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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-413

IN THE MATTER OF

R. WESLEY AGEE

AN ATTORNEY AT LAW

Decision

Argued: December 18, 1996

Decided: January 27, 1997

JoAnn G. Eyler appeared on behalf of the Office of Attorney Ethics.

Bernard Freamon 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 on a recommendation for discipline filed by the Special Master Michael L. Kingman. Count I of the complaint charged respondent with violations of RPCs 1.2(d) (assisting a client in illegal or fraudulent conduct); 1.15(b) (failing to deliver funds to a third person); 3.1 (asserting a frivolous claim); 3.3(a) (false statements to a tribunal); 3.4(a) (obstructing another party's access to evidence); 8.4(c) (conduct involving misrepresentation), and 8.4(d) (conduct prejudicial to the administration of justice). In Count II, the complaint charged respondent with violations of RPCs 1.2(d) (assisting a client in illegal or fraudulent conduct); 8.4(c) (conduct involving misrepresentation); 4.1(a)

(making a false statement of a material fact); 1.15(b) (failing to deliver funds to a third person); 1.7(c)(1) (conflict of interest), and 1.3 (lack of diligence). Finally, Count III of the complaint charged respondent with violations of R. 1:21-7(c)(5) (improper contingent fee) and RPCs 1.5(a) (fee overreaching); 1.15(a) (safekeeping property), and 8.1(a) (making a false statement of a material fact in connection with a disciplinary investigation.)

Respondent was admitted to the New Jersey bar in 1976. He has no prior ethics history.

* * *

Respondent was charged with misconduct in three separate matters: Gaynor/Russell, Gilmore and Ore.

THE GAYNOR/RUSSELL MATTER

On February 27, 1990, a proof hearing was scheduled to take place in Superior Court before Judge Harry A. Margolis in Essex County. The subject matter of the proceeding was a breach-of-contract suit filed by Ainsley Brimm, Esther Beecham and Linda Bacon, the buyers of real property, against the seller, Carol Gaynor, and the real estate broker, Empire Builders Real Estate and Investment Group, Inc. ("the broker"). Jeremy Doppelt represented the buyers, while Jon Roy Skolnick represented the broker. The buyers alleged that the seller, Gaynor, had failed to convey to them a three-family residence, as required by the

contract. The buyers further alleged that the broker wrongfully refused to refund their deposit. The broker filed a cross-claim against Gaynor for the real estate commission that would have been payable if the transaction had been completed.

The buyers and the broker obtained a default against Gaynor. At the proof hearing, respondent, who had had no prior connection with the matter, appeared with another individual, Marvin Russell, and discussed the case with Doppelt and Skolnick. Respondent announced that Russell, Gaynor's brother-in-law, was the "equitable owner" of the property and wished to settle the case. Gaynor was not present at the proof hearing. There is no indication that Gaynor disputed Russell's equitable ownership of the property. The parties reached a settlement at the courthouse, which required Russell and Gaynor to pay $5,775 to the buyers and $4,050 to the broker upon the earlier of the refinancing of the property or six months from the date of the settlement. The settlement provided for the placement of two mortgages against the property: the obligation to the buyers was to be secured by a second mortgage subordinate to an existing mortgage, and the obligation to the broker was to be secured by a third mortgage. Finally, the settlement provided that the broker would refund the buyers' deposit.

The parties appeared before Judge Margolis to place the settlement on the record. In the transcript of the February 27, 1990 hearing, respondent stated several times that he represented both Gaynor and Russell:

> Mr. Doppelt: Judge, just for the purpose of my understanding precisely Mr. Agee's representation here. I just want to confirm that you're authorized by both Mr. Russell and Mrs. Gaynor to enter into the settlement agreement.

Mr. Agee: Yes....

The Court: And do you have authority from your clients then, both from Miss Gaynor and from Mr. Russell?

Mr. Agee: Yes, I do, your Honor....

The Court: You're authorized to speak for both Russell and Gaynor.

Mr. Agee: Yes, I am, your Honor, by virtue of the legal and equitable interest [sic] which are merging.

[Exhibit P-A-5 at 3,5.]

At the time of the proof hearing, respondent had never met or spoken with Gaynor and had no authority from her to settle the litigation. His only basis for claiming authority from Gaynor was Russell's representation to respondent that Gaynor, his sister-in-law, would go along with the terms of the settlement.

Respondent explained at the proof hearing before Judge Margolis that Gaynor had been an "accommodating party" to obtain a mortgage and that Russell had an equitable interest in the property. He also represented that Gaynor would be transferring title to the property back to Russell, but he did not state when that conveyance would occur.

Subsequent to the proof hearing, Doppelt sent to respondent a mortgage to be executed by Gaynor and Russell. On March 5, 1990, Gaynor and Russell signed the mortgage instrument at respondent's office. Respondent took the acknowledgment and returned the document to Doppelt. Similarly, on March 8, 1990, Skolnick forwarded to respondent a mortgage in favor of the broker. Once again, on March 19, 1990, Gaynor and Russell appeared at respondent's office and signed the mortgage. Respondent took the

acknowledgment and returned the mortgage instrument to Skolnick. Respondent never suggested that Gaynor seek independent legal advice and did not explain to her the consequences of signing the mortgage documents granting security to the buyers and broker.

Notwithstanding that respondent arranged for Gaynor and Russell to execute the two mortgage instruments, on March 5, 1990, the same day that Gaynor signed the mortgage in favor of the buyers, she also executed a deed conveying the subject property to Russell and his wife, Dorothy Russell. Respondent prepared the deed, arranged for Gaynor's signature, witnessed the deed, and took the acknowledgment. On the next day, March 6, 1990, he sent the deed to be recorded. Also on March 6, 1990, Skolnick sent respondent a letter requesting title information and enclosing a proposed stipulation of settlement. Respondent returned the letter to Skolnick, on which respondent had written the words "none available." Respondent also returned to Skolnick the signed stipulation of settlement. The stipulation referred to respondent as attorney for Gaynor and Russell. Judge Margolis signed the stipulation on April 23, 1990 and filed it as a consent order.

In September 1990, Russell delivered to respondent's office some checks and money orders payable to the buyers and broker, in full settlement of the litigation. Instead of distributing the funds to the attorneys for the recipients, respondent returned the monies to Russell, by letter dated September 10, 1990, because Russell had not paid respondent's attorney fee. The letter indicated that, if Russell paid respondent's fee of $2,500, respondent would distribute the funds.

As a result of the letter from respondent, Russell decided that he would distribute the settlement proceeds himself. He went to Doppelt's office and personally gave him the settlement funds for the buyers. Russell indicated to Doppelt that he would be giving a check to Skolnick for the broker. Because, however, the broker had absconded with the buyers' deposit, reneging on the settlement agreement, Doppelt intended to levy on the broker's share of the settlement payable by Russell in order to recover the buyers' deposit. Consequently, Doppelt told Russell that, if Russell paid Skolnick, he would only have to pay Doppelt's clients again.

Russell telephoned Skolnick, who suggested that Russell hold the funds until the dispute between the buyers and the broker was settled. Subsequently, Russell's new attorney, Linda McDonald, notified Russell that the dispute was resolved. By that time, however, Russell no longer had the money. On October 1, 1990, Skolnick asked respondent when he could expect payment from Russell. Respondent told Skolnick that the funds were "in circulation" and led him to believe that payment would be forthcoming.

