr., a local real estate developer, who is also the brother of one of respondent's law partners, appraised the property in connection with the Santucci estate. Exhibit J-1 at 35. During 1986 and 1987, the sellers received several unsolicited offers for the purchase of the Warren Township property. The offers ranged in price from $60,000 to $117,000 for each lot. Some of the offers included unacceptable contingencies, such as, for instance, that the sellers take back a mortgage on the property. Several of the offers made were submitted by PML Associates, a partnership that included a local developer, Charles Messano.

At one point, Baldasarre and her husband were interested in purchasing the property from Neuman at a price of $105,000 for each lot. After the Baldasarres were unable to obtain financing, however, the proposal fell through. All of the other offers were reviewed by the sellers and respondent and were rejected by the sellers for various reasons.

According to Neuman, at a meeting with her, her sister and respondent in early January 1987, respondent inquired why they had not approached him for the names of potential investors. Neuman claimed that respondent had informed the sisters that he knew a few real estate developers and that he would "put the word out and get

back to them." Exhibit J-1 at 30. Thereafter, respondent informed the sisters that one of his clients, DiFrancesco, had offered to purchase the property at $100,000 per lot. The sellers countered that they wanted $110,000 per lot, with no mortgage contingency and with no other contingencies other than the buyer's ability to obtain a preliminary major subdivision approval.

Respondent, in turn, claimed that it was the sellers who had requested that he inquire of any of his clients whether they were interested in purchasing the tract. He also claimed that he advised the sellers to consider offering the property through a broker or by public auction. It is uncontested that respondent suggested that the sellers obtain a more current appraisal of the property. They felt, however, that a new appraisal was unnecessary because they were familiar with the real estate market. They also had the other offers as a point of comparison.

On February 5, 1987, after discussing the proposal with respondent, DiFrancesco expressed an interest in purchasing the property on the seller's terms, with the addition of two critical conditions. DiFrancesco wanted the right to assign the contract and also the right to waive the subdivision approval contingency. DiFrancesco advised respondent that he would deposit $50,000 for the property and requested that respondent represent him in the transaction and in obtaining the subdivision approval. Respondent informed DiFrancesco that he could not represent him unless the sellers gave their consent and both the sellers and DiFrancesco waived the conflict of interest stemming from the dual

representation. The following day, respondent provided DiFrancesco a draft contract and the waiver. He advised DiFrancesco to review both documents with another attorney. However, DiFrancesco did not do so. The waiver provides, in relevant part:

> The Sellers have requested that you represent them regarding this matter. I have also asked you to represent me as Buyer. You have pointed out to me potential conflicts. All these matters were discussed in detail at the conference in your office on February 5, 1987. Notwithstanding potential conflicts, I still request that you represent me as Buyer, knowing full well that you will also be representing the Sellers. I feel as though your representation of both the Sellers and the Buyer in this matter will actually facilitate and expedite the obligation of both parties under the aforesaid contract.

Thereafter, respondent met with the sellers and conveyed DiFrancesco's offer. He reviewed and explained the additional terms upon which DiFrancesco insisted. Respondent also informed the sellers that he had represented DiFrancesco in the past, that DiFrancesco was the brother of one of his partners and that he could not represent the sellers unless they consented and waived the conflict of interest.

According to the sellers, they felt that it was a conflict of interest for respondent to represent both parties to the transaction. Apparently, however, when they discussed the matter between themselves, they believed that the transaction would be consummated more easily if respondent represented both parties, because of his familiarity with the matter and with the procedure in obtaining the requested approvals in the area.

On February 6, 1987, DiFrancesco gave respondent the $50,000

deposit, the signed agreement of sale and the waiver letter. Thereafter, respondent met with the sellers on February 9, 1987 and presented them with the signed contract. The contract listed a purchase price of $2,200,000 based on twenty subdivided lots. (The price was later adjusted to $1,980,000 to reflect a subdivision application for eighteen lots.) The transaction was conditioned on DiFrancesco's ability to obtain a preliminary major subdivision approval of at least fifteen sewered, single-family lots within six months. If DiFrancesco moved expeditiously, he would be given an additional ninety days to obtain the approval. DiFrancesco also had the option of waiving the subdivision contingency. The agreement further provided for the right of assignment. In that event, DiFrancesco would remain individually liable to the sellers for the satisfaction of all of the obligations set forth in the contract. Lastly, the contract included a provision that, if it were assigned, the assignee would be required to continue using the same engineer as well as respondent, as the attorney. The record does not indicate that respondent was to receive any personal benefit from the continued representation, other than his fees. The purpose of the provision, as stated in the agreement, was "to insure expediency in the application process so that the applicable dates regarding the obtaining of preliminary major sub-division approval and the anticipated time of closing shall not be interfered with or delayed as a result of the . . . assignment."

