Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Miles Jaffe, P 15418,

Respondent/Cross-Appellant.

Case No. 90-154-GA

Issued: August 20, 1993

BOARD OPINION

The hearing panel below, by a majority, concluded that respondent Miles Jaffe violated the provisions of Canon 5 of the former Code of Professional Responsibility, DR 5-105, by representing the sellers in a real estate transactions while members of his law firm represented the purchaser. On its face, that disciplinary rule does not prohibit such dual representation in every instance and allows multiple representation of parties under certain circumstances. While it was conceded by all parties to the transaction that the respondent had made disclosure of the dual representation and that written consent to the respondent's continued representation had been given, a majority of the hearing panel concluded that it was not "obvious" that the respondent and his law firm could adequately represent the interests of both parties and, therefore, the dual representation did not fall within the exception which then existed under DR 5-105(C).[1] Furthermore, the majority concluded, the respondent's disclosure of the potential conflict, even though it was made at a meeting attended by a justice of the Michigan Supreme Court did not constitute a full disclosure within the meaning of DR 5-105(C).

---

[1]The Code of Professional Responsibility which was in effect in 1983, the time of the transactions which are the subject of this proceeding, was replaced by the Michigan Rules of Professional Conduct on Oct. 1, 1988.

Although representation of clients with opposing interests was generally prohibited under DR 5-105(A) and (B), DR 5-105(C) provided that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible affect of such representation on the exercise of his independent professional judgment on behalf of each."

The dissenting panel member concluded that the dual representation in this case fell within the exception described by DR 5-105(C), noting that the "obvious" requirement of that sub-rule provided no clear guideline to the respondent and was without practical meaning. This panelist also concluded that the respondent had made an adequate disclosure of the potential conflict of interest in light of the legal background and sophistication of the individuals to whom the disclosure was made.

Following the separate hearing on discipline mandated by MCR 9.115(J)(2), the hearing panel entered an order of reprimand. Both the Grievance Administrator and the respondent have filed petitions for review with the Attorney Discipline Board.

The Grievance Administrator argues that the misconduct found to have been established by the panel does not adequately insure the protection of the public, the courts and the legal profession. The Grievance Administrator seeks a suspension of 120 days and argues that the respondent should be required to re-establish his fitness to practice law in a reinstatement proceeding. The Grievance Administrator also seeks reversal of the hearing panel's decision to disallow the Administrator's claim for reimbursement to the State Bar of Michigan of certain investigative costs expended by the Administrator prior to the filing of the formal complaint.

The respondent seeks reversal of the hearing panel's findings of misconduct, vacation of the order of reprimand and dismissal of the complaint.

We conclude that, based upon all of the evidence presented, respondent's conduct was permitted under DR 5-105(C) and therefore did not constitute a violation of DR 5-105(A) or (B). Except for the alleged violation of Canon 5, DR 5-105, all other charges of misconduct in the formal complaint were voluntarily dismissed by the Grievance Administrator during the panel proceedings. The Order of Reprimand must therefore be vacated and the complaint dismissed.

Facts

The pleadings in this case include separate statements of fact submitted by each party, a stipulated statement of facts submitted at the direction of the hearing panel and the detailed findings of fact prepared by the panel in its report. There is no significant dispute between the parties as to the events alleged in paragraphs 5 through 11 of the Grievance Administrator's complaint.

Respondent, Miles Jaffe, was a partner in the law firm of Honigman, Miller, Schwartz and Cohn (hereafter "Honigman"). For many years, Jaffe had represented Mr. and Mrs. Leslie Green. Mr. and Mrs. Green owned 315 acres in Oakland County known as Turtle Lake Farms which included a 211 acre parcel referred to as "the homestead". In 1969, respondent drafted the necessary documents for the establishment of the Leslie H. Green and Edith C. Green Charitable Trust.

Mr. Green died in 1973. Following Mrs. Green's death in March 1983, Turtle Lake Farms was owned by the Estate of Edith Green (forty-nine percent), the Leslie and Edith Green Charitable Trust (thirty-one percent), and the Edith Green Marital Trust (twenty percent).

After Mrs. Green's death, the Honigman firm represented the Edith C. Green estate. Comerica Bank--Detroit ("Comerica") was the sole personal representative of the

decedent's estate. Comerica was also the sole trustee of the marital trust. The remaining interest in Turtle Lake Farms was held by the Charitable Trust. The trustees of the Charitable Trust were Jaffe, Comerica, the bishop of the Episcopal Diocese of Michigan (then H. Coleman McGehee, Jr.) and the dean of the Cathedral Church of St. Paul (then Bertram N. Hurlong). The Cathedral Church of St. Paul and the Episcopal Diocese were the income beneficiaries of the Charitable Trust.

Respondent Jaffe was the attorney in the Honigman firm principally responsible for matters pertaining to the estate and the eventual sale of the Turtle Lake Farms property although other attorneys at the Honigman firm assisted in matters involving both the trust administration and the sale of the real estate.

In the spring of 1983, Maurice Cohen, a principal in a commercial real estate development company, learned that Turtle Lake Farms might be available for purchase and his inquiries were directed to the Honigman firm. Mr. Cohen had been a client of the Honigman firm for several years, as had his company. Although another partner at Honigman had been primarily responsible for legal services rendered to Cohen and his company, respondent Jaffe had, from time to time, provided legal services to Cohen for estate planning and tax matters.

In early August 1983, Cohen indicated his willingness to make an offer for the homestead portion of Turtle Lake Farms. On August 12, 1983, Jaffe wrote a letter to Comerica (Exhibit 13). The letter, after noting the representation of various Green related entities by the Honigman firm stated that:

> "This firm also represents, and Maurice S. Binkow is the attorney responsible for, Mr. Maurice Cohen in respect of both his business and personal affairs.
>
> I am advised that Mr. Cohen intends to submit an offer to purchase certain of the property owned by the other [Green related] entities described herein and that he desires that Mr. Binkow represent him with regard to any such offer.
>
> The situation described above creates a conflict of interest within this firm arising from representation of the parties on each side of a transaction to be proposed by one of them to the other.
>
> We believe that we can adequately represent the interests of both sides of this contemplated transaction. We may not do so without the disclosure of our conflict made in this letter to all parties to the transaction and without the consent of all parties to the transaction.
>
> If [Comerica], Bishop McGehee and Dean Hurlong wish to consent to our representation of the three entities described above and of Mr. Cohen in respect of his offer to purchase a portion of the above property, please so advise us in writing. If you do not consent, we will not represent Mr. Cohen in this matter. In no event will the undersigned act as a Co-Trustee in respect of any offer made by Mr. Cohen.