Because Russell failed to pay the broker pursuant to the terms of the settlement agreement, on January 14, 1992 Skolnick filed a foreclosure action against Russell and Gaynor. When Skolnick ordered the title work, he discovered that Gaynor had conveyed the property to the Russells. Accordingly, Skolnick abandoned the foreclosure proceeding. He telephoned respondent and demanded an explanation, complaining that the conveyance had created a tenancy by the entireties that defeated his client's security because Mrs. Russell had not signed the mortgage in favor of the broker. According to Skolnick's testimony at the

ethics hearing, respondent replied that he was not a title company and that Skolnick should have obtained title insurance:

> Q. Did he express any surprise that you were upset by the deed?
>
> A. No. He was just screaming he is not a title company. He doesn't warrant - I don't remember the words warrant or guarantee. He is not a title company.
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> [1T187][1]

On cross-examination by respondent, Skolnick testified:

> If you did not understand what I was talking about you would have said, a normal response would have been, Skolnick what is wrong with the foreclosure, what is the problem, why can't you collect. And the response is I'm not a title company. The only reason to say that is because you knew my foreclosure is no good.
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> [1T188-189]

On January 30, 1992, Skolnick wrote to respondent, warning him that, unless respondent gave a satisfactory explanation within five days, he would assume that respondent had participated in a fraud and conspiracy to defraud the broker and would take appropriate action. The record does not reflect whether respondent took any action in response to the letter.

Apparently, the broker, in addition to absconding with the buyers' deposit, failed to pay Skolnick's attorney fee. Skolnick then filed a motion to assert an attorney's lien against the settlement proceeds due from Gaynor and Russell to the broker. Thus, both Skolnick and the buyers were seeking payment from the broker's share of the settlement. Judge Irwin I. Kimmelman entered an order on January 7, 1991, granting a lien to Skolnick to the extent

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[1] 1T denotes the transcript of the July 29, 1996 hearing before the Special Master.

of one-third of the settlement. The order further provided that the funds were to be paid to Doppelt, who would disburse two-thirds to his clients, the buyers, who were still owed their deposit, and one-third to Skolnick, pursuant to the attorney's lien.

Skolnick also filed a motion against Gaynor, Russell and respondent to enforce the buyers' (Doppelt's clients) and his rights. Skolnick and Doppelt had agreed that, based on Judge Kimmelman's order, there was no longer a conflict of interest between Skolnick and the buyers, as they had a common interest in enforcing Judge Kimmelman's order and getting paid. The buyers consented to be represented by Skolnick. Respondent was named as a defendant, based on the fact that he had prepared and recorded the deed from Gaynor to the Russells that impaired the mortgages granted to the buyers and broker and based on respondent's failure to disclose the execution of the deed. Judge Margolis ruled that, because respondent and Russell had not been parties to the original breach-of-contract litigation, relief could not be granted in the context of a motion to enforce litigant's rights.

Skolnick subsequently filed a separate complaint in Special Civil Part. In response, respondent filed a third-party complaint against Doppelt, claiming that Doppelt had tortiously interfered with the settlement agreement between Russell and the broker. Respondent contended that the alleged tortious interference occurred when Doppelt told Russell that, if Russell paid Skolnick, he would only have to pay Doppelt's clients again. Skolnick moved for summary judgment and Doppelt moved to dismiss the third-party complaint. On the return date of the motions, March 26, 1993, respondent asserted to Judge Philip B. Cummis that, at the settlement proceedings before Judge Margolis on February 27,

1990, he had represented only Russell and not Gaynor: "I made it very clear to Mr. Donafeld [sic] and Mr. Skolnick that I was not representing Ms. Gaynor" (Exhibit P-A-3 at 12). Respondent stated that he had a written retainer agreement with Russell providing for a fee of $2,500. Judge Cummis ordered respondent to produce the written fee agreement by March 29, 1993. Respondent failed to produce the fee agreement. Thereafter, Judge Cummis entered orders granting Skolnick's motion for summary judgment and Doppelt's motion to dismiss the third- party complaint against Doppelt. Judge Cummis also ordered respondent to pay sanctions to Skolnick and Doppelt under the frivolous litigation statute. The orders were affirmed by the Appellate Division on appeal. On March 30, 1993, Judge Cummis referred the matter to the Office of Attorney Ethics ("OAE").

At the ethics hearing, respondent gave his version of the Gaynor/Russell matter through cross-examination of witnesses and his own direct testimony. He tried to elicit testimony from Doppelt and Skolnick to the effect that, at the proceeding before Judge Margolis, they had understood that respondent was representing only Russell and not Gaynor. Both attorneys, however, were consistent in their testimony that respondent asserted to them and Judge Margolis that he represented both Gaynor and Russell. When respondent was asked how he could enter into a settlement agreement on behalf of Gaynor, whom he had never met, respondent replied, "Good question. The court allowed it" [2T210].[2] As pointed out by the presenter, however, the court allowed it only because of respondent's

[2] 2T denotes the transcript of the July 30, 1996 hearing before the Special Master.

representation that he had Gaynor's authorization to settle the matter. Respondent insisted at the ethics hearing that he was representing only Russell and that he had indicated to Judge Margolis that he had never met Gaynor.

Furthermore, at the ethics hearing respondent attempted to draw much attention to the fact that Skolnick, who had represented the broker, had subsequently represented the buyers in seeking the enforcement of Judge Kimmelman's order. Despite the fact that both attorneys testified that the clients had consented to the representation, respondent suggested that there was a conflict of interest and expressed surprise that the OAE had failed to investigate "the problem."

Respondent testified at the ethics hearing that, at the time of the Gaynor/Russell matter, he had handled fifty to one hundred real estate transactions. He was then shown a copy of a July 10, 1990 transcript of his deposition in civil litigation,[3] in which he had stated that he had conducted in excess of one thousand closings. Respondent attempted to explain the discrepancy by calling it a mistake and misunderstanding by the court reporter because the notion that he had handled one thousand closings was "absurd." In addition, the presenter offered a tape recording of respondent's interview with the OAE on September 22, 1995, in which respondent had also stated that he had handled "thousands" of real estate closings. Respondent's explanation for his statement on the tape recording was that he had exaggerated his response in reaction to an antagonistic question.

[3] The litigation was brought against respondent by Thomas and Pearl Gilmore, the grievants in an unrelated matter discussed below.

With regard to Skolnick's letter requesting back title information on the Gaynor property, respondent claimed that he assumed that Skolnick was referring to a title search, not the fact that the property had just been conveyed from Gaynor to the Russells. Respondent added that he had not disclosed the information about the Gaynor conveyance because he thought Skolnick was asking him only if he had conducted a prior title search.

Respondent also testified about the settlement funds that he returned to Russell, instead of distributing to the attorneys for the buyers and broker. Respondent stated that Russell had dropped off the checks when he, respondent, was not in the office. Respondent contended that he did not distribute the funds because Russell had not paid him his attorney fee and that he had relied on RPC 1.16(b)(4), which permits an attorney to withdraw from representation if the client fails to fulfill an obligation to the lawyer regarding the lawyer's services and the client has been given reasonable warning that the lawyer will withdraw. Respondent also testified that, at the time that Russell delivered the funds to his office, he still represented Russell:

> Q. When did you terminate your services to Mr. Russell?
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> A. Well, actually, I didn't. I didn't terminate. I sent a letter to him, which I thought was in line with RPC 1.16, on September 10 [1990]. And as I indicated to him that I was still representing him. As far as I'm concern [sic] the only condition I wanted is pay me my money to which you signed a retainer agreement to pay me and the deal is done.
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> [3T35][4]

[4] 3T denotes the transcript of the July 31, 1996 hearing before the Special Master.