Respondent gave the sellers the $50,000 deposit, DiFrancesco's

waiver letter and waiver letters to be signed by each of the sellers. The sellers' letters stated, in relevant part:

> You have indicated to us that you will be representing Paul M. DiFrancesco, Jr. regarding the Buyer's obligation set forth in the aforesaid proposed contract. You have suggested that we take this contract to other counsel and review it before we sign the same. You have pointed out to us potential conflicts if you represented the undersigned as Sellers and Paul M. DiFrancesco, Jr., the Buyer. Notwithstanding such conflicts, we request that you represent us regarding the sale of the subject property. Your association with this property goes back to the death of our late father, Arthur H. Santucci, on September 23, 1982, at which time you acted as attorney for the estate and attorney for the undersigned as co-executrices.
>
> We have received written offers from third parties to purchase the subject property. We had previously instructed you that we would sell the subject property to a client of yours for a price of $110,000 per single family building lot. The aforesaid contract contains that price and we have concluded that the other terms, provisions and conditions set forth in the proposed contract are fair and reasonable.
>
> You discussed all of the above with us in detail at the conference in your office which took place on February 9, 1987.

Respondent testified that he had suggested to sellers that they take the agreement and waiver letters to another attorney for independent advice and consultation and that they had rejected this advice.

Each of the sellers testified that respondent explained the terms of the agreement of sale. Nevertheless, they later testified that it was their belief that DiFrancesco could only assign the contract after the closing of title between them and DiFrancesco.

On February 12, 1987, the sellers signed the agreement and waiver letters.

In April 1987, prior to the closing of title between the two sisters and DiFrancesco, respondent represented DiFrancesco in the resale of the Warren Township property to Messano Construction Co., Inc., whose principal, Charles Messano, had earlier participated in PML's unsuccessful attempts to purchase the property. The contract was a "sale," not an assignment of rights. The sale price under this contract (the "Messano contract") was $3,600,000, based on $200,000 per subdivided lot. This agreement was contingent upon DiFrancesco's closing with the sellers and his obtaining preliminary major subdivision approval within eighteen months.

At DiFrancesco's request, the Messano contract also included a confidentiality clause prohibiting Messano from either entering the property without respondent's or DiFrancesco's permission (Exhibit J-4 at 29) or listing or advertising the property for sale during the term of the agreement. The agreement stated that the purpose of the clause was, "among other things, not to jeopardize" the subdivision application process. However, Messano testified, during the trial court proceedings, that the clause was inserted because respondent and DiFrancesco did not want the sellers to know that DiFrancesco had assigned the agreement. According to Messano, respondent stated that it would be respondent's problem if the sellers found out about the transaction. Respondent, however, denied making that statement and contended that the purpose of the clause was to prevent the planning board from knowing that someone

other than DiFrancesco had an ownership interest in the property, as buyer.

Respondent did not inform the sellers of the Messano contract, despite subsequent meetings with them on various occasions during the spring and summer of 1987 to discuss the status of DiFrancesco's subdivision application and to execute planning board documents. Respondent testified — and the trial court found — that, in May 1987, respondent informed Baldasarre's husband of the Messano contract, while representing him on a separate, unrelated matter. Respondent also claimed that he asked Mr. Baldasarre to convey that information to the sellers. Respondent testified that he assumed that Mr. Baldasarre had so informed the sellers. Contrary to respondent's claim, however, Mr. Baldasarre testified that respondent never discussed the Messano agreement with him.

