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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 99-244

IN THE MATTER OF

GREGORY V. SHARKEY

AN ATTORNEY AT LAW

Decision

Argued: October 14, 1999

Decided: December 16, 1999

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.

Robert F. Novins appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us based on the Office of Attorney Ethics' ("OAE") appeal of the District I Ethics Committee's post-hearing dismissal of the complaint.

The complaint charged violations of RPC 4.1(a)(1) (false statement of material fact

or law to a third person), RPC 4.1(a)(2) (failure to disclose a material fact to a third person) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1969. During the relevant times, he was a partner in a law firm in Lakewood, New Jersey. He has no prior disciplinary history.

* * *

Most of the material facts are not in dispute. In or about1989, Jeff Halpern, a former client, told respondent that he was a mortgage company representative and occasionally had clients who needed legal representation. Halpern asked if respondent were interested in referrals of such clients.[1] Respondent had previously represented Halpern in a criminal matter. Halpern, while a real estate agent, had converted real estate deposits to his own use. Because Halpern had a prior conviction on a bad check charge, he received a five-year prison sentence with a period of parole ineligibility. After Halpern was released from prison, he became a mortgage company representative.

Halpern introduced Gail Froomess and her mother, Eveline Froomess, to respondent as clients who were partners in Eveline Associates and were interested in investment properties. Gail Froomess was also the manager of a real estate agency.

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[1] The OAE initially received notice of this matter in 1991. However, it was placed on inactive status because of a pending investigation by the United States Attorney's Office. The matter was reactivated in February 1997 after that office declined to file charges against respondent.

This matter concerns respondent's representation of Eveline Associates and Gail Froomess in three real estate transactions involving single-family houses in Brick Township: 1 Toledo Drive, 81 Tall Timber Drive and 16 Toledo Drive. Respondent was the closing agent in each of the real estate transactions, which were structured identically. As detailed below, as soon as Eveline Associates purchased the property from an unaffiliated third party, it sold the property to Gail Froomess for a higher price. Respondent described the first and second transactions for each of the three properties as "simultaneous." In order to purchase the properties from Eveline Associates, Gail Froomess obtained mortgage loans for seventy five percent of the resale price. The mortgage funds were used to finance the entire initial purchase price. Eveline Associates did not bring any funds to the settlements. The OAE characterized the transactions as "flipping."

Respondent testified that he was not involved in the structuring of the deals and that, before he was retained, the contracts had already been signed and the deals structured as two separate closings. Respondent was unable to explain why Froomess had not purchased the properties directly from their original owners.

According to respondent, after speaking with employees of First Preferred Mortgage Corp. ("First Preferred") and First Northern Mortgagee Corp. ("First Northern"), the mortgage companies involved in the transactions, he was satisfied that the mortgage companies were aware of the two simultaneous closings, the terms of the contracts, the sales prices and the fact that the mortgage proceeds from the second transaction would be used to

fund the first transaction. Also, according to respondent, the two Real Estate Settlement Procedures Act ("RESPA") statements for each of the closings were "faxed" to the lenders and/or the lenders' attorney in advance of the closings. Respondent testified that he also contacted the title company and was satisfied that the title company understood the structure of the transactions.

For each deal, respondent prepared both RESPA statements for the purchase by Eveline Associates and the sale by Eveline to Froomess. In each of the RESPA statements for the sale by Eveline Associates to Froomess, respondent certified that "[t]he settlement statement which I have prepared is a true and accurate account of this transaction. I have caused the funds to be disbursed in accordance with this statement." That was untrue. All three Eveline to Froomess RESPA statements reflected cash due from Gail Froomess, but the cash funds were never tendered to respondent or disbursed by him at the closing. Respondent testified that, in each of the deals, he was told that Froomess had paid the cash funds directly to Eveline. According to respondent, he did not write "POC" (paid outside of closing) on the line showing the cash due from the borrower because it was his understanding that the POC designation related to charges by the lender shown on the second page of the RESPA statement and that it would not pertain to any of the items on the first page.

Sometime after the closings, Froomess ceased paying the mortgages and all three properties went into foreclosure within eighteen months of purchase.

1 Toledo Drive

On February 21, 1989, Eveline Associates purchased 1 Toledo Drive from Cameron Developers, Inc. for $410,000 and simultaneously sold it to Froomess for $699,000. Froomess obtained a $524,000 mortgage loan from First Northern. The funds from the First Northern mortgage were used for the initial purchase by Eveline Associates.