Respondent wrote a letter to the OAE in response to the Gaynor/Russell grievance, in which he stated the following:

> I made Mr. Skolnick aware of the fact that I was no longer representing Mr. Russell as a result of a conversation with Mr. Russell on September 15, 1990 in which Mr. Russell told me he could not afford to pay me my legal fee, therefore he was terminating my services, and he requested that I return the checks and money orders that he left with my office so that he could give the funds directly to Mr. Doppelt and Mr. Skolnick.
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> [Exhibit P-A-2 at 5.]

At the hearing before Judge Cummis on March 26, 1993, respondent gave a third account of what had taken place:

> [Russell] went and borrowed the money and he brought it to my office sometime later and I asked him, I said where, well the agreement was that he would pay my fee, he said he would borrow enough money to pay me. At the point in time I saw that he wasn't going to pay me, so and I had discussed the matter with them, he terminated my services. He said well since the only thing that's left to do is to turn the money over to the lawyers I'll do that myself. He said therefore he's terminating my services and he wants the money back. He instructed me not to send the money to the attorneys. That he would come by and pick it up and deliver it himself because he was terminating my services.
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> THE COURT: Don't you think at that point you should have gone to the Court, kept it in your trustee account and gone to the Court for instructions?
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> MR. AGEE: Well at that point in time Judge I had an obligation under the Rule of Professional Conduct that once I'm terminated I would have to cease and not perform any more services. I did what I thought was best as an attorney to protect my interest as a lawyer.
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> [Exhibit P-A-3 at 16-17.]

Apparently, in a certification filed with Judge Cummis, respondent had given yet another version of the events. At the March 26, 1993 hearing, Judge Cummis pointed out to respondent that, in an affidavit filed with the court, respondent had stated that the funds

were delivered to his office on September 10, 1990 and were not returned to Russell until September 16, 1990.

* * *

The special master also found that respondent violated RPCs 1.7 (conflict of interest), although he was not so charged in the complaint, 3.1, 3.3(a), 8.4(a) and 8.4(d). The special master found no violations of RPCs 1.15(b), 1.2(b) or 3.4(a). The violation of RPC 1.7 was based on respondent's representation of both Gaynor and Russell, when they had divergent interests; Gaynor had title to the property, while Russell was claiming to be the equitable owner.

The special master also found that respondent violated RPC 3.1 (asserting a frivolous claim), by filing the third-party complaint against Doppelt. The special master concluded that respondent had no reasonable basis for bringing suit against Doppelt for tortious interference. He also found a violation of RPC 3.3(a) (false statements to a tribunal), based on respondent's assertion to Judge Margolis that he was authorized to represent Gaynor, when he had never met or spoken with her and had no actual or apparent authority to settle the case on her behalf. Furthermore, the special master found that respondent's misrepresentation to Judge Margolis, Doppelt and Skolnick about his representation of Gaynor also constituted a violation of RPCs 8.4(c) (conduct involving misrepresentation) and 8.4(d) (conduct prejudicial to the administration of justice).

The special master found no violation of RPC 1.2(d) (assisting a client in illegal or fraudulent conduct). The basis for the charge was respondent's participation in preparing and overseeing the execution of the mortgages signed by Russell and Gaynor in favor of Skolnick's and Doppelt's clients, while at the same time preparing and overseeing the execution of a deed from Gaynor to the Russells that had the effect of defeating the security of the mortgages. The special master remarked that, if the conveyance had been delayed until the settlement was fully paid, or if respondent had also required Dorothy Russell to sign the mortgages, the security would not have been impaired. However, the special master found that respondent's acts were not the result of fraud, but of ignorance of the effect the deed had on the security of the mortgages:

> And I think it didn't dawn on Mr. Agee because he didn't understand or appreciate the significance of it. The one area in which Mr. Agee's representation of himself helped, to be very blunt about it, is it did help support his claim that many of the mistakes he made in this case were the results of ignorance. And I think this was such a mistake. I don't think he did it deliberately to cut-off the ability to enforce the judgment or to foreclosure [sic] their ability to do it.
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> [4T94-95][5]

The special master also pointed out that, while the conveyance from Gaynor to the Russells defeated the enforcement of the mortgages via foreclosure, it did not invalidate the judgment. The special master noted that the judgment against Russell could have been enforced by other means, or against the property upon a sale; the lien and judgment were not defeated, only the method for enforcing it by foreclosure.

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[5] 4T denotes the transcript of the August 1, 1996 hearing before the Special Master.

The special master also found no violation of RPC 3.4(a) (obstructing another party's access to evidence). At the ethics hearing, the presenter argued that the basis for this charge was respondent's failure to notify Skolnick and Doppelt of the deed signed by Gaynor, his failure to notify the other attorneys that he had the settlement monies from Russell, and his misrepresentation to Skolnick that he had no back title information when he had just prepared a deed transferring title. The special master noted his prior finding that respondent had acted out of ignorance, and not with the intent to defraud the parties. Moreover, the special master referred to respondent's statement during the settlement proceedings before Judge Margolis that Gaynor would be conveying the property to Russell. Therefore, the special master reasoned, the parties were on notice that a deed would be executed and the conveyance should have been expected. In addition, the special master accepted respondent's testimony that he interpreted Skolnick's request for title information to mean back title, such as a prior title policy or binder, instead of a status of the current holder of title.

Similarly, the special master found respondent did not violate RPC 1.15(b) (failure to deliver funds to a third person):

> Mr. Russell did bring some funds and drop them off at Mr. Agee's office several months after the conclusion of the settlement. At a time when [R.] 1:11-3 did not obligate Mr. Agee to continue his representation. There is no evidence from which I can conclude that Mr. Agee agreed at that point to continue his representation.
>
> I find based on Mr. Russell's testimony that he dropped off the money. Mr. Agee indicated he was not there when the money was dropped off. I have nothing to contradict that. And in light of what happened that is probably correct. Mr. Agee then discovers the money is there. Has a conversation with

> Mr. Russell in which Mr. Agee raises the legitimate point that he had not been paid up to that point for any of his services.
>
> Mr. Russell was very frank in acknowledging that once he found out that the last thing that Mr. Agee had to do was deliver the money, Mr. Russell said to Mr. Agee well, I'll deliver the money. And that it was, at the very least, in equal parts a decision.... Do we say that Mr. Agee was terminated at that point? He actually technically wasn't representing Mr. Russell anymore since the time limit, under which he was obligated to represent him, had past [sic]. [4T95-96]

Accordingly, the special master found nothing wrong with respondent's return of the settlement monies to Russell.

THE GILMORE MATTER

Respondent represented Pearl and Thomas Gilmore in a bankruptcy matter. After respondent filed a Chapter 13 petition on their behalf, the bankruptcy trustee accepted a plan that required the Gilmores to make monthly payments to the trustee. The plan also permitted the Gilmores to retain their home. The Gilmores had three outstanding mortgages against their property. They were not able to pay the trustee consistently, but desperately wanted to keep their residence. They tried to refinance their mortgage loans, but were rejected due to poor credit.