Very truly yours,

Miles Jaffe

Although the panel concluded that a copy of this letter was not sent directly to either Bishop McGehee or Dean Hurlong, the panel found that it did ultimately come to the attention of the bishop and the dean.

Upon learning of Cohen's interest in purchasing a portion of Turtle Lake Farms, Jaffe also initiated an inquiry within his firm regarding the ethical issues involved. Although the panel concluded that the firm's Ethics Committee operated its review in what the panel characterized as "an extraordinarily informal manner", the committee produced a formal memorandum on the matter, dated August 25, 1983. The committee concluded that Jaffe could represent the trust in the proposed real estate transaction on the condition that consent be obtained from all trustees and beneficiaries of the trust, that Jaffe not vote on the approval of the sale of trust property, and that Cohen consent to his representation by Honigman attorney Maurice Binkow.

It is not disputed in these proceedings that Cohen and Comerica gave their consent to the dual representation and it is not alleged in this proceeding that the respondent failed to make an adequate disclosure to Cohen or Comerica.

On August 22, 1983, Jaffe arranged a meeting at the Honigman offices with Bishop McGehee and Dean Hurlong, his co-trustees of the Green Charitable Trust. The meeting was also attended by Cleveland Thurber, David Wind and Gari Kerston, all of Comerica and G. Mennen Williams, then a justice of the Michigan Supreme Court. Justice Williams was present in his capacity as senior warden of St. Pauls, equivalent to the chair of the lay board of the cathedral. One purpose of the meeting was to discuss the conflict of interest issue.

In its report, the hearing panel made the following factual finding:

> "At the August 22, 1983 meeting, Jaffe (a) disclosed that Cohen was a client of the Honigman firm; (b) indicated that Binkow was the responsible partner for Cohen; (c) indicated that the property would be sold for $3.5 million and marketed for 30 days; (d) was present when someone from Comerica assured the Bishop and the Dean that they would be kept advised of sale efforts. Hurlong 450, 526; McGehee 563, 592-593. It does not appear that significant time was spent in explaining any pitfalls other than that "it would be pretty obvious. . .that you might not get the best deal",.Hurlong 446-447, and while it appears that the Bishop understood the conflicts issue to have been "dealt with very openly and honestly", McGehee 566, there was no suggestion by Jaffe that the Bishop or the Dean obtain independent counsel. There is no doubt that any questions tendered by any party to Jaffe were completely answered and the entire discussion was forthright, open and honest. McGehee 585. It also appears that either the Bishop or the Dean (or both) were aware that

> Jaffe had performed some services for Cohen. McGehee 640. However, no detailed description of services provided by Jaffe to Cohen was provided, Hurlong 442; McGehee 561, that Jaffe may have previously indicated to Cohen an asking price for the Turtle Lake Property of $3 million, Jaffe 146; Hurlong 448-449; McGehee 563." (testimony referred to by the hearing panel in its report is identified by the name of the witness and the relevant page(s) of the transcript).

The panel further concluded that at the end of that meeting it was clear that a written consent from the bishop and the dean would be forthcoming, that the matter would go forward and that Honigman could proceed on behalf of both sides to the transaction when the Cohen offer was formally tendered. At that point, the panel concluded, respondent Jaffe "believed that he and the Honigman firm could adequately represent the dual interests of buyer and seller in this transaction".

Subsequent to the meeting of August 22, 1983, Dean Hurlong consulted with an attorney from the firm of Miller, Canfield, Paddock and Stone and Bishop McGehee consulted with an attorney from the Dykema, Gossett firm.

On August 31, 1983, Bishop McGehee and Dean Hurlong wrote Jaffe in response to Jaffe's August 12, 1983 letter. Their letter stated in part:

> "We have also reviewed the conflict of interest issue created by Mr. Maurice Cohen's intended offer to purchase a portion of the property and the fact that he is represented by an attorney in the same law firm as yours.
>
> Because of the disclosure of the conflict of interest and the forthright discussion at our recent meeting, we do not believe that this will be an impediment to the proposed transaction and would be consistent with our mutual desire to achieve the maximum sales price for the property. Therefore, subject to the satisfactory demonstration by the Comerica Bank after reasonable investigation that the offer is indeed suitable, appropriate, and in keeping with the present market situation, we consent to the firm of Honigman Miller Schwartz and Cohn representing the Trust and Mr. Cohen" (Exhibit 5)

It is not necessary here to recite the balance of the panel's findings. Suffice it to say that Cohen's offer to purchase the property for $3 million dollars, dated August 23, 1983, was rejected by Comerica and Comerica thereafter engaged in some marketing efforts for the property. On approximately September 15, 1983, Comerica decided to sell the homestead parcel to Cohen for $3.25 million. During the period of the negotiations and eventual sale of the property, from August 15, 1983 through October 3, 1983, Jaffe rendered over forty hours of legal services to the Green estate, a substantial portion of which was related to aspects of the Green-Cohen transaction. At the closing of the sale of the property, Jaffe signed the deed in his capacity as a trustee. This ministerial act was inconsistent with his assurance in the letter of August 12, 1983 that he would not take part as trustee in the transaction. Jaffe testified, however, that the act of signing the deed was undertaken as an accommodation to facilitate issuance of a title insurance policy.

Discussion:

The formal complaint which commenced these proceedings charged that the respondent, as an attorney and partner in the Honigman firm at a time when the firm was representing the Edith Green Estate, the Green Charitable Trust, the Marital Trust and potential purchaser Maurice Cohen had a duty to conform his conduct to the then existing provisions of Canon 5 of the Code of Professional Responsibility, DR 5-105. The complaint specifically charged that respondent Jaffe violated that duty in three respects:

> 1) That he failed to adequately explain and fully disclose to all of the interested parties the nature and extent of the potential conflict and failed to fully advise the parties of the possible effect of such representation on the exercise of his professional judgment. Thus, the complaint charged, the respondent failed to obtain an informed consent from the interested parties to the continued representation by the Honigman firm. [Paragraph 13-A]
>
> 2) That he failed to notify the St. Peter's Home for Boys, a beneficiary of the Charitable Trust, and the attorney general of the State of Michigan, of the potential conflict. [Paragraph 13-B]
>
> 3) That he continued to represent the Green Estate and the Trusts in spite of the fact that he and the Honigman firm "could not adequately represent the inherently conflicting interests of the parties to the transaction. [Paragraph 13-C]

During the course of the panel proceedings, in response to a motion for involuntary dismissal, counsel for the Grievance Administrator conceded that he could offer no legal authority to support the charges in paragraph 13(B). By its exclusion of any mention of paragraph 13(B) in its report on misconduct, the hearing panel's report raises the implication that the sub-paragraph was dismissed. To dispel any confusion on that point, we treat the "reluctant admission" of the Administrator's counsel that he could offer no legal authority in support of that charge as a voluntary withdrawal of those allegations. Canon 5 of the Code of Professional Responsibility, DR 5-105(C) speaks specifically of a lawyer's duty to make full disclosure to the "affected clients" of the possible effects of multiple representation. No rule has been cited which created a duty on Jaffe's part to give notice to trust beneficiaries or other "interested parties" of a potential conflict. Had it not be withdrawn, sub-paragraph 13(B) would properly have been dismissed.