The RESPA statement showed that $143, 475.55 was due in cash from Froomess at the closing. However, as explained above, respondent did not receive those funds from Froomess and did not disburse them at the closing.[2]

The mortgage commitment for the transaction specified that Froomess was to occupy the property as her principal residence. Respondent was sent the commitment prior to closing and had to have Froomess sign it again at the closing. He was, thus, aware of the condition. Moreover, respondent was aware that Froomess was purchasing the property for investment, not as her residence. Therefore, he witnessed his client's signature on a document that contained a misrepresentation.

From the closing proceeds Halpern received three checks, totaling $23,164.45. According to respondent, Froomess had given him a list of disbursements to be made from the closing proceeds and he did not question the payments. Halpern had not been involved in the closing and respondent did not know why he had received any of the proceeds.

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[2] The RESPA also showed a $50,000 deposit, which was not disbursed by respondent. However, the complaint did not contain any charges relating to the deposit.

According to the RESPA statement, respondent received a $750 fee for the second closing only.[3]

In support of his position that First Northern and American Title Insurance Company were aware of the structure of the transactions, respondent relied on the following undisputed facts and documents:

1. the title binder was sent to First Northern's attorney prior to the closing;

2. the title binder required a deed from Cameron Developers to Eveline Associates and a deed from Eveline Associates to Froomess;

3. the closing instructions from First Northern's attorney required that the deed from Cameron to Eveline be recorded;

4. the closing instructions from First Northern's attorney required that, on the RESPA, the sales price be shown as $699,000 and the deposit monies as $50,000;

5. First Northern's attorney prepared the mortgage.

As noted earlier, Froomess defaulted on the mortgage. In August 1990, Travelers Mortgage Services Inc. filed a foreclosure action. Travelers Mortgage Services had apparently purchased the mortgage from First Northern although that issue was not clarified at the hearing.

81 Tall Timber Drive

On May 2, 1989, Eveline Associates purchased 81 Tall Timber Drive from George

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[3] Respondent's client ledger card for the closing shows an additional $250 paid to respondent, but that issue was not explored at the hearing.

and Charles Cuyulis and Eugenia Giannakas for $300,000 then sold it to Froomess for $600,000. Froomess obtained a $450,000 mortgage loan from First Preferred, which financed the entire purchase by Eveline Associates.

The RESPA statement for this transaction showed that $142, 312.04 was due in cash from Gail Froomess at the closing. However, Froomess did not give those funds to respondent and they were not disbursed at the closing. According to respondent, Froomess had told his secretary that the funds had been paid directly to Eveline and he later confirmed that fact with Gail and Eveline Froomess. Respondent did not see a check or other evidence that the funds had been paid.[4]

Respondent also witnessed Gail and Eveline Froomess' signatures on a Federal National Mortgage Association ("Fannie Mae") affidavit and agreement that stated that Froomess had $150,000 cash equity in the property.[5] According to respondent, he believed she had such equity, even though she did not bring any money to the closing. Respondent testified as follows:

> This Fannie Mae affidavit had been prepared by the lender then supplied to my office. So, I believe that the mortgage lender who had, you know, taken her application, and done a credit history, and determined her financial status determined, you know, the money to invest in the closing, and again, there was the indication on the RESPA form in other words, where we had been advised by Gail Froomess that the cash due was being paid to Eveline Associates.

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[4] The RESPA statement also showed a $25,000 deposit, which was not disbursed by respondent. The complaint did not charge any misconduct with respect to the deposit.

[5] The complaint alleged that respondent had prepared the Fannie Mae affidavits but the evidence indicates that they were prepared by the lender's attorney.

In the affidavit, Froomess also represented that she was occupying or would, within thirty days of the closing date, occupy the property as her principal residence. However, respondent was aware that Froomess was purchasing the property for investment, not as her residence. Therefore, he witnessed his clients' signatures on a document that contained misrepresentations.

Respondent disbursed $5,000 to Halpern and $14,918.36 to Halpern's wife from the mortgage proceeds. Neither had been involved in the closing and respondent did not know why they received any of the proceeds. Again, according to respondent, the disbursements were made based on a list given to him by Gail Froomess; he did not question the payments.

Respondent received a $1,500 fee for both closings.

In support of his position that First Preferred and Continental Title Insurance Company were aware of the structure of the transactions, respondent relied on the following:

1. the title binder showed George and Charles Cuyulis and Eugenia Giannakas as the owners of the property;

2. the title binder required proof that there had been no change in the Eveline Associates partnership and stated that, upon receipt of a deed from Cuyulis to Eveline Associates, "title will be recertified;"

3. an April 13, 1989 letter from respondent to First American Home Mortgage Corporation,[6] forwarding the title binder;

4. a May 1, 1989 "fax" cover sheet from respondent's office to First Northern, transmitting the deed from Cuyulis to Eveline;

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[6] Although it is not clear from the record, First American was apparently an agent of First Northern.