Respondent suggested an arrangement to the Gilmores by which they purportedly would be able to keep their house and satisfy their debts. Respondent proposed that the Gilmores convey their house to an "accommodating buyer" and remain in possession as tenants. Several years later, the title to the property would be transferred back to them.

Respondent told the Gilmores that he knew someone who would be willing to help them in this fashion. Respondent recommended Charles Jennings, whom he introduced to the Gilmores. Respondent suggested an arrangement by which the Gilmores and Jennings would execute a contract for the sale of the property, apply for a mortgage, and use the mortgage proceeds to pay off the three existing mortgages. All closing costs would be paid out of the mortgage proceeds and Jennings would receive a fee for his "services."[6] Jennings was not required to advance any of his own money toward the "purchase."

On September 2, 1987, the Gilmores entered into a contract to sell their home to Jennings at a purchase price of $135,000; the amount paid by buyer as initial deposit was to be $3,000 and the amount payable on the signing of the contract $10,000. At closing, the amount due from buyer was to be $20,750. Thus, according to the contract, the total sum to be paid by Jennings was $33,750. The deposit was to be held in trust by respondent and the closing was to take place at respondent's office. Although this clause was not mentioned at the ethics proceeding, the sellers would have to pay all of the buyer's closing costs, including the mortgage application fee, points, title search, survey, and legal fees for "agreed upon valuable services rendered by the Buyer to the Seller" (Exhibit P-B-2). On the same date that they signed the contract of sale, the Gilmores and Jennings entered into an agreement to lease the property to the Gilmores, who would also be granted an option to purchase the property from Jennings.

[6] The record refers to Jennings' fee as $10,000 in some places and as $12,000 in others.

Thereafter, Jennings applied for a mortgage from Citicorp, indicating that respondent was his attorney. On October 28, 1987, Citicorp's review attorney, Roy Binder, sent a letter to respondent with general information about the mortgage and preliminary closing instructions. Included in the letter was a requirement that the title binder contain a provision that all leases had to be subordinated to the mortgage.

Binder testified at the ethics hearing that from all appearances the transaction was a purchase money mortgage. The agreement for a lease and option to purchase was not supplied to Citicorp, nor was a copy of the lease. Binder stated that Citicorp regarded respondent as Jennings' attorney, not the Gilmores' attorney, as respondent claimed. Binder explained that Citicorp never communicated with a seller's attorney. Respondent never contacted Citicorp in response to its letter of October 27, 1987 stating that Jennings had named him as his attorney. Furthermore, on November 4, 1987, Citicorp sent a letter to respondent asking him to contact Binder if he had not yet received the letter of instruction from him. The letter referred to the loan as respondent's client's loan. Respondent did not contact Citicorp to indicate that he did not represent Jennings.

According to Binder, Citicorp would not have extended the loan to Jennings if it had known any of the following details: Jennings did not put any of his own money into the property, respondent was not holding any deposit monies in his trust account as indicated by the real estate contract, a lease was to be executed by the buyer and seller, the property was not owner-occupied, and Jennings had given the Gilmores an option to buy the property. According to Binder, had full disclosure of the true nature of the transaction been made,

Citicorp might have agreed to issue a mortgage, but with less favorable terms. The interest rate would have been higher, private mortgage insurance would have been required and the loan to value ratio would have been different.

John Mills, a Morristown attorney, testified at the ethics hearing that he had represented Jennings on prior occasions and that Jennings had asked him to represent him in the Gilmore matter. In fact, Mills had prepared the lease, the contract of sale and the agreement for lease with option to purchase. The contract of sale prepared by Mills stated that he would hold the deposit in his trust account and that the closing would take place at his office. The documents ultimately signed by the parties provided that respondent would hold the deposit and that the closing would take place at respondent's office. Apparently, respondent simply took the documents prepared by Mills, made some very minor changes, and arranged for the parties to execute them.

Mills testified that, at some point, he became uncomfortable with the transaction and informed Jennings that he wanted no part of it. According to Mills, while he did not notify respondent in writing that he no longer represented Jennings, he informed respondent of his concerns and told him that he would not participate in the transaction. Mills added that he was concerned about the conveyance because the documents supplied to the lender did not accurately reflect the nature of the transaction and deviated from the instructions from the lender. For example, the affidavit of title that the lender supplied stated that no tenancies existed, while the parties contemplated entering into a lease agreement. Furthermore, Mills was aware that the interest rate for owner-occupied property loans was generally lower than

that of rental property loans. Mills was also concerned that the RESPA settlement sheet would have to reflect the fee paid by the Gilmores to Jennings. Finally, Mills was not comfortable with the deal because it was one-sided in Jennings' favor.

Mills also testified that, although it is customary for the buyer's attorney to order title work and comply with the lender's requirements, his file did not reflect a mortgage commitment letter, title request, title binder, survey, notice of settlement or any other document showing that he was representing Jennings in the Gilmore matter.

The real estate closing took place on January 22, 1988. Respondent was the only attorney at the closing. He acted as closing attorney on behalf of Citicorp, as well as attorney for the buyer and the sellers. Respondent prepared a "waiver," which the Gilmores and Jennings signed at the closing, stating that they retained respondent as their attorney for the real estate conveyance and that they "waive[d] the use of any other attorney involved other than R. Wesley Agee" (Exhibit R-6). The following documents, among others, were signed at the closing: a deed conveying the property to Jennings, a lease providing for a tenancy for a three-year period, and a deed dated January 22, 1991 (three years later) conveying the property back to the Gilmores. Apparently, the Gilmores were concerned that Jennings might change his mind about conveying the property to them and requested respondent to obtain the deed and hold it in escrow. Respondent prepared the deed from Jennings to the Gilmores, witnessed it and took the acknowledgment, although the date on the deed was three years in the future.

The RESPA from the closing indicates that Jennings had deposited $33,750 toward the purchase price of the property. Respondent signed the RESPA and certified it as a true and accurate account of the transaction. He also signed and forwarded to Citicorp a "first lien letter" stating that he had complied with all of Citicorp's instructions.

The RESPA and the client ledger sheet for the Gilmore to Jennings transaction[7] indicated that $745.56 was sent to the City of Orange in payment of first quarter property taxes. The City of Orange returned the check to respondent, indicating that the taxes had already been paid. Nevertheless, respondent failed to refund the money to his client or credit them for the return of the taxes. Respondent could not explain this failure, adding that he was unable to recall what had taken place nine years before. Similarly, the client ledger card stated that check number 516 from respondent's trust account was sent to the Essex County Registrar. However, check number 516, although payable to the Essex County Registrar, was only in the amount of $17 (Exhibit P-B-24). Again, respondent was not able to explain this discrepancy.

As it turned out, the client ledger card was a total fabrication, in the sense that it had not been prepared contemporaneously with the transaction, but instead in preparation for the OAE audit. On July 28, 1995, the OAE sent a demand to respondent for "original client files and client ledger cards" for the grievances, including the Gilmore grievance. Respondent

[7] During the ethics hearing, the presenter asked respondent why the client ledger sheet was in the name of Charles Jennings if, as he claimed, respondent did not represent Jennings. Respondent was not able to give a satisfactory explanation.

produced a client ledger card at a meeting with the OAE. He did not disclose to the OAE that he had just reconstructed the ledger card in response to the demand for records.