Ultimately, DiFrancesco failed to obtain the preliminary subdivision approval within six months and sought the ninety-day extension contemplated in his contract with the sellers. The sellers agreed to grant an extension until November 12, 1987, relying on respondent's assurance that DiFrancesco was moving "as expeditiously as practicable" on the application. In October 1987, DiFrancesco advised respondent that, because of difficulties encountered before various boards, he would not obtain the subdivision approval within the agreed upon time period. He, therefore, asked respondent to obtain an additional six-month extension and additional ninety-days, if necessary, to obtain the subdivision approval. DiFrancesco offered to release the $50,000

deposit to the sellers, in return for such an amendment to the contract.

On October 7, 1987, respondent met with the sellers to discuss DiFrancesco's request for an extension. Neuman testified that, initially, they had resisted granting the extension because property values were escalating so quickly. Neuman added that they had asked respondent's opinion on what would be in their own best interests and that her sister had interjected that DiFrancesco could just "turn around and resell the property." Neuman testified as follows:

> With that [respondent] turned around and said, no way, he can't do anything without you girls. And I said are you sure he's going to be developing, and he said yes.
> [Exhibit J-1 at 57]

Baldasarre testified that she did not want to give DiFrancesco an extension because she felt that, after so much time had gone by, DiFrancesco could get a lot more money for the property. Baldasarre asked respondent if someone else would be building on the property. She testified, "respondent said no way. He can't do anything without us girls." Exhibit J-1 at 89. That assurance persuaded the sellers that DiFrancesco would not resell the property. After a discussion between themselves, they agreed to give DiFrancesco an extension.

Respondent testified that he had explained to the sellers that, even if they did not grant the extension, DiFrancesco had the option to either terminate the contract or to waive the contingency and proceed with the transaction. He also testified

that he had advised the sellers that he did not know which option DiFrancesco would choose, if the sellers were to deny the extension. However, the sellers testified that, during that meeting, respondent had never presented the alternative to them that DiFrancesco could waive the contingency and close, if they denied the extension. Exhibit J-2 at 64.

It is undisputed that respondent did not advise the sellers whether to grant or deny the extension and did not disclose to them, at that time, DiFrancesco's agreement with Messano. Respondent claimed that it did not occur to him to reveal the existence of the agreement to the sellers. After the sellers discussed the extension between themselves and agreed to grant the extension, the $50,000 deposit was released to them in consideration for the extension. The sellers signed the amendment to the contract on October 7, 1987.

In early January 1988, the sellers heard a rumor that DiFrancesco had contracted to sell the Warren Township property for $300,000 per lot. Neuman immediately called respondent and asked him about that rumor. Instead of clarifying the situation, respondent advised Neuman to attend a board of health meeting on January 12, 1988, at which DiFrancesco would be present. Respondent also claimed that he advised Neuman to discuss the matter with DiFrancesco. Respondent failed to disclose the Messano contract during that conversation with Neuman.

Neuman, in turn, testified that, when she questioned respondent about the rumor, he inquired where she had heard it;

after she told him, without identifying the actual source, the subject was changed. Neuman further testified that she had a lot of confidence in respondent and believed that, if the rumor had been true, respondent would have told her. She did not recall respondent's advice that she discuss the matter with DiFrancesco; therefore, she did not raise the matter with DiFrancesco at the January 12, 1988 meeting. Exhibit J-2 at 67.

It was not until late January 1988 that the sellers learned from one of the principals of PML Associates, Inc. that there was a contract between DiFrancesco and Messano to resell the Warren Township property and that respondent had represented DiFrancesco in that transaction.

Thereafter, the sellers retained new counsel and, during a February 11, 1988 meeting with their new lawyer, reviewed the Messano agreement for the first time.

On March 3, 1988, DiFrancesco sent a letter to the sellers, informing them that the subdivision application was complete and that the hearing thereon was to take place in April. As noted earlier, on March 17, 1988, the sellers brought an action against respondent and DiFrancesco, alleging legal and equitable fraud and seeking a rescission of the contract and compensatory and punitive damages against respondent, his law firm and DiFrancesco. DiFrancesco counterclaimed, charging tortious interference with prospective economic advantage in connection with the Messano contract and seeking specific performance and punitive damages.

DiFrancesco obtained a subdivision approval on April 25, 1988.

He had already secured financing for the closing and, the next day, he advised the sellers that he was prepared to close. The sellers did not respond. DiFrancesco moved for an order compelling the sellers to close so that he, in turn, could close the Messano deal.