5. the fact that First Preferred prepared the mortgage, affidavit and agreement;

6. two appraisals: a March 24, 1989 appraisal that showed a market value of $600,000 and an April 6, 1989 appraisal that showed a value of $625,000, both of which had been done for First American.

Ultimately, Froomess defaulted on the mortgage. In August 1990, Morgan Guaranty Trust Company filed a foreclosure action. Apparently, Morgan Guaranty had purchased the mortgage from First Preferred, although that issue was not clarified at the hearing.

16 Toledo Drive

On September 29, 1989, Eveline Associates purchased 16 Toledo Drive from Mildred Januska for $375,000 and sold it to Froomess for $700,000.

Froomess obtained a $490,000 mortgage loan from First Northern, which was used for the initial purchase by Eveline Associates.

The RESPA statement showed that $220,000 was due in cash from Froomess at the closing.[7] However, respondent did not receive any funds from Froomess and did not disburse that amount at the closing. Again, according to respondent, he had been told that those funds had been paid directly to Eveline by Froomess.

Respondent witnessed Gail and Eveline Froomess' signatures on a Fannie Mae affidavit and agreement that stated that Gail Froomess had $210,000 in cash equity in the property. In the affidavit, Froomess also represented that she was occupying or would,

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[7] The RESPA statement did not show any deposit.

within thirty days of the closing date, occupy the property as her principal residence. However, respondent was aware that Froomess was purchasing the property for investment, not as her residence. Therefore, he witnessed his clients' signatures on a document that contained misrepresentations.

Respondent received a $1,500 legal fee for both transactions.

In support of his position that First Northern and Lawyers Title Insurance Corporation were aware of the structure of the transactions, respondent relied on the following:

1. the title binder was sent to First Northern's attorney prior to closing;

2. the title binder showed Januska as the owner of the property;

3. the closing instructions from First Northern's attorney required that the sales price be shown on the RESPA statement as $700,000 and the deposit monies as $10,000.

4. an employee of First Northern prepared the Fannie Mae affidavit and agreement.

In addition, respondent stated that the back title information for the property indicated that the original owner, Januska, had obtained a $550,000 mortgage on the property in 1986; therefore, respondent added, the property was worth more than the $490,000 mortgage obtained by Froomess.

On November 28, 1989, Gail Froomess gave a $70,000 second mortgage to Troika Affiliates. In May 1990, there was a refinancing of the First Northern mortgage because

First Northern had been unable to sell its original mortgage.[8] Ultimately, Froomess defaulted on the mortgage. In December 1990, Countrywide Funding filed a foreclosure action. Countrywide Funding had apparently purchased the mortgage from First Northern although that issue was not clarified at the hearing.

Kelli Whitmore, respondent's former real estate secretary, testified that she performed all of the pre-closing work for the law firm's real estate transactions.[9] According to Whitmore, respondent's two partners did the majority of the real estate work, while respondent was primarily a trial attorney. Whitmore testified that she was responsible for communicating with the clients, lenders and title companies prior to the closing to make sure that all of the title company's and lender's requirements had been met. She also prepared all of the closing documents not prepared by the lenders, including the RESPA. It was her practice to send the RESPA to the client prior to the closing and then speak with the client via telephone to make sure that the figures were correct.

It was also her practice, Whitmore testified, to send the title binders to the lenders. According to Whitmore, although she would routinely forward the deeds to the mortgage

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[8] The complaint alleged that Froomess had obtained a $490,000 third mortgage from First Northern. However, that was actually the refinancing of the original loan and the OAE abandoned that charge against respondent.

[9] Whitmore testified that she was employed by respondent's firm for three years, beginning in 1989. She could not remember when in 1989 she began her employment. When testifying about the 81 Tall Timber Drive transaction, she stated that "I came right in the middle of this file." However, the 1 Toledo Drive transaction predated the 81 Tall Timber Drive deal. Therefore, Whitmore may not have been respondent's secretary for the first transaction. That issue was not explored at the hearing.

companies, she did not specifically recall whether she had done so in these transactions. She did not remember the specific details of each of the Eveline Associates transactions, but she remembered the transactions because she had to give a statement about them to the Federal Bureau of Investigation sometime after the closings.