The Grievance Administrator's counsel also moved voluntarily to withdraw the charges that respondent's conduct violated MCR 9.104(1-3), [2] stating that the motion was

---

[2] By this motion, the Grievance Administrator withdrew the claim that respondent's conduct constituted grounds for discipline as follows:

> RULE 9.104 GROUNDS FOR DISCIPLINE IN GENERAL;

made to clear up any confusion as to whether the Administrator was "bringing the character of Mr. Jaffe into play in this matter". (Tr. p. 246-247)

With the withdrawal of these charges, the sole substantive issue remaining before the panel was whether or not the respondent's conduct was permitted under the then existing provisions of Canon 5, DR 5-105 which stated:

> "(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).
>
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and each consents to the representation after full disclosure of the possible effects of such independent professional judgment on behalf of each."

Review of the hearing panel's conclusion must therefore be based on the applicability of Canon 5, DR 5-105 to the specific acts and omissions in sub-paragraphs 13(A) and 13(C) of the formal complaint which are alleged to be violations of the respondent's duties.

A. <u>The Requirement of Full Disclosure</u>

Following the complaint's recitation that the respondent had a duty to conform his conduct in connection with the Green-Cohen transaction to the provisions of Canon 5, DR 5-105, the complaint charges in sub-paragraph 13(A) that:

ADJUDICATION ELSEWHERE

The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

1) conduct prejudicial to the proper administration of justice;

2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;

3) conduct that is contrary to justice, ethics, honesty, or good morals;. . .

> A. Respondent failed to adequately explain and fully disclose to all of the interested parties the nature and extent of the potential conflict between Mr. Cohen, as potential purchaser, and the Charitable Trust, the Marital Trust, and the Green Estate, as potential sellers of the Turtle Lake real estate, including the failure to fully advise said parties of the possible affect of such representation on the exercise of his professional judgment, and thus, the respondent failed to obtain an informed consent from said interested parties to the representation by the Honigman, Miller firm of all parties to the transaction.

On the issue of disclosure, the Grievance Administrator's case was focused exclusively on the disclosure to the Bishop of the Episcopal Diocese of Michigan (then H. Coleman McGehee, Jr.) and the Dean of the Cathedral Church of St. Paul (then Bertram N. Hurlong), two of Jaffe's co-trustees of the Green Charitable Trust. It is not claimed in this case that insufficient disclosure was made to the third co-trustee of that trust, Comerica Bank, or to the potential purchaser, Maurice Cohen. As to the respondent's disclosure to Bishop McGehee and Dean Hurlong, the panel majority found that:

> "In this case, there was a disclosure. It was enough to satisfy, at the time, concerns of the Dean and the Bishop, as well as Comerica. It was considered to be forthright in terms of the information disclosed and, as a result, a consent was forthcoming. Indeed, other than what the panel considers to be minor issues involving a land-planner and the specific nature of services provided by Jaffe to Cohen, there is little in the way of factual non-disclosure complained of here. In addition, the potential conflict was considered by independent counsel for the Dean and the Bishop, who assisted in preparation of their response and consent". (Hrg.Pnl.Rept. p.21)

The panel majority ruled, however, that this disclosure was insufficient because it was not accompanied by advice to Bishop McGehee and Dean Hurlong of their right to seek independent counsel "to represent their interests in being fully informed concerning this transaction". This duty, the panel majority concluded, was fundamental and it was this failure which was cited as misconduct. The panel rejected, in turn, respondent's arguments that 1) Bishop McGehee and Dean Hurlong were hardly unsophisticated lay people but were presumed by Jaffe to have some experience in consulting with counsel on sensitive or complex legal matters; 2) All parties agree that Jaffe discussed the issue of his potential conflict at the August 22, 1983 meeting attended by the Cathedral Senior Warden, Justice G. Mennen Williams and that Jaffe felt that it would have been "presumptuous" to remind a justice of the Michigan Supreme Court that the representatives of the Cathedral could seek independent counsel; and, 3) Both Bishop McGehee and Dean Hurlong did, in fact, seeks independent counsel.

The standard of review governing the Board's review of a hearing panel decision requires the Board to determine whether or not the panel's findings have adequate evidentiary support while at the same time allowing the Board a greater measure of discretion with regard to the ultimate conclusion. Grievance Administrator v Irving August, 438 Mich 296; 304 NW2d (1991). Applying that standard of review in this case, we do not

take issue with the hearing panel's factual findings. As noted earlier, there is little dispute between the parties as to the nature of Jaffe's communications with the Bishop and the Dean on the subject of a potential conflict. Rather, we do not find adequate support for the panel's conclusion that the respondent had an affirmative duty in the summer and fall of 1983 to advise Bishop McGehee and Dean Hurlong to seek independent counsel. We find specifically that failure to provide such advice did not constitute a violation of Canon 5, DR 5-105 under the circumstances in this case.

Having found that there was "forthright" disclosure of the multiple representation by the respondent, the panel prefaces its finding that the disclosure was nevertheless insufficient by stating:

> "Troubling, however, is respondent's failure to advise his clients Bishop McGehee and Dean Hurlong, of their right to seek independent counsel to represent their interests and being fully informed concerning this transactions." (Hrg.Pnl.Rept. p.21)

In retrospect, more careful and more detailed disclosure with explicit references to the right to seek independent counsel may well have been desirable. However, the issue before the Board is whether or not the respondent's failure to advise the trustees to seek independent counsel violated a duty found in DR 5-105, the only disciplinary rule cited in the formal complaint. It is on this issue that we disagree with the hearing panel's conclusion.