At the ethics hearing, respondent had difficulty answering questions about the ledger sheet and confirmed that it was reconstructed. He explained that, when he received the demand for records from the OAE, he searched his office and could not find the ledger sheet. He believed that it had been given to his attorney in the civil litigation brought against him by the Gilmores. Respondent then went through the records he had and reconstructed the ledger sheet. When asked why he had failed to disclose this fact to the OAE, respondent replied that the question was never asked, that the omission was caused by his frustration and nervousness and that he did not think that the word "original" on the demand for records modified the words "client ledger sheet." According to respondent, he thought that the word "original" modified only "client files" and that, if the OAE wanted original client ledger sheets, it should have demanded "original client files and original client ledger sheets."

During the ethics hearing, the presenter stated her belief that respondent had been specifically asked, during the investigation, if the client ledger sheet had been prepared contemporaneously with the closing. Respondent, in turn, asserted that the OAE had asked only about his general policy and that it was his general policy to prepare the ledger sheets contemporaneously. He denied being specifically asked about the Gilmore/Jennings ledger sheet. The presenter then played an audio-tape of the investigation. The special master noted that, on the tape, respondent had been asked when the Gilmore/Jennings ledger card was prepared and that respondent had replied that it had been prepared contemporaneously

with the closing. In fact, that was not true, as noted above. Respondent later admitted that he had reconstructed the document in anticipation of the OAE audit.

The client ledger sheet also disclosed a check sent to the bankruptcy trustee. In accordance with Gilmore's instructions, respondent sent the bankruptcy trustee a check for $4,000, in partial payment of the outstanding debt owed by the Gilmores, pursuant to the Chapter 13 plan. Respondent's cover letter to the trustee, which was dated February 16, 1989, indicated that he had received a copy of an order dismissing the bankruptcy petition and was submitting the check in an effort to restore the matter. However, on March 21, 1988, the trustee returned the check to respondent because the bankruptcy petition had been dismissed on February 3, 1988 (about two weeks after the closing) for failure to pay in accordance with the plan. Respondent failed to file a motion to reinstate the bankruptcy petition. He merely returned the check to the Gilmores.

Sometime after the closing, Jennings, now the named title-holder of the property, improperly borrowed funds and placed a mortgage on the property. He then failed to pay the mortgage, resulting in a foreclosure and, obviously, the Gilmores' loss of their residence. Thereafter, the Gilmores filed civil litigation against Jennings and respondent. Both Mr. Gilmore and Jennings were deceased at the time of the ethics proceedings.

Respondent maintained that he did not represent Jennings in the Gilmore transaction. He claimed that, as far as he was concerned, John Mills had represented Jennings. According to respondent, Mills never informed him that he no longer represented Jennings. Respondent went on to say that he had waited for Mills to appear at the closing. Respondent

noted that Jennings was authorized to indicate to Citicorp that the real estate closing would take place at respondent's office, but was not authorized to name respondent as his attorney. Respondent explained that he did not correct Citicorp's apparent misunderstanding that he represented Jennings because he did not want to "prejudice the flow of the loan process." Similarly, respondent contended that he had ordered a title commitment, an action usually performed by the buyer's attorney, because there were times when he could not reach Mills and he "wanted the real estate deal to move." However, at the ethics hearing, respondent was shown a title commitment issued by Royal Title Service on July 20, 1987 (about six weeks before the contract for the sale of the Gilmore property). The title commitment indicated that it was prepared for respondent and listed Citicorp as the proposed insured, thereby indicating that, contrary to respondent's testimony, he knew to which lender Jennings had applied for a mortgage loan.

With regard to the deposit money that proved to be a fiction, respondent testified that he obtained approval from Citicorp to list on the RESPA statement the payment of a deposit of $3,750, even though that was not so. According to respondent, Citicorp had told him that he could use the option agreement in place of a deposit. Respondent added that, because Jennings was in the mortgage business himself, respondent thought Jennings had an "inside track" with Citicorp.

* * *

The special master found that respondent violated all the RPCs listed in the complaint. He noted that the transaction would have been permissible if disclosure of the lease agreement and the tenancy created thereby had been made to Citicorp, and if Jennings had been represented by independent counsel. The special master characterized the transaction as follows:

> This was a transaction fraught with peril to the Gilmores from the beginning.... While this was in theory a legal transaction it was a dangerous one for the Gilmores. A danger realized because they lost the house. And Mr. Agee had an obligation to fully and carefully explain to them the dangers of this transaction and the conflict because there was a conflict between the Gilmores and the [sic] Jennings.
>
> I find as a fact there is always a conflict between a seller and a buyer in a real estate transaction. I find as a fact that the conflict in this case was much greater than one would ordinarily find because this was more than just a purchase and a sale. There were other things that were going to happen afterward. There was going to be a landlord/tenant relationship. There was an option to repurchase. There were elements and things that the Gilmores expected to happen that might not happen and, in fact, didn't happen....
>
> Apparently Mr. Jennings went out and got a mortgage on the property. The mortgage was not paid and the property was foreclosed upon. That was a danger that the Gilmores were not aware of at the time that this transaction was entered into. They were given a false sense of security by the preparation of the deed.
>
> [4T103-104]

The special master found credible Mills' testimony that he told respondent that he was uncomfortable with the deal and had refused to play a part in it. More significantly, the special master found that respondent deliberately lied at the ethics hearing about his conversation with Mills:

> Part of the problem is Mr. Agee is trying to recall things that happened many, many years ago and he was frank to admit that.
>
> But unfortunately in the course of answering questions what I would find Mr. Agee to do, over and over again, would be to listen to a question and, frankly, to give an answer to the question recollecting such facts as would paint Mr. Agee in the best possible light. Then when Mr. Agee was confronted with additional facts that would contradict his prior answer he would revise his answer to encompass the new facts in an effort to still portray himself in the favorable light.
>
> So what we would get with answer to question [sic] is three or four different versions of what happened until, finally, Mr. Agee would acknowledge he was not sure what happened.... But clearly I can not credit much of Mr. Agee's testimony with regard to these transactions. It directly contradicted documents like P-B-1....
>
> [4T105-106]

The special master further remarked that respondent represented three parties, Citicorp, Jennings and the Gilmores, to whom respondent did a disservice because all their interests conflicted. The special master noted that at the closing the parties had irreconcilable differences, in that, among other things, Jennings did not want to impair his ownership interest in the property, while the Gilmores wanted assurances that Jennings would not be permitted to sell the property to another party. The special master concluded that respondent should have halted the closing and instructed Jennings to obtain independent counsel. Instead, respondent had the parties execute a "waiver" in which they agreed to be represented by respondent, despite the fact that they had adverse interests. The special master noted respondent's testimony that he had telephoned the title company during the closing to see if the conflict could be reconciled, at which time he had been advised not to do anything to

cloud the title. The special master found a violation of RPC 1.7(c)(1) (conflict of interest), adding that "this case is a law school example of the dangers of conflicts of interest." 4T121.

The special master also found that respondent perpetrated a fraud on Citicorp by indicating that he was holding a deposit in his trust account when he was not, and by arranging for the execution of the contract of sale at the same time as the agreement for lease with an option to purchase, when these documents conflicted with each other. The special master found that the contract itself was fraudulent and that the settlement sheet was a fiction; neither document reflected the true nature of the transaction. Furthermore, the special master noted that respondent permitted Jennings to execute an affidavit of title that stated that there was no tenancy. The special master rejected respondent's explanation that he could acknowledge Jennings' signature, even though respondent knew the document contained falsehoods, as respondent himself was not asserting them. Accordingly, the special master found a violation of RPCs 1.2(d) (assisting a client in illegal or fraudulent conduct), 8.4(c) (conduct involving misrepresentation) and 4.1(a) (making a false statement of a material fact).