On September 19, 1988, the trial court ordered the sellers to close and accept payment on or before October 9, 1988. The closing did not occur, because DiFrancesco's title company would not insure title due to the pendency of the sellers' rescission claim. Thereupon, Messano voided his contract with DiFrancesco as a result of DiFrancesco's inability to convey marketable title within the eighteen-month period required by the contract.

On July 3, 1990, the trial court found that respondent and DiFrancesco were not guilty of fraud and that the sellers were guilty of tortious interference with DiFrancesco's prospective economic advantage. The court awarded DiFrancesco compensatory damages.

The sellers appealed the trial court decision. The Appellate Division found that respondent's dual representation of the sellers and DiFrancesco constituted a conflict of interest. The Appellate Division also overturned the trial court's finding that the sellers had failed to prove fraud, reasoning as follows:

> Legal fraud consists of five elements: (1) a material representation by defendant of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intent that the plaintiff rely upon it; (4) reasonable reliance by the plaintiff, and (5) resulting damage to the plaintiff . . . . The fact that no affirmative misrepresentation is made does not bar relief predicated on a claim of fraud. Silence in the face of an

obligation to disclose may be fraud, since the suppression of truth when it should be disclosed is equivalent to an expression of a falsehood . . . . Equitable fraud, unlike legal fraud, does not require the element of scienter, knowledge of the falsity and an intent to obtain an undue advantage . . . . Fraud, of course, is never presumed; it must be established by clear and convincing evidence . . . .

Here, the evidence is compelling that [respondent]intentionally withheld from [sellers] the existence of the Messano agreement despite his duty as [sellers'] attorney to disclose this material fact. [Respondent] had several meetings with plaintiffs after the Messano agreement had been signed, including the critical October 7, 1987 meeting, when the extension in question was given and [respondent] inexplicably never disclosed the existence of the agreement. The trial court found that [respondent] had mentioned the Messano agreement to Mr. Baldasarre at a May 20, 1987 meeting. However, of significance is that the court did not find that Mr. Baldasarre had in fact conveyed this information to [sellers]. In any event respondent's duty to disclose was owed to [sellers],not to Mr. Baldasarre. Based on the evidence, the conclusion is inescapable that [respondent] withheld this material fact with the intention that [sellers] be induced into granting the extension to DiFrancesco.

[Sellers'] reliance and detriment are also readily ascertainable from the facts. It is undisputed that [sellers] simply would not have granted the extension at the October 7, 1987 meeting had they known about the Messano agreement. It is true that the trial court found that if [sellers] had refused the extension, DiFrancesco would have waived the subdivision contingency and closed title immediately. If that is so, [sellers] would have received the $1,980,000 purchase price immediately instead of having to wait until the subdivision was approved. Moreover, as stated, if [sellers] had known about the Messano agreement, they may well have bargained for a substantial advance of the

> purchase price or other consideration for the granting of the extension. We conclude that [sellers] have clearly and convincingly established the elements of both legal and equitable fraud against [respondent] and therefore he and his law firm are liable to [sellers] for damages. (citations omitted). (emphasis supplied).
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> [Baldasarre v Butler, 254 N.J. Super., 502, 521-522 (App. Div. 1992).]

The Appellate Division further determined that respondent's actions were not imputable to DiFrancesco; that rescission was not an available remedy to the sellers; that only an award of compensatory and/or punitive damage would be appropriate; and that the judgment against sellers for tortious interference with a prospective economic advantage should be reversed.

Thereafter, respondent, his firm and DiFrancesco petitioned the Supreme Court for certification, which was granted. In Baldasarre v Butler, 132 N.J. 278 (1993), the Court affirmed in part, reversed in part and remanded the matter, finding that DiFrancesco was not vicariously liable for any fraud perpetrated by respondent and that the sellers were not liable to DiFrancesco for tortious interference with DiFrancesco's contract with Messano. The Court did not pass upon the sellers' claims against respondent and his firm for legal and equitable fraud because these claims had already been settled. Therefore, the Appellate Division's findings on the issues of legal and equitable fraud are final.