While it may well be desirable to include advice to clients to seek independent counsel as part of the full disclosure required by DR 5-105(C), that requirement is not found in the discipline rule itself or in the case law of this state. Indeed, the opinion of the Oregon Supreme Court relied upon by the Grievance Administrator and cited by the panel, In re Boivin, 533 P2d 171 (Ore, 1975) stops short of a ruling that full disclosure under DR 5-105 requires advice to the parties of their right to seek independent counsel. That decision holds that:

> "To satisfy the requirement of full disclosure by a lawyer before undertaking to represent two conflicting interests, it is not sufficient that both parties be informed of the fact that the lawyer is undertaking to represent both of them, but he must explain to them the nature of the conflict of interest in such detail so that they can understand the reasons why it may be desirable for each to have independent counsel, with undivided loyalty to the interests of each of them." In re Boivin, 533 P2d 171 at 174.

In determining whether or not respondent Jaffe explained to the Dean and the Bishop the nature of the conflict of interest in such detail so that they could understand the reasons why it might have been desirable for them to seek independent counsel, it is proper and relevant to consider the relative sophistication of the individuals to whom the explanation was given.[3]

---

[3]Consideration of the quality of disclosure articulated in Boivin, supra, and other cases from other jurisdictions is an

It was entirely reasonable, for example, for the respondent to take into consideration the positions which Bishop McGehee and Dean Hurlong had achieved in the ecclesiastical hierarchy of the Episcopal Church. While we agree generally with the hearing panel's assessment of the inherent danger of an attorney making broad assumptions as to his clients' relative sophistication in legal matters, we reject the implication that respondent Jaffe should have assumed that he was dealing with "the unsophisticated client" as that term may be used by legal commentators. That assumption would simply not square with the facts in this case. Whether or not it was specifically disclosed to the respondent, it is a fact that Bishop McGehee was, at the time of his dealings with the respondent in 1983, a licensed member of the Virginia State Bar, having served years earlier as an assistant attorney general in that state. It is a fact, as is evident from the record, that both Bishop McGehee and Dean Hurlong were capable, articulate individuals who understood their responsibilities as co-trustees of the Green Charitable Trust.

Of greater significance was the involvement of the Cathedral's Senior Warden, Supreme Court Justice G. Mennen Williams. On this issue, we agree with the dissenting panel member that the presence of Justice Williams at the meeting on August 22, 1983 constitutes significant evidence which must be considered in determining the adequacy of the respondent's disclosure. As the panel's findings of fact make clear, Justice Williams was present at that meeting in his capacity as a lay representative of the Cathedral and one purpose of the meeting was to discuss the conflict of interest issue. (Hrg.Pnl.Find/Fact 24; Jt.St.Fact 16) There is no evidence in the record that Justice Williams raised any objection to Jaffe's continued representation at that meeting or at any other time. We cannot support the conclusion of the hearing panel majority that the absence of specific evidence of Justice Williams' expertise on conflicts issues negates the respondent's entirely reasonable testimony that he felt it would have been "presumptuous" to lecture Justice Williams on the Cathedral's right to obtain counsel.

The finding that respondent failed to make a full disclosure sufficient to alert the Dean and the Bishop of the advisability of seeking independent counsel is not only unsupported by the evidence but is refuted by the unchallenged facts that both the Dean and the Bishop did seek independent counsel and that no further information regarding the continued involvement of Jaffe or members of his law firm was requested. The inescapable inference which must drawn from the subsequent conduct of Bishop McGehee and Dean Hurlong is that they did receive sufficient information from respondent to suggest the need for independent legal advice.

We agree with the respondent that if an alleged duty to advise his clients of their right to seek independent counsel was not clearly set forth in the applicable disciplinary rule (in this case, DR 5-105), the respondent could not be found to have violated that duty where it was not charged in the formal complaint.

In 1983, this Board ruled that notwithstanding a body of Michigan case law casting "suspicion" on an attorney's drafting of a will naming himself as beneficiary, professional misconduct would not be found where the drafting of such a will was not directly prohibited

---

appropriate aid to an analysis of the issues presented here. However, we do not imply that the Oregon Supreme Court's 1975 decision in In re Boivin constituted a standard by which respondents conduct should necessarily be measured for purposes of determining professional misconduct.

by the Code of Professional Responsibility then in effect. Matter of Robert H. Watson, DP 209/82, (Brd. Opn. 7/18/83). In this case, neither the language of DR 5-105 nor decisions of the Supreme Court describe advice regarding independent legal counsel as a necessary element of the full disclosure required in DR 5-105(C). As in Watson, we believe that a finding misconduct must be based upon conduct prohibited in the applicable disciplinary rules, not conduct looked upon with suspicion or disfavor. Not only would it have been difficult for the respondent to conform his conduct in 1983 to a standard not apparent in DR 5-105, but the complaint filed in October 1990 contains no mention of a duty to advise the respondent's clients of their rights to an independent attorney. On that issue, the hearing panel's decision runs contrary to the rule that an attorney may be disciplined for misconduct only where it has been charged in the complaint. Matter of McWhorter, 407 Mich 278; 284 NW2d 472 (1979); State Bar Grievance Administrator v Corace, 390 Mich 419, 425; 213 NW2d 124 (1973).

B. The "Obvious" Requirement

Apart from the charges in sub-paragraph 13(A) of the complaint that the respondent failed to make "full" disclosure to his co-trustees, the respondent was charged in sub-paragraph 13(C) with the following:

> C. "Respondent continued to represent the Charitable Trust, the Marital Trust, and the Green Estate and to permit other attorneys in the Honigman, Miller firm to do likewise, with regard to the Turtle Lake Farms-Cohen transaction, in spite of the fact that he and the other attorneys in the Honigman, Miller could not adequately represent the inherently conflicting interest of the parties to the transaction."

Overshadowing any consideration of the respondent's continued involvement in the Green-Cohen transactions is a single paramount factor. Canon 5 of the Code of Professional Responsibility, DR 5-105, the only disciplinary rule or court rule under which the respondent is charged in this case, did not contain an absolute prohibition against the respondent's multiple employment. DR 5-105(C) explicitly allows such multiple representation if it is "obvious" that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure. For the reasons stated above, we find that the panel's conclusion that the respondent failed to make full disclosure within the meaning of that sub-rule was not supported by the evidence in the record. We must therefore examine the panel's conclusion that the respondent was not afforded the protection of DR 5-105(C) because it could not have been "obvious" that he and other members of the Honigman firm could adequately represent the interests of both the sellers and the buyer in the Green-Cohen transaction.

Again, we are in agreement with dissenting panel member Green both as to his conclusion that it may have been preferable to have had a rule flatly prohibiting multiple representation, especially in real estate transactions where the essential terms have not been fully negotiated, and that in the absence of such a rule a finding of misconduct cannot be based upon factors which may or may not be obvious in retrospect but which were not necessarily obvious to the attorney at the time of the contemplated representation.