The special master also found violations of RPCs 1.3 and 1.15(b), based on respondent's failure to timely disburse the funds to the bankruptcy trustee. As a consequence of respondent's lack of diligence in failing to forward the money to the trustee, the bankruptcy petition was dismissed. The special master remarked that sufficient funds were available at the closing to permit respondent to send to the bankruptcy trustee the full amount due.

THE ORE MATTER

In March 1988, respondent represented three minors, Ricky Ore, Kameelah Philips and Sakinah Patterson, and one adult, Tijuana Arrington, as plaintiffs in a personal injury automobile accident matter. He settled the case without filing a complaint. Pursuant to the terms of the settlement, Arrington was to receive $1,200 and the minors $3,500. Prudential Insurance Company ("Prudential") agreed to pay eighty-five percent of the settlement, while the remaining fifteen percent was to be paid by the Joint Underwriting Association ("JUA"). Prudential sent to respondent four checks dated April 18, 1989, totalling $9,945, made payable to respondent and each individual claimant. Three checks were in the amount of $2,975 and one in the amount of $1,020. Respondent deposited the checks in his trust account on April 24, 1989. On April 28, 1989, respondent issued to himself three trust account checks for $1,315 each and one for $550, for a total of $4,495, in payment of his attorney fee. Although the checks were post-dated May 1, 1989, they were negotiated by the bank on April 28, 1989. On May 1, 1989, respondent issued three checks for $2,185 for the minors and one for $650 for Arrington, for a total of $7,205. The checks were debited by respondent's bank on May 4, 1989.

On May 2, 1989, the JUA issued four checks totalling $1,755, payable to respondent and the respective individual claimants, representing fifteen percent of the settlement. Three checks were for $525 and one was for $180. The checks were deposited in respondent's trust account on May 8, 1989.

At the time that respondent issued to himself four checks totalling $4,495 (April 28, 1989) and four checks to his clients totalling $7,205 (May 1, 1989), for a grand total of $11,700, respondent had not yet received the funds from the JUA. Consequently, respondent necessarily invaded trust account funds to the extent of $1,755. Respondent's client ledger cards did not properly reflect the above chronology. Instead, all four client ledger cards wrongly indicated that the check from the JUA was received on May 5, 1989, instead of May 8, 1989, and that the checks to him were issued on May 5, 1989, instead of April 28, 1989. This inaccurate entry allows a conclusion to be drawn that respondent deliberately altered the dates on the client ledger cards to mislead the OAE that he had sufficient funds on hand to cover his fees and the disbursements to his clients.

Another charged impropriety was respondent's receipt of a contingent fee in excess of the amount allowed by the rule. For each of the three minors, respondent received a fee of $1,315 from a settlement of $3,500, or thirty-eight percent of the recovery. The maximum fee allowable for representing a minor is twenty-five percent or, in this case, $875. Respondent charged Arrington a fee of $550 from a settlement of $1,200, or forty-six percent of the amount recovered. The maximum fee allowable is thirty-three and one-third percent or, in Arrington's case, $400.

Respondent testified at the ethics hearing that these excessive fees represented or were an isolated incident that occurred inadvertently because, at the time the settlement checks were received, he was defending an individual in a serious criminal trial and was in the office

only sporadically. He further explained that he was the only person in his office authorized to write checks.

In addition to the four client ledger sheets in the Ore matter, the OAE introduced into evidence twenty-six client ledger sheets from respondent's 1988-1989 ledger book in which the fee exceeded thirty-five percent of the recovery. Exhibit P-C-8. Respondent attempted to justify the fees by saying that he often incurred out-of-pocket expenses for which he should be reimbursed; accordingly, he would write one check for both the expenses and his fee. However, the client ledger sheets do not reflect any out-of-pocket expenses.

With regard to the Arrington matter, in which respondent received a fee of $550 out of a $1,200 recovery, respondent stated that his fee was $400 for the personal injury case and that he was owed $150 from a prior landlord-tenant matter. The client ledger sheets, however, do not reflect any matter for Arrington, other than the personal injury case.

In defense of the charge of invasion of trust account funds, respondent claimed that he had a "cushion" of $450 in his trust account. Simple arithmetic, however, shows that a"cushion" of $1,775 would have been required to cover the attorney fee and client checks respondent wrote against the Prudential funds.

* * *

The special master found that respondent violated RPC 1.15(a) (safekeeping property). He discussed whether respondent acted knowingly or negligently:

> The real problem with this case is that at the time that you wrote these checks out to yourself and to your client. And at the time that the funds cleared the bank, April 28th. You didn't have the money. You had not even gotten all of the checks. The JUA checks were not even in your office. The JUA checks are dated May 2, 1989. So at the time that you wrote the checks to yourself and to your clients you didn't have the money to pay it. So you invaded your trust account. You draw [sic] on other client's funds to pay yourself....
>
> I asked you to explain to me the mechanics of it. And you attempted to do so. I don't understand your testimony. I don't understand your explanation. I don't understand how this could have happened. It escapes me. You said you handled the ledger card, the trust accounts, yourself...
>
> There is only, frankly, one way it could have happened. And that is that you just didn't care. That you were just so careless and so negligent about your bookkeeping that you wrote out the checks without referring to the ledger card.... I don't think at the time that you did it that you consciously sat there and said I'm going to draw against someone else's trust account balance because the checks to your clients, which are reflected in P-C-5, were also cashed prior to your deposit of the JUA funds....
>
> The fact is that you did it all in one transaction suggests to me that you did act in ignorance. It was a mistake. It is an amazing mistake to me. It is a mistake of well beyond a bookkeeping error. It means that you didn't check anything. You didn't look at the ledger book. You don't look at the bank book. You didn't look at the files. You just wrote the checks out for money you didn't have.
>
> [4T123-126]

The special master also found that respondent violated RPC 8.1(a) (making a false statement of material fact in connection with a disciplinary investigation). Although the special master did not elaborate on his findings for this violation, the complaint charged respondent with attempting to create a false timetable of the settlement receipts and disbursements on the client ledger sheets to conceal the fact that respondent had taken his fees before receiving the full settlement proceeds.

Because of respondent's testimony that he was entitled to reimbursement for out-of-pocket expenses, the special master found no violation of RPC 1.5(a) or R.1:21-7(c) (fee overreaching). Although the special master was not convinced that respondent had actually incurred such expenses, he ruled that the OAE had not established overreaching by clear and convincing evidence.

The special master recommended that respondent be suspended for three years, subject to a proctorship upon reinstatement, and that respondent not be permitted to work as a sole practitioner.

* * *

Following a de novo review of the record, the Board is satisfied that the special master's findings of unethical conduct are clearly and convincingly supported by the record. Also, for the reasons expressed in the special master's report, the Board agreed with the dismissal of the allegations of violations of RPC 1.2(d), RPC 3.4(a), RPC 1.15(a), RPC 1.5(c) and R.1:21-7(c). In addition, as discussed below, the Board found that respondent had violated RPC 8.1(a) with respect to the Gilmore matter.