* * *

The Special Master determined that the nature of the contract between the sellers and DiFrancesco indicated that it was very

difficult to prepare without some negotiation and proper advice to the parties as to its terms. The Special Master found that, because the agreement was so complex, important provisions, other than the core terms agreed upon by the buyer and sellers, would have been discussed by respondent with his clients. The Special Master found, for example, that certain key clauses were omitted from the contract, including the contingency period, demands as to environmental issues or interest on the deposit.

Because the Special Master found that the rule of law concerning conflicts of interest was uncertain at the time of the transaction, he did not reach a conclusion as to whether respondent's conduct, at the time the contract was negotiated, was unethical. He further found that there was no "per se ban" against representation of both buyer and seller during the contract stage for complex commercial real estate transactions until the Baldasarre v. Butler decision.

Nevertheless, the Special Master found that a conflict of interest clearly arose at the October 7, 1987 meeting on the extension of the contingency period and that respondent violated RPC 1.7(b), which states:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and

> (2) the client consents after a full disclosure of the circumstances and consultation with the client . . . .

The Special Master determined that respondent also violated RPC 1.7(b) when he failed to inform the sellers of the Messano contract, thereby compromising their rights under the agreement and precluding them from improving their position by negotiating additional consideration before granting the additional extension. The Special Master also found that respondent violated RPC 1.4(a) and (b), by failing to keep the sellers reasonably informed.

The Special Master reasoned that, in some instances, if an attorney does not have the opportunity to speak with his clients one-on-one, then relaying the information through an intermediary might satisfy his ethics obligations. In this matter, however, he found that respondent's relaying the information to Mr. Baldasarre, was not sufficient. The Special Master noted that respondent, in fact, had the opportunity to speak with and meet with his clients on several occasions after the Messano contract was signed and that respondent never mentioned the contract and never inquired whether Mr. Baldasarre, in fact, had conveyed the information to his wife or asked the sellers directly if they were aware of the information. The Special Master, therefore, found that respondent failed to fulfill his obligation to the sellers.

Finally, the Special Master concluded that respondent further breached his obligation to his clients when, in January 1988, Mrs. Neuman called him to inquire about the rumor she had heard of

DiFrancesco's resale of the property. The Special Master reasoned that, at that point, respondent was required to disclose the relevant information to Neuman and that, by failing to comply with a "reasonable request for information," respondent violated RPC 1.4(a).

With respect to whether respondent's failure to disclose the Messano contract constituted fraud, the Special Master found that this question hinged on respondent's subjective intent. He concluded that the presenter had failed to establish by clear and convincing evidence that respondent intended to defraud the sellers by "deliberate" and "purposeful" concealment.

CONCLUSION AND RECOMMENDATION

Following a de novo review of the record, the Board is satisfied that the Special Master's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence. The Board also finds that a conflict of interest arose on October 7, 1987, when respondent met with the sellers regarding DiFrancesco's desire for an extension of the time to obtain a subdivision approval. At that time, and unbeknownst to the sellers, DiFrancesco had already entered into the contract with Messano for a substantially greater sale price. Respondent's dual representation of the sellers and DiFrancesco clearly prevented respondent from giving the sellers adequate legal advice. Moreover, respondent's failure, at that time, to disclose to the

sellers the existence of the Messano contract put the sellers in an uneven bargaining position with DiFrancesco. DiFrancesco's interests were clearly adverse to those of the sellers and respondent's representation of the sellers was clearly "materially limited" by his responsibilities to his other client.

The Board also finds that respondent's representation of sellers and buyer during the negotiation stage of the contract was impermissible. Opinion No. 243, 95 N.J.L.J. 1145 (1972), clearly prohibits the dual representation of buyer and seller of real property prior to the execution of the contract of sale:

> Generally, it is at this stage of negotiations for the sale of property that a buyer and a seller have their greatest difficulties. Their interests are in conflict if for no other reasons than the buyer wishes to obtain the property as cheaply as possible and the seller wishes to get the highest price. At this juncture, also, there can and frequently do arise disputes concerning fixtures to be left in the premises, assumption of mortgages, mortgage contingencies, and other matters in which there can be serious disagreements, in all of which the interest of the buyer and seller will be diametrically opposed.
> [Id. at 1150]