The Grievance Administrator persuasively argues that the multiple representation of a buyer and seller in a real estate transaction is, at best, fraught with inherent dangers for all parties concerned and the hearing panel has cited those cases from other

jurisdictions in which such representation has resulted in a finding of professional misconduct. However, the criticism of such representation embodied in those opinions does not necessarily warrant a finding of misconduct in this state. Neither party has cited case law from a Michigan court or disciplinary agency which could be said to constitute fair notice to the respondent or any other attorney in 1983 that DR 5-105(C) would not be deemed to constitute an exception to DR 5-105(A)(B) in cases involving real estate transactions. On the contrary, in one of the few Michigan cases dealing with the prohibition against multiple representation embodied in DR 5-105, the Court of Appeals ruled that, without expert testimony, it was not obviously apparent that a defendant/attorney in a legal malpractice case violated DR 5-105 by representing the buyers and sellers in a real estate transaction.

> "This is especially true if defendant happened to believe his independent judgment would not be adversely affected by representing these multiple clients. See DR 5-105(A)" Beattie v Firnschild, 152 Mich App 785; 394 NW2d 107, 110 (1986)

Nor can it be said that there is uniform authority from other jurisdictions that such multiple representation must be considered as misconduct pe se regardless of the apparent exception created by DR 5-105(C). We note, for example, that the Oregon Supreme Court, having suggested in 1975 in Boivin, supra, that even full disclosure by a lawyer may not afford complete exoneration when representing conflicting interests, revisited its analysis of DR 5-105 ten years later in In re Johnson, 707 P2d 573 (1985). In Johnson, that Court ruled that the appropriate action by a lawyer depends upon the application of a judicially created hierarchy of conflicts ranging from those that are "actual" to those which are "likely" or "unlikely". In Johnson, the respondent/attorney was charged with a violation of DR 5-105 by representing both the buyer and seller in a land-sale contract. After noting that "it necessarily should occur to practicing lawyers that the simultaneous representation of multiple clients is fraught with professional danger", that Court ruled:

> "However, we believe that when it is not apparent from 'the very nature of the transaction' that an actual or likely conflict exists, a lawyer's representation of multiple clients in a land-sale transaction is not necessarily 'one of the clearest cases of the improper representation of conflicting interests' as we stated in In re Boivin, 271 Ore. 419, 425; 533 P2d 171 (1975). Thus, if a transaction does not reveal the actual or likely conflict of interest, the statements quoted from Barnett and Boivin are inapposite. That is the situation in the instant case.
>
> Applying the two-part test described above to the facts set forth earlier in this opinion, in consonance with the Disciplinary Review Board, we do not conclude that the accused knew, or by the exercise of reasonable care should have known, facts establishing an actual or likely conflict of interest in the land-sale transaction." In re Johnson, 707 P2d 573, 580.

We note also the opinion in Dillard v Broyles, (Tex App) 633 SW2d 636. While it is true that that opinion was consistent with an earlier ethics opinion issued by the State Bar of Texas, it was that court's unequivocal ruling that:

> "With the agreement of the parties after a full disclosure of the facts, an attorney may properly represent both the buyer and seller in a real estate transaction". 633 SW2d at 642

The hearing panel resolved this issue by concluding as a matter of law that under the circumstances presented in this case "it is impossible to believe that it would be 'obvious' to any attorney that dual representation was possible".

If anything is to be gained from a review of the cases and legal commentaries cited in this case, it is that there was in 1983 no black-letter law expressing the "impossibility" of dual representation. Stated another way, there is nothing obvious about what the "obvious" requirement meant or how it was to be applied. It is not without some degree of understatement that the Michigan Court of Appeals, referring to DR 5-105 observed that "Here the disciplinary rule is fairly vague". Beattie v Firnschild, supra 394 NW2d at 111.

In his testimony to the panel in this case, Professor Jeffrey Hazzard testified that the respondent's decision to proceed with the representation should be judged by whether it was "objectively reasonable":

> "Question-- All right. What is the opinion as to whether to decline the representation on the basis they could not adequately represent the inherently conflicting interest of the parties.
>
> Professor Hazzard--I think they were not required to decline it. I think this is what we call a consentable conflict. That is, the rule talks about is it obvious, which means it is objectively reasonable for a law firm to seek a consent, and could you tell the client enough about what the two representations would be that the client would understand the law firm's position.
>
> I think they did that; I think its reasonable here; this [sort of] thing is done in this parlance, this is not an unconsentable conflict, its a consentable disclosure and time for reflection by the client, I think it was quite appropriate." Professor Hazzard, (Tr. 824)

It was obvious that respondent was required to make disclosure. It was not obvious that, having disclosed and having obtained informed consent from sophisticated parties, respondent could not proceed with the representation.

In short, regardless of the merits of any argument as to what the rule on multiple representation should have been, we find that a strict rule prohibiting such representation is supported by neither the evidence or the case law. Misconduct should not be dependent upon the retroactive application of a standard which is so vague as to be without practical meaning.

For the above-stated reasons, the Board concludes that the specific charges of misconduct enumerated in the formal complaint were neither established by the evidence nor supported as a matter of law. We conclude that there was not evidentiary support for a conclusion that the respondent failed to make a full disclosure and obtain an informed consent from the affected clients to the continued representation by the Honigman, Miller

firm. [Paragraph 13(A)]; we find, and the Grievance Administrator concedes, that the respondent was not under a legal duty to notify non-clients (the St. Peter's Home For Boys and the Attorney General of the State of Michigan) of a potential conflict. [Paragraph 13(B)]; and the record does not establish by the evidence or as a matter of law that the representation by the respondent and his firm in the Green-Cohen transaction was prohibited per se and was outside of the scope of DR 5-105(C).

C. The Grievance Administrator's Request For Increased Discipline

We wish to comment briefly on the Grievance Administrator's request for increased discipline by way of emphasizing the limited scope of the charges of misconduct in this case.

There is no challenge to the panel's finding that respondent Jaffe was open and forthright in his written and verbal disclosures to Comerica, Bishop McGehee, Dean Hurlong and Maurice Cohen regarding his firm's multiple representation of the parties to the Green-Cohen transactions. The issues before the panel and this Board revolve around the questions of whether or not the consent given by the Dean and the Bishop was informed consent after full disclosure and whether or not it was "obvious" to the respondent that the inherently conflicting interests of the parties could not be represented simultaneously under any circumstances.