In the Gaynor/Russell matter, the special master's finding that respondent violated RPC 1.7 was supported by clear and convincing evidence. In the settlement of the case, respondent represented both the record title-holder, Gaynor, and an individual claiming to have an equitable interest in the property, Russell. For obvious reasons, the interests of the

two clients conflicted with one another. Moreover, in preparing the deed conveying the property from Gaynor to the Russells, respondent represented both the buyer and the seller in the same transaction without observing the safeguards of RPC 1.7. Although respondent was not specifically charged with a violation of that rule, the record developed below contains clear and convincing evidence of such a violation. Respondent did not object to the admission of such evidence in the record. In light of the foregoing, the complaint is deemed amended to conform to the proofs. R. 4:9-2; In re Logan, 70 N.J. 222, 232 (1976).

The special master's finding that respondent violated RPC 3.1 was also appropriate. Respondent had no reasonable basis for claiming that Doppelt had interfered with the settlement agreement. Because the broker had absconded with the buyers' deposit, Doppelt was entitled to levy against the broker's share of the settlement proceeds to protect the buyers' interests. While not bound by Judge Cummis' finding, the Board took into consideration that Judge Cummis awarded sanctions against respondent in favor of both Skolnick and Doppelt, based on the frivolous pleadings respondent filed in response to the efforts of counsel to enforce the judgment.

Similarly, the findings of the special master that respondent violated RPCs 3.3(a), 8.4(a) and 8.4(d) are amply supported by the record. Not only was respondent's conduct unethical when he represented to Judge Margolis that he was authorized by Gaynor to settle the case although he had never met or spoken with her, but he also acted improperly later when he denied to Judge Cummis that he had ever represented Gaynor. Respondent lied to

one judge about being authorized to represent a client and then lied to another judge that he had not made such a representation. As stated by the special master,

> I am appalled at Mr. Agee's handling of the matter. He astounds me that an attorney would appear in court based upon a third party coming into his office and making representation [sic] about a defendant in a case, in which that party is not even mentioned. And then for the attorney to appear in court, place representations on behalf of a defendant with whom he has never communicated, is astonishing. Absolutely astonishing. It may well be ignorance but it is dangerous ignorance.
>
> It is more than negligence. It is more than carelessness. I don't find that it was venal in the sense that it was a deliberate attempt.
>
> [4T99]

The special master was correct to dismiss the charge of RPC 1.2(d). While at first blush one could get the impression that respondent had the intent to defraud the buyers and the broker, his testimony fully demonstrated that he was truly ignorant of the effect that the conveyance from Gaynor to the Russells had on the mortgage-holders. Even at the ethics proceeding, respondent appeared incapable of understanding the consequences of the transaction and how it impaired the ability of Doppelt's and Skolnick's clients to foreclose on the property. Furthermore, as noted by the special master, respondent did say on the record before Judge Margolis that the property would be conveyed from Gaynor to Russell. While respondent did not indicate that Mrs. Russell would also receive an interest in the property or that the conveyance would occur before the execution of the mortgages, there does not appear to be any fraudulent intent on respondent's part, just a complete lack of awareness of basic real property law.

The special master pointed out that the conveyance did not entirely defeat the ability of the judgment-creditors to enforce the judgment. However, their recourse of choice, foreclosure of the mortgage, was no longer available. Other remedies to collect their settlement would have been more time-consuming and expensive, as borne out by the record.

The charge of obstructing another party's access to evidence was properly dismissed. Because the special master found no fraud on respondent's part in connection with the deed signed by Gaynor, he concluded that respondent did not obstruct another party's access to evidence, in violation of RPC 3.4(a). As discussed above, the special master found that respondent was seemingly unaware of the legal effect of Gaynor's conveyance to the Russells and of the fact that, without Mrs. Russell's signature on the mortgage, it was not enforceable by foreclosure. Consequently, it was consistent for the special master to find that respondent's nondisclosure of these events was not intended to obstruct access to evidence. The special master accepted respondent's testimony that he interpreted Skolnick's request for back title information as a request for any title search information respondent might have had, instead of an inquiry about the current titleholder.

Similarly, the Board agreed with the special master's dismissal of RPC 1.15(a). Respondent was no longer the attorney of record pursuant to R.1:11-3, and therefore, he was not obligated to perform additional services for Russell, such as distributing settlement checks.

As discussed above, the special master found that respondent had violated all the RPCs with which he was charged in the Gilmore matter. The record provides ample support

for this finding. Indeed, respondent's misconduct in Gilmore was egregious. He displayed a continuing pattern of deceitful conduct, which extended to his testimony at the ethics hearing, particularly with regard to the "reconstructed" or manufactured client ledger sheet. Moreover, it is undeniable that respondent still has no appreciation for the seriousness of his misconduct. He demonstrated consistently that he lacks a grasp of even rudimentary principles of an attorney's ethics responsibilities.

Respondent committed what the special master appropriately characterized as a "law school example of a conflict of interest." He impermissibly represented the buyer and seller in the negotiation of the transaction, see Advisory Committee on Professional Ethics Opinion 243, 95 N.J.L.J. 1150 (November 9, 1972), and continued to represent them after the execution of the contract, a representation permissible only with the safeguards of RPC 1.7. Respondent's testimony that he did not represent Jennings and that he fully expected Mills to appear at the closing was not worthy of belief. Furthermore, the record supports the conclusion that respondent represented Jennings from the beginning. The title binder, which was prepared almost two months before the real estate contract was executed, indicated that it was prepared for respondent and listed Citicorp as the lender, contradicting respondent's testimony that he had no idea to which lender Jennings had applied for a mortgage. The "waiver" prepared by respondent and signed by Jennings and the Gilmores was a sham. Its sole purpose was to protect respondent. It failed at even this meager endeavor..

Respondent's behavior in this matter was more than negligent, it was reckless. The danger of proceeding with the real estate closing was obvious. Respondent must have known

of this danger because he prepared a waiver for his clients to sign. Therefore, respondent recognized the existence of the conflict, but chose to continue with the transaction, risking grave peril to the Gilmores. Unfortunately for the Gilmores, that risk became a sad reality when Jennings borrowed money against the property, defaulted on the mortgage loan and caused the Gilmores to lose their house.

The danger inherent in the transaction as structured by respondent is perhaps best illustrated by the deed that respondent arranged for Jennings to execute. The deed was prematurely dated January 22, 1991, three years after its actual execution. Respondent acknowledged Jennings' signature. As noted by the special master,

> [a] legal fiction was used, P-B-5 was created, a deed dated January 22, 1991 which appears to all of the world as if it was prepared, signed, and certified to by Mr. Agee three years later from the date that he actually did it....
>
> A deed prepared that appears to be valid only in three years, as any attorney should know, is a worthless piece of paper. A promise that you have a deed and hold it in escrow is meaningless because there was absolutely nothing to prevent Mr. Jennings from walking out of that closing, going down the street to another lawyer, and another person, and selling the property out from under the Gilmores once he had title....
>
> It doesn't interfere with title. It is nothing. It may give rise to some kind of claim of fraud against both you and Mr. Jennings by the Gilmores....
>
> So it was a legal fiction. It was done by Mr. Agee in an attempt to reconcile two irreconcilable interests to help out the Gilmores solve their financial problems. It was totally unacceptable. Totally improper. And Mr. Agee should have known that.

[4T113-115]

The proper action to protect the Gilmores would have been to prepare a document granting them an option to re-purchase the property and to record that document to give

notice to the world of the Gilmores' interest in that property. With this protection, Jennings would have been unable to obtain the mortgage that ultimately caused the Gilmores to lose their residence.