The opinion further notes the difficulties that can arise if the same attorney represents both parties at the closing, such as, disputes about changed conditions of the property between the date of the contract of sale and the closing, adjustment of taxes and assessments and escrow funds. In such situations, the attorney cannot exercise his or her independent professional judgment in behalf of one client without adversely affecting the other. The opinion concludes that:

> the representation of a buyer and a seller in connection with the preparation and execution of a contract of sale of real property is so fraught with obvious situations where a conflict may arise that one attorney shall not undertake to represent both parties in such a situation. (emphasis supplied).
> [Ibid]

In In re Lanza, 65 N.J. 347 (1974), the Court underscored the dangers in representing both buyer and seller in a real estate transaction. It quoted the rule from Opinion No. 243 that, in all circumstances, "it is unethical for the same attorney to represent buyer and seller in negotiating the terms of a contract of sale. In re Lanza, supra, 65 N.J. at 352. With respect to obtaining consent to dual representation, the majority opinion in Lanza stated:

> It is utterly insufficient simply to advise a client that he, the attorney, foresees no conflict of interest and then to ask the client whether the latter will consent to the multiple representation. This is no more than an empty form or words. A client cannot foresee and cannot be expected to foresee the great variety of potential areas of disagreement that may arise in a real estate transaction of this sort. The attorney is or should be familiar with at least the more common of these and they should be stated and laid before the client at some length and with considerable specificity.
> [Ibid.]

In Justice Pashman's concurring opinion, he noted that attorneys are not clairvoyant and cannot foresee problem areas, even though they are able to realize the potential for conflict. He found that the dual representation in a buyer-seller situation should be totally forbidden.

In Baldasarre v. Butler, 132 N.J. 278 (1993), the Court clearly enunciated the prohibition against the dual representation of buyer and seller in a complex real estate transaction. However, the fact that this "bright-line" rule was first spelled out in the lawsuit leading to this ethics proceeding does not bar the Board from declaring respondent's conduct unethical from its inception. As noted above, Opinion No. 243, which predates respondent's conduct, prohibits the representation of seller and buyer prior to the execution of the contract. Moreover, even before the Court's blanket prohibition in Baldasarre, the bar was aware that multiple representation in certain situations was impermissible, even in the face of observance of the strictest safeguards. See RPC 1.7(c)(1) and (2). Accordingly, respondent cannot be heard to complain that, until the Court's pronouncement in Baldasarre, conduct of this sort was not prohibited. Lastly, respondent's failure to withdraw from representation of the sellers and of DiFrancesco after October 7, 1987 — when he inevitably became conscious of a blatant conflict of interest situation — was also unethical and in violation of RPC 1.7.

The record also supports a finding of violations of RPC 1.4(a) and (b). Regardless of whether or not respondent asked Mr. Baldasarre to convey the information regarding the Messano contract to the sellers, respondent's duty was to the sellers. It was his responsibility to convey the information directly to his clients or, at a minimum, to ensure that Mr. Baldasarre had conveyed that information to the sellers and that the sellers understood the

information and had no questions about any of their rights or obligations.

Respondent met or spoke with the sellers on several occasions about the progress of the transaction and other aspects of their contract with DiFrancesco. Yet, respondent failed to mention the Messano contract or to find out if they were aware of it or had questions about it. Moreover, when specifically questioned by Neuman with regard to rumors she had heard about DiFrancesco's resale of the property, respondent avoided answering her question. Respondent gave various excuses for failing to convey this pertinent information to his client. A few of his excuses included that he thought that the sellers knew about the deal, that it was not on his mind at the time or that he felt that Messano's offer was too speculative. The logical conclusion, however, is that all of these reasons were nothing more than an attempt to cover up his unethical conduct, not only for failing to keep his clients reasonably informed, but also for intentionally withholding the information from them.

The Special Master concluded that the question of whether respondent's conduct constituted fraud required an analysis of his subjective intent. The Special Master found that respondent did not attempt to conceal "entirely" from the sellers the existence of the Messano contract. The Special Master found credible respondent's statement that he had not disclosed that information to the sellers because he thought it was speculative and irrelevant to their decision to grant or deny the extension. The Special

Master also pointed to respondent's claim that he informed Mr. Baldasarre of the Messano contract and requested that he pass on this information to the sellers. The Special Master, therefore, concluded that the presenter had failed to establish by clear and convincing evidence that respondent intended to defraud the sellers by "deliberate" and "purposeful" concealment.