Nowhere in the complaint is it alleged that the respondent concealed any information, made any misrepresentation or committed any fraudulent or dishonest act. While paragraph 13(B) of the compliant alleges in a conclusory manner that "respondent could not adequately represent the inherently conflicting interests of the parties to the transaction", there has been no allegation in this case, and not a scintilla of evidence in the record, as to any actual damage suffered by a party to the real estate sale. The complaint contains no charge under Canons 6 and 7 of the Code of Professional Responsibility that respondent neglected any matter entrusted to him, that he intentionally failed to seek a legal objective of a client, or intentionally prejudiced or damaged a client during the course of the professional relationship. By voluntarily withdrawing the charges under MCR 9.104(1-3), the Grievance Administrator's counsel affirmed that the respondent was not charged with engaging in conduct prejudicial to the administration of justice; was not charged with conduct that exposes the legal profession to obloquy, contempt, censure or reproach; and was not charged with engaging in any conduct contrary to justice, ethics, honesty or good morals. The Administrator's counsel withdrew those charges for the stated reason of clearing up any question of whether or not respondent Jaffe's "character" was at issue.

It is the Grievance Administrator's position, however, that respondent's violation of Canon 5, DR 5-105 was so egregious that protection of the public demands that he be suspended for a period of 120 days and that he be required to undergo separate reinstatement proceedings to establish his fitness to practice law. We must admit to some surprise that the Grievance Administrator, having affirmatively stated to the hearing panel and to the respondent that the respondent's character was not at issue, should now seek suspension and reinstatement proceedings to consider the respondent's moral fitness. In requesting a suspension of at least
120 days, the Grievance Administrator's Brief in Support of Petition for Review states:

> "How can it be said that respondent's continued and numerous offenses and transgressions during this entire transaction warrant a simple reprimand? Respondent's actions evidenced a reckless disregard of his clients' interests and was designed to insure that one of his clients, Cohen, would obtain the property of other clients, at an inadequate price". Grievance Administrator's Brief in Support of Petition for Review, p. 14.

That allegation to the Board amounts to a claim of deliberate fraud, or, at least, a claim that respondent's conduct violated DR 7-101(A)(3) [A lawyer shall not intentionally prejudice or damage his client during the course of the professional relationship]. It is an allegation which was not charged in the formal complaint, is not supported by the evidence, is contrary to the hearing panel's factual findings and directly contradicts counsel's assurance to the panel that the respondent's conduct in this matter did not involve fraud or dishonesty and did not reflect upon his moral character.

The complaint under which the respondent is charged was narrowly drawn when it was filed and the charges were narrowed even further when the potential grounds for a finding that the respondent's conduct was unethical or dishonest were withdrawn. The Grievance Administrator cannot now come before the Board and demand a lengthy suspension on the very issues of ethics, honesty and character which his counsel withdrew.

D. The Hearing Panel's Decision to Disallow Costs

The Grievance Administrator has petitioned the Board for review of the hearing panel's refusal to award certain costs sought by the Attorney Grievance Commission in the investigation and prosecution in this matter. The Board's decision to reverse the hearing panel's findings of misconduct results in a vacation of the hearing panel Order of Reprimand in its entirety, with no costs assessed against the respondent. Nevertheless, this issue has not previously been considered by the Board and is of sufficient importance to warrant comment.

Following the hearing panel's decision on misconduct, the Attorney Grievance Commission submitted to the panel an Itemized Statement of Expenses, dated July 29, 1991 for charges incurred by the Grievance Commission in this action in the total amount of $3678.20. (This is the total of the individual charges itemized. The Commission's statement incorrectly claims a total of $3684.20).

Objections to that statement of expenses were filed by the respondent on the grounds that those costs and expenses attributable to the Grievance Administrator's special counsel were not expenses "allocable to a hearing" pursuant to MCR 9.128.

On August 13, 1991, the hearing panel chairperson directed the Board's Executive Director to review the costs under the procedure provided under MCR 2.625(F)(3). The resulting examination of costs filed by the Board's Executive Director on October 11, 1991 concluded that while MCR 9.128 is specific in its reference to the reimbursement by a disciplined attorney of expenses allocable to a hearing, review and appeal, that rule contains no provisions for reimbursement of expenses allocable to the investigation of a matter prior to hearing. Based upon that interpretation of MCR 9.128, the Board's Executive Director, performing the functions of a court clerk under MCR 2.625(F)(3),

allowed expenses incurred by the Grievance Commission in the amount of $2712.44 but disallowed the following expenses incurred by the Administrator's special counsel incurred prior to the filing of the formal complaint on October 3, 1990:

> 1) Special Counsel's Hotel Expense, January 27, 1990 in the amount of $194.31;
>
> 2) Special Counsel's Mileage to Meet with AGC, August 23, 1990 in the amount of $82.50;
>
> 3) Special Counsel's Parking August 23, 1990 in the amount of $6.95;
>
> 4) Special Counsel's Copying Charges for his Report to the AGC, August 23, 1990 in the amount of $682.00.
>
> Total Amount: $965.76

We believe that under the current language of MCR 9.128, the hearing panel's decision to disallow those costs was correct. The applicable provisions of that rule direct that:

> **MCR 9.128--Costs**
>
> "An itemized statement of the expenses allocable to a hearing must be made a part of the report in all matters of discipline and reinstatement. The hearing panel and the board in the order for discipline or for reinstatement must direct the attorney to reimburse the state bar for the expenses of that <u>hearing, review and appeal,</u> if any. . ."
>
> (Emphasis added)

Review of sub-chapter 9.100, including the definitions in MCR 9.101 reveals a separation of the discipline process into four separate and distinct stages, each clearly defined in the rules promulgated by the Supreme Court. "Investigation" means fact finding on alleged misconduct under the direction of the Grievance Administrator [See MCR 9.101(12); MCR 9.112; MCR 9.113 and MCR 9.114]. "Hearing" means the public hearing before a hearing panel appointed by the Attorney Discipline Board [See MCR 9.115]. "Review" means examination by the board of a hearing panel's final order on petition by an aggrieved party [See MCR 9.101(9) and MCR 9.118]. "Appeal" means judicial re-examination by the Supreme Court of the board's final order on petition by an aggrieved party [See MCR 9.101(10) and MCR 9.122].

The Supreme Court, in adopting MCR 9.128, could have directed that a disciplined attorney reimburse the state bar for the expenses of "<u>investigation</u>, hearing, review and appeal," or expenses of the "proceeding". By referring specifically to only three of the four component parts of the discipline process, we can only infer that omission of a requirement for reimbursement of the expenses incurred the "investigation" stage was intentional.