There is sufficient evidence that respondent committed a fraud on the lender, Citicorp. He intentionally withheld from Citicorp those documents that would have disclosed the true nature of the transaction: a lease/option agreement instead of a straight sale. Respondent gave various accounts of Citicorp's knowledge of the transaction. He even went so far as to suggest that a Citicorp loan officer structured the deal. On the one hand, he testified that he had contacted Citicorp and had received its approval to proceed as he did. On the other hand, he admitted that he had not disclosed the tenancy to Citicorp because Citicorp had not asked. One added impropriety on respondent's part was his certification of the accuracy of documents that, he knew, contained false statements.

Ultimately, the Gilmores lost their home. As aptly stated by the special master, respondent attempted to serve parties with irreconcilable interests and performed a disservice to them all. The special master expressed astonishment at respondent's actions:

> As with the previous count I am appalled and astounded that an attorney would engage in this kind of conduct and not realize what he was doing. I accept Mr. Agee that you were trying to help the Gilmores but you had obligations as an attorney that you were not free to overlook and that you did overlook.
> [4T120]

The special master did not find that respondent violated RPC 8.1(a) (knowingly making a false statement of material fact to the disciplinary authorities), even though respondent admitted that he had manufactured the Gilmore/Jennings client ledger sheet.

Apparently, the OAE was not aware, prior to the filing of the complaint, that the client ledger sheet had been reconstructed. Therefore, Count II of the complaint did not include this charge. At an interview of respondent during the investigation of these grievances, the OAE specifically asked respondent if the Gilmore/Jennings client ledger sheet had been contemporaneously made. Respondent misrepresented that it had. In light of sufficient proofs of this violation in the record, the Board found that respondent also violated RPC 8.1(a). The complaint is deemed amended to conform to the proofs. R. 4:9-2, In re Logan, supra, 70 N.J. 222, 232 (1976).

With respect to the Ore matter, the finding of the special master that respondent violated RPCs 1.15(b) and 8.1(a) is supported by clear and convincing evidence. Respondent admitted that he wrote checks to himself and his client, even though he had not received all of the settlement monies. His testimony that he kept a "cushion" of approximately $450 in his trust account only confirmed the fact that he invaded trust account funds. An additional $1,775 would have been required to cover the checks that respondent issued. The fact that the trust account had a positive balance and that there were sufficient funds for the bank to honor the checks does not mean that funds belonging to other clients were not invaded. The crucial question is whether the invasion was knowing or negligent.

The special master found that respondent did not knowingly misappropriate client funds. Rather, he found that respondent had been careless by not looking at his trust account records, the client ledger sheets, or the files to determine if he had equivalent funds on

deposit. According to the special master, respondent simply wrote checks with complete disregard of whether the funds to be paid by the insurance companies were already on hand.

The special master's finding in this regard was proper. Although there is a strong suspicion that respondent knew that he did not have sufficient funds on deposit to cover his fees and the disbursements to his clients, the OAE did not demonstrate by clear and convincing evidence that respondent knowingly misappropriated client funds. The special master found, however, that respondent's conduct was more than negligent or careless. The special master labeled it reckless. Indeed, respondent did not even consider whether he had received all of the settlement funds before he paid himself and issued checks to his clients.

The violation of RPC 8.1(a) was well supported by the record. Respondent's client ledger sheets recorded the insurance checks as deposited before they were actually received by respondent and, further, recorded the checks to himself and his clients as issued after their actual date of issuance, all in an effort to convince the OAE that respondent had not invaded trust account funds.

The special master's dismissal of RPC 1.5(a) and R.1:21-7(c)(5) was appropriate. The evidence did not clearly and convincingly demonstrate that respondent overcharged his clients. His testimony that he had incurred expenses for which he was reimbursed was not rebutted. The proofs were simply insufficient to find a violation of the above rules.

In short, respondent's conduct in these three matters was abominable. He committed serious infractions. He displayed a pattern of deceit; he lied to judges; he lied to the OAE; he lied to the special master and he lied to other attorneys. No doubt, he lied to his clients

as well. Respondent manufactured a client ledger card in the Gilmore matter and misrepresented to the OAE that it was prepared at the time of the settlement. Then he lied about that statement, denying he had ever made it. As stated by the special master, respondent gave three or four versions of the same event, and then proclaimed that he did not remember what had actually occurred.

Respondent perpetrated a fraud on Citicorp. A finding could have been made that he and Jennings also perpetrated a fraud on the Gilmores. He permitted a serious conflict of interest to develop, having introduced Jennings to the Gilmores, and then claimed that the real estate deal "fell into his lap" and that he was misled by his clients. He accepted little or no responsibility for his actions, blaming his clients, other attorneys and even judges for his troubling ethics offenses.

Respondent also negligently – indeed, recklessly – misappropriated trust funds in the Ore matter.

Furthermore, throughout the four days of ethics hearings, respondent showed no remorse, contrition or acknowledgment of wrongdoing. He showed a total lack of appreciation for his actions, his ethics responsibilities and the serious detrimental effect his misconduct had on his clients, particularly the Gilmores, who lost their home. On numerous occasions in the ethics proceedings, respondent stated that the misconduct, or as he termed it, "errors in judgment," had occurred nine years earlier and that today, he is a wiser, more experienced attorney. The Board disagrees. To this day, respondent does not understand what he did wrong and why.

Respondent did have the disadvantage of the passage of a significant amount of time since the violations occurred. As a consequence, respondent appeared to have difficulty remembering some of the facts and circumstances surrounding the misconduct. Further, his misconduct appeared to stem from ignorance, not venality. At the ethics hearing, respondent was the recipient of favorable treatment by the special master. Respondent received the benefit of every doubt. The special master was patient with and fair to respondent during four difficult days of hearings, at which respondent showed a lack of candor, remorse, and awareness of basic ethics principles.

There remains then the issue of appropriate discipline for this respondent. While respondent's violation of the conflict of interest rule centered on his representation of clients with competing interests, his conduct was just as serious as that of attorneys who enter into business transactions with their clients. Although the nature of the conduct is not the same, the gravity of the misconduct is similar. In In re Harris, 115 N.J. 181 (1989), an attorney was given reciprocal discipline of a two-year suspension for, among other things, inducing a client to loan money to another client without disclosing that the borrowing client was undergoing financial difficulties and that part of the loan proceeds was to be paid to the attorney under a prior obligation due from the borrower. Similarly, in In re Humen, 123 N.J. 289 (1991), an attorney was suspended for two years for engaging in numerous sensitive business transactions with a client when the attorney's and the client's interests were directly in conflict.

Respondent's most egregious conduct constituted the deception that he habitually practiced. Such deception manifested itself in misrepresentations to the court and other tribunals, as well as the fraud that he perpetrated on the lender in the Gilmore matter. In In re Reiss, 101 N.J. 475 (1986), the attorney, while exhibiting gross disregard of conflicts of interest with his clients, who were also partners, filed a false certification with the court, denying that he represented one of the parties. He received a one-year suspension.

In light of the foregoing, the recommendation of the special master that respondent be suspended for three years and that he be subject to a proctorship on reinstatement is appropriate. In addition, given respondent's lack of understanding of the professional responsibilities imposed on attorneys, the Board directed that, prior to reinstatement, respondent complete the Institute for Continuing Legal Education core courses and twelve additional hours of professional responsibility courses.

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

Dated: 1/27/97

LEE M. HYMERLING
Chair
Disciplinary Review Board