These findings, however, ignore Messano's testimony about the inclusion of the confidentiality clause in the Messano contract. Before the trial court, Messano testified:

> THE WITNESS: The confidentiality clauses were for [sic] purposes that Mrs. Baldasarre and Mrs. Neuman weren't to find out about my contract with him.
>
> . . .
>
> I wasn't allowed to list the property with any realtor, put it in newspapers or put it in the media for any purposes of advertising. But I could, I was allowed to sell by word of mouth and let people know that I had this property for sale, if I had customers from any other property who didn't want to be in that subdivision, I had the opportunity of putting them into this subdivision.
>
> THE COURT: Let me ask you, Mr. Messano, when you said Mr. DiFrancesco indicated that Ms. Baldasarre and Ms. Neumann were not to be told about your contract.
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> THE WITNESS: Yes.
>
> THE COURT: Did you ask why, or were you told the reason for that?
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> THE WITNESS: Well, I made, -- my attorney made it very clear to [respondent] that what if the ladies find out about it? And at that point, [respondent] mentioned to us that it would be his problem when they did find out about it. It's not our problem.
>
> THE COURT: What was your discussion? Was there a discussion as to why the women should not be told?
>
> THE WITNESS: No, there was no discussion why they would not be told.

THE COURT: But Mr. DiFrancesco said to you, don't tell Mrs. Neumann or Mrs. Baldasarre about your contract. That's the reason for paragraph 27.

THE WITNESS: The purpose for paragraph 27 was not to let them find out about my contract with him.
[Exhibit J-4 at 26-27]

Respondent denied making those statements to Messano. Respondent testified that the sole purpose of the confidentiality clause was to prevent the planning board from knowing that someone other than DiFrancesco "owned" the property. Baldasarre v. Butler, 254 N.J. Super. 502, 511 (App. Div. 1992).

In either case, it was respondent's intent to withhold this pertinent information — the Messano contract — either from the sellers or, by his own admission, from the planning board, a governmental body essential to the subdivision approval process.

The Special Master found that Mr. Baldasarre's testimony that respondent never informed him of the contract was not reliable because Mr. Baldasarre's testimony was impeached by his prior deposition testimony. In that testimony, Mr. Baldasarre was unable to remember the dates of prior meetings with respondent on various other matters. Mr. Baldasarre testified, however, that, after his deposition, he inspected his work calendar, thereby refreshing his recollection of dates, and also later recalled other matters upon further reflection.

It stands to reason that, if respondent had actually informed Mr. Baldasarre of the Messano contract, Mr. Baldasarre would have conveyed this critical information to the sellers in May 1987, the time of the alleged conversation. The sellers would not,

therefore, have waited until January 1988 to question the respondent about the contract. Moreover, once the sellers learned of the existence of the Messano contact, they immediately retained another attorney to protect their interests. They probably would have done so earlier, had they learned of respondent's deception. Based on the foregoing, the conclusion is inescapable that respondent intentionally withheld the information of the Messano contract from the sellers to protect DiFrancesco, whom he also represented in the Messano contract and who also happened to be the brother of one of his law partners.

The Appellate Division found, by clear and convincing evidence, that respondent's conduct constituted both legal and equitable fraud. Baldasarre v. Butler, 254 N.J. Super. at 522. The Board is bound by that determination. See Newark v. North Jersey District Water Supply Commission, 106 N.J. Super. 88, 99 (Ch. Div. 1968); aff'd. 54 N.J. 258 (1969) (judgment of a court of competent jurisdiction on a question of law or fact or on a mixed question of law or fact, once litigated and determined, is, so long as it stands unreversed, conclusive upon the parties and their privies). See also Warren Township v. Suffness, 225 N.J. Super. 399, 408 (App. Div. 1988); cert. den. 113 N.J. 640 (1988) (doctrine of collateral estoppel bars relitigation of any issue that was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action).