In reaching this conclusion, we do not imply in any way that the disallowed expenses of the special counsel were not legitimately incurred. MCR 9.129, clearly provides that legal counsel must be reimbursed by the state bar for his or her actual and necessary

expenses. However, in the absence of a modification or clarification of MCR 9.128, it does not appear that the disciplined attorney must reimburse the state bar for the expenses incurred by the Grievance Administrator or the Attorney Grievance Commission during the investigative phase of these proceedings.

Board Members Burns, Bushnell and Zegouras concur.

The Separate Opinion of Vice-Chairperson Hotchkiss and the Dissenting Opinion of Board Member Hurwitz are attached.

Board Members DunCombe and Fieldman did not participate in this matter.

Separate Opinion of Dr. Linda S. Hotchkiss

I concur in the majority opinion. However, I wish to emphasize that my decision is based upon the somewhat unique set of circumstances presented in this case. I believe that it is significant that dual representation by the respondent and other members of his law firm was discussed with the parties to the transaction, that at least one of these discussions was conducted in the presence of a justice of the Michigan Supreme Court and that the parties had ample opportunity to seek independent legal advice regarding the respondent's continued involvement. However, I would further emphasize that this decision should not be construed as a signal that dual representation should become the accepted practice without adequate safeguards.

Since October 1, 1988, the dual representation of clients in a single transaction has been governed by Rule 1.7 of the Michigan Rules of Professional Conduct. Under the current rule, a lawyer may represent multiple clients in a single matter if the lawyer "reasonably believes the representation will not adversely affect the other client" and each client consents after consultation. The pitfalls of dual representation are so great that extreme caution should be exercised to insure that there has been absolute compliance with the applicable rules.

Dissenting Opinion of Miles A. Hurwitz

I adopt the facts set forth in the majority opinion of the Board. I believe, however, that the hearing panel correctly analyzed the essential elements of Canon 5, DR 5-105 as applied to those facts. Relying upon that analysis, I would affirm the hearing panel's finding of misconduct.

The standard of review governing the Board's review of a hearing panel decision requires the Board to determine whether or not the panel's findings have adequate evidentiary support. Grievance Administrator v Irving August, 438 Mich 296 (1991). Applying that standard, I find factual support and adopt the majority decision of the hearing panel.

The substantive issue presented is whether respondent violated Canon 5, DR 5-105 of the Michigan Code of Professional Responsibility by engaging in multiple representation. That rule, which governed the respondent's conduct, is the only rule alleged to have been violated in this case. The rule addresses, "the simultaneous representation of differing

interests"; the preservation of independence of an attorney's judgment; and the prevention of a dilution of the attorney's loyalty to a client. Comment, "Conflicts of Interest in the Legal Profession", 94 Harv L Rev 1244, 1292-1293 (1981).

The threshold issue in determining the existence of a DR 5-105 violation involving dual representation is whether, "it is obvious" that the attorney can adequately represent the interests of each client. After satisfaction of that requirement, there has to be "full disclosure" to each client of the effect that the dual representation will have on the attorney's independent professional judgment; and, each client must consent to the representation after the full disclosure. Absent satisfaction of all three elements, dual representation is not permissible. Dubin & Schwartz, Michigan Rules of Professional Conduct and Disciplinary Procedure at I-78 (ICLE) commenting on DR 5-105.

The "Obvious" Requirement

As DR 5-105(C) makes apparent, an objective standard of "obvious" serves as the initial obstacle to prevent dual representations. "Obvious" has been given the meaning of "easily discovered, seen, or understood, readily perceived by the eye or the intellect, synonymous with the words 'plain', 'clear', and 'evident'". Black's Law Dictionary, 4th ed (1951).

In clarifying and commenting upon DR 5-105, the authors of the Code of Professional Responsibility, in Ethical Consideration EC 5-15 of the ABA Model Code of Professional Responsibility, stated as follows:

> "**EC 5-15** If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation . . . ."

This guideline, clear on its face, evidences just what it says: Where a good faith doubt exists as to the propriety of representation, it is not "obvious" that dual representation will be adequate for each client. The underlying rationale of the applicable code sections also supports this conclusion. The policy being, the need to assure that an attorney gives undivided loyalty to a client without the possibility of using confidential information to the detriment of a client. Respondent and his firm possessed confidences and secrets concerning the subject realty, the Green estate, and the affairs of Cohen.

The apparently disparate concepts found in DR 5-105(A) and (B), on the one hand, and DR 5-105(C) on the other, require analysis. In (A) and (B), a lawyer is flatly prohibited from multiple representation, "if the exercise of [the attorney's] independent professional judgment will be or is adversely affected by [the attorney's] representation of another client except to the extent permitted under DR 5-105(C)." Before DR 5-105(C) can even be considered, there must necessarily exist a significant doubt about the attorney's "exercise of his independent professional judgment." Having found such a doubt, only where "it is obvious" that adequate representation will result, can the attorney proceed to seek client consent.

In determining "adequacy" of representation of multiple clients in a non-litigation context, case law indicates a strong preference for finding technical services as arguably proper. Courts consistently reject "adequacy" arguments where more in the way of legal

services was expected by the parties. In re Phelps, 760 P2d 1331 (Ore 1988), an Oregon Supreme Court made the distinction precisely:

> [Respondent attorney] stated that he told [his two clients] that he was reluctant to get involved in any dispute between them and that he would refer them to separate lawyers at any hint of conflict. He maintains that he only agreed to prepare documents to carry out a prearranged agreement between the brothers, that he did not represent one "against" the other but sought to serve the partners' joint interest. We do not find clear and convincing evidence that the accused violated DR 5-105(A) in initially accepting the proffered employment, but he violated DR 5-105(B) by continuing the employment when it became clear that more than professional preparation of standard documents for an agreed transaction was required in order to safeguard the partners' separate interests. 760 P2d at 1337.

Indeed, it is this distinction between technical services only - such as scrivener services - and actual counseling services that has lead courts to either totally bar dual representation of buyers and sellers in land transactions or to severely question them. See, e.g. In re Lanza, 322 A2d 445 (NJ 1974); In re Boivin, 533 P2d 171 (Ore 1975).

In real estate matters, frequently a buyer and seller negotiate a transaction among themselves, often with a real estate broker, and execute a purchase agreement. Where an attorney is presented with an executed agreement, the attorney's function is reduced to true scrivener services: Drafting the documents to reflect and effectuate the purchase agreement.

Where no final agreement has been reached, however, an attorney (or those he supervises) is enmeshed in actually negotiating the terms of the purchase offer. Thus, the attorney is obligated to exercise independent professional judgment in advising the client.