In addition to the foregoing, respondent's failure to inform Neuman of the Messano contract, when she called him to inquire

about the "rumor" she had heard, constituted a misrepresentation. Respondent's silence was just as serious a misrepresentation as if he made an affirmative misstatement of fact. Crispin v. Volkswagenwerk, 96 N.J. 336, 347 (1984). Notwithstanding that the Board is bound by the decision of the Appellate Decision on the issue of fraud, there is sufficient independent evidence in the record for a finding of fraud. At a minimum, respondent was guilty of misrepresentation by silence, in violation of RPC 8.4(c).

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

In In re Guidone, ___ N.J. ___ (1994) (slip op. at 10), the Court imposed a three-month suspension where an attorney violated RPC 1.7, RPC 1.8 and RPC 8.4(c). The attorney represented the Lions Club (the "Club") in the sale of a twenty-five acre tract of land in Mount Olive, New Jersey. Unbeknownst to the Club, the attorney joined a partnership to purchase the land and failed to disclose that fact to the Club. A contract of sale was executed in July 1986. In or before September 1987, the attorney requested a price reduction from the Club because a portion of the property was wetlands. Only then did the attorney disclose to the Club his membership in the partnership. Notwithstanding the turmoil generated by the disclosure, the Club permitted the attorney to handle the closing.

The Court found that the attorney deliberately concealed his involvement in the partnership. In Guidone, the Court distinguished the attorney's conduct from that of respondent, in Baldasarre v Butler, 132 N.J. 278 (1993). The Court noted that, in Baldasarre, the conflict of interest stemming from respondent's representation of both sides in a complex real estate transaction was at least perceived, if not fully appreciated, by the clients. While it is true that, from the outset, respondent advised his clients of the possibility of a conflict of interest, it must be remembered that the Baldasarre case was a civil action against respondent, not an ethics proceeding. Notwithstanding that respondent presented both parties to the transaction with conflicts letters and advised them to have the letters independently reviewed by other counsel, the record does not elaborate on the extent of any explanations provided by respondent of the potential conflicts that could arise. Moreover, the Court's decision in Baldasarre did not consider the elements of fraud or misrepresentation, because they were settled by the parties. The Board, therefore, does not interpret the Court's statement in Guidone as mitigation of this respondent's conduct. More simply stated, the fact that the Court thought that, in Baldasarre, the clients at least had notice of the conflict, unlike in Guidone, should not mean that respondent's conduct is deserving of less than a three-month suspension, the discipline imposed in Guidone.

The Court looks to egregious circumstances or serious economic injury to clients as aggravating factors. Certainly those factors

are present in this matter. Respondent improperly represented both parties to the transaction from its inception, thereby violating Opinion No. 243 and RPC 1.7. Respondent's conduct was further aggravated by his continued representation of the parties when DiFrancesco sought an extension to the contract and also by his failure to advise the sellers of the Messano contract.

Respondent had represented the sisters and their spouses before and during the sale of the property. The sisters obviously trusted respondent and relied on him to protect their interests, which he failed to do. More significantly, respondent should have advised the sellers of Messano's interest in the property when it came to light. Instead, respondent deliberately concealed this information from the sellers. Respondent had an absolute duty to immediately disclose the Messano contract to the sellers as soon as he became aware of it and to terminate forthwith his representation of both sides. His failure to disclose to the sellers the existence of the Messano contract eliminated any bargaining power the sellers may have had and precluded them from negotiating more favorable terms to an extension agreement, thereby causing economic injury to them.

Respondent's misconduct also caused considerable anxiety and financial injury to the sellers, as witnessed by the lawsuit they filed and the following appeal they pursued and later defended.

Finally, respondent's explanations for breaching his duty to disclose the Messano contract to the sellers clearly underscored his lack of contrition for his misconduct as well as his lack of

understanding of his ethics obligations — his duty to represent his clients with undivided loyalty.

In light of the foregoing, a five-member majority of the Board recommends that respondent be suspended for a period of three months. Two of those members, while concurring with the balance of the majority's findings, found that respondent's representation of the parties in the negotiation phase of the transaction was not unethical because of the lack of clarity on conflict of interest law. Those two members, however, agreed with the majority that, after October 7, 1987, the conflict of interest became so obvious that respondent should have withdrawn from the representation of all parties. Three members voted for a six-month suspension. One member recused himself.

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

Dated: 3/10/95

By: _____
Raymond R. Trombadore
Chair
Disciplinary Review Board