The potential buyer and seller in the real estate transaction in the instant case had not agreed to the essential terms of the transaction when respondent commenced representation of both of them. The fundamentally antagonistic interests prohibited respondent from representing both buyer and seller since it could never be "obvious" within the meaning of DR 5-105(C) that he could adequately represent the interests of both.

I would suggest a rule that all real estate transactions inherently cause a non-waivable conflict of interest for dual representation of buyer and seller. However, I submit that a client and attorney could enter into a clear and express agreement in which the attorney would not participate in any negotiation of the purchase agreement, its terms, its content, or at the very least, that there would be absolutely no such involvement by the attorney. Absent such agreement, I do not believe it is likely that it could ever be "obvious" that a conflict could be waived before execution of the purchase agreement.

Respondent Jaffe's representation in this matter called upon him to provide legal representation to his clients - whom he recognized as including Comerica, the Bishop, the Dean and himself. The representation included counseling regarding the terms of the Turtle Lake Farms transaction, the implications of the transaction upon his clients, recommending strategies to maximized his clients' benefit, and asserting those positions with a proposed purchaser represented by respondent's own professional partners. It could not be "obvious" that his professional judgment would not be impaired.

Respondent suggests that two attorneys (or teams of attorneys) were involved here: The "Jaffe" team representing the Charitable Trust, and the "Binkow team" representing the Cohen interests. Such a distinction flies in the face of the reality of partnership practice where the client typically retains the firm, and not just a single member of it. Jaffe knew from the outset, "both teams" constituted one common set of attorneys: The Honigman firm. Notwithstanding this knowledge, Jaffe and his firm failed to make any provisions to erect a "Chinese Wall" between the "Jaffe team" and the "Binkow team" and profited from the conflicting dual representation.

Judicial opinion has long been antagonistic to the representation of adverse interests by the same attorney. Reference is first made to In re Lanza, 322 A2d 445 (NJ 1974), a proceeding for discipline of an attorney. In that case the New Jersey Supreme Court held that representation of both vendor and purchaser of real estate constituted misconduct. At page 448, the court stated:

> This case serves to emphasize the pitfalls that await an attorney representing both buyer and seller in a real estate transaction. The Advisory Committee on Professional Ethics, in its Opinion 243, 95 N. J.L.J. 1145 (1972) has ruled 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.

Justice Pashman, in the concurring opinion of Lanza, pages 449-451, carefully analyzed DR 5-105(C).

> I believe that if a conflict is perpetually lurking somewhere in the background, an attorney is likely to be swayed or adversely affected thereby, whether consciously or unconsciously. I therefore, choose not to exempt so-called potential conflicts under DR 5-105(C). Because of the admittedly inherent nature of a buyer-seller situation and the dangers involved, true impartiality is only an ideal and not an actuality. No matter how honest and well intentioned an attorney is, the possibility for conflict always exists. Commencing with the negotiation of contract terms to the preparation and execution of that contract to sell, and then to the closing itself . . . the attorney is dealing with two or more conflicting interests. To believe otherwise is illusory.
>
> * * *
>
> . . . A buyer-seller situation is not a clear-cut, mechanical situation in which the attorney can impartially act. There exists in every buyer-seller situation an inherent conflict of interests which even though inadvertent, may affect or give the appearance of affecting an attorney's impartiality and professional relationship. Therefore, it become irrelevant whether full disclosure is made and informed consent is given.
>
> * * *
>
> . . . neither buyer nor seller can ever possibly fully appreciate all the complexities involved. That is precisely the reason why full disclosure and informed consent are illusory. What most people typically do is rely upon the representation of their attorney when he reassures them that everything will be properly handled. However, the attorney is, unfortunately, not a

> clairvoyant who can foresee problem areas, although he realizes that there is certainly the potential for genuine conflict. Even where his motives are of the highest, as they usually are, and in good faith believes that he can effect a meeting of the minds, he really is not sure. Because of that dangerous uncertainty, I believe attorneys would, generally, welcome this prohibition against potential conflict.

The New Jersey Supreme Court, four years after Lanza, decided In re Dolan, an Attorney-at-Law, 384 A2d 1076 (NJ 1978). In that case a disciplinary proceeding was brought concerning dual representation of vendor and purchaser with respect to purchase of real estate. The court found the dual representation to constitute misconduct. Justice Pashman, in his concurring opinion, set forth the rationale for criticizing the dual representation of vendor and purchaser in a real estate transaction according to the mandates of DR 5-105 at pages 1083-1084 as follows:

> . . . representing the seller, [the attorney] must use all reasonable and proper means to see that the proposed sale of his client's property is consummated; as representing the buyer, he has an obligation to reveal any information which would be of genuine interest or help to the buyer in determining whether to make the purchase and in protecting his rights after the contract has been signed. It is apparent that this twofold obligation cannot be met in circumstances where the attorney's knowledge embraces any fact, known to him as the results of his relationship with the seller, which, if known to the buyer, might influence him to reject the purchase or to insist upon terms or conditions less favorable to the seller.

The majority opinion of this Board asserts Jaffe did not have "fair notice" in 1983 that DR 5-105(C) would not be deemed to constitute an exception to the conflicting representation of buyer and seller in the subject real estate transaction. The New Jersey Supreme Court, in 1963, in the case of In re Kamp, 194 A2d 236 (NJ 1963) held that an attorney, who primarily represented vendor and purchaser in the sale of realty violated his ethical responsibilities. The court, at page 242, indicated:

> . . . However, under the circumstances, and since this is the first case in which this practice has been brought to our attention, we do not think it appropriate to impose any penalty upon the respondent other than to reprimand him for his conduct. This, however, is not to be taken as a measure of future discipline. The bar will, of course, be upon full notice that the practices here condemned are regarded as highly unprofessional, and any further violations which come to the attention of the court will therefore necessarily be dealt with severely . . . .

The hearing panel in the instant case only reprimanded respondent Jaffe for his highly condemned disregard of ethical standards. Twenty years before Jaffe acted unprofessional in 1983, the New Jersey court in Kamp, gave notice of the serious and obvious conflicts in representing buyer and seller in a real estate transaction.

In conclusion,

> "* * * 'No man can serve two masters.' If there is the slightest doubt as to whether or not the acceptance of professional employment will involve a conflict of interest between two clients . . . or may require the use of

information obtained through the service of another client, the employment should be refused."

The representation by a lawyer of both the buyer and the seller in a business transaction is one of the clearest cases of the improper representation of conflicting interests . . . .

In re Boivin, 53 P2d 171, 174 (Ore, 1975)

This Board should affirm the finding of misconduct by the hearing panel.