Whitmore testified that she spoke with Froomess prior to each of the closings, went over the RESPA statements with her and asked about the closing funds due from Froomess. According to Whitmore, Froomess told her that the funds were going to be paid to Eveline Associates outside the closing and Whitmore relayed this information to respondent. She testified that it never occurred to her to put "POC" on the line showing the cash due from borrower because she had never seen it done in that way.

Respondent's law partner, Eugene Hendrickson, testified that on the closing day, because respondent was delayed by a court appearance, Whitmore had gone over the 16 Toledo Drive closing documents with Hendrickson. Because he had questions about the transaction, he spoke with someone from the mortgage company, who told him that there was no problem with the structure of the transaction, it was a "Gail Froomess deal" and that the mortgage company did "these deals all the time."

Stephen J. Szabatin, a banking consultant, testified as an expert witness for the OAE. Szabatin was employed for twenty-eight years by the New Jersey Department of Banking, retiring as a deputy commissioner. According to Szabatin, the three real estate transactions were part of a "land flip" scheme with no other purpose than to defraud the mortgage

companies into lending more money than the properties were worth. He testified that there could not have been any legitimate reason for the manner in which the deals were structured. In Szabatin's opinion, the principals of the mortgage companies could not have known of the true nature of the transactions because, if they had, they would never have made the loans. According to Szabatin, a mortgage representative who was part of the scheme would be in a position to prevent the principals of the company from ascertaining the true details of the transactions even if the loan processors were not part of the scheme because loan processors are typically clerical persons without the experience to recognize a "land flip" scheme.

Although they had been available for review, Szabatin did not inspect some of the documents relied upon by respondent as evidence that the mortgage companies knew about the "flipping." Szabatin admitted that, if the lender had reviewed the title binders in two of the transactions, it would have been on notice of the "flipping" of the property.

Wendell A. Smith testified as an expert witness for respondent. Smith has practiced real estate law since 1961 and was a member of the Institute for Continuing Legal Education panel that held programs on the Real Estate Settlement Procedures Act when that law was initially enacted. According to Smith, "you can't assume because there is a gross discrepancy in the purchase price that it's something illegal." He gave examples of instances in which property was legitimately "flipped" and where there had been "quick profits" and "simultaneous closings." He opined that there was nothing unethical about such deals, provided the parties and the lenders were aware of all of the circumstances. However, he

conceded that, if he had been retained by Eveline Associates and had found out that Froomess was a partner in Eveline Associates, his "antenna would [have gone] up" and that he had "thrown people out of [his] office for less than that." Smith stated that it would have depended on the facts. According to Smith, the documents supported respondent's position that the lenders were aware of the nature of the transactions.

With respect to respondent's failure to write "POC" on the RESPA statement to show that the funds due from Froomess to Eveline Associates had been paid outside the closings, Smith testified that he would have used the notation, but that it was not required by the RESPA regulations.

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The DEC dismissed the complaint because it found that, in each of the three transactions, respondent or someone in his office had made full disclosure to the mortgage companies of the circumstances surrounding the transactions. The DEC found that, in the case of 1 Toledo Drive and 81 Tall Timber Drive, the title binders reflected the need for a second deed, which put the lender on notice of the structure of the transactions. The DEC further found that, in each transaction, respondent's office forwarded to the lender, prior to closing, copies of both RESPA statements, namely, the RESPA for the sale from the unrelated third party to Eveline Associates and the RESPA for the sale from Eveline Associates to Gail Froomess, which also would have put the lenders on notice of the true

nature of the transactions.

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Upon a de novo review of the record, we are satisfied that there is clear and convincing evidence that respondent was guilty of unethical conduct. Although we do not find that there is sufficient evidence that respondent was knowingly involved in a scheme to defraud the mortgage lenders, as alleged in the complaint, the evidence does show that respondent was guilty of violating RPC 8.4(c) (misrepresentation).

According to respondent's unrebutted testimony, the lenders and the title companies were aware of the structure of the deals, including the differences in the purchase prices between the first and second transactions.[10] Respondent's testimony was supported by the testimony of his former secretary and his law partner and by some of the closing documents. Also, according to respondent, he had no involvement in the negotiations of the real estate contracts or the structuring of the transactions. He testified that Eveline and Gail Froomess had already negotiated the terms of the deals and obtained mortgage commitments before

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[10] Respondent also indicated that the "parties" were aware of the details of the transactions, but it is not clear from the record whether "parties" included the original owners of the properties. However, the original owners, one of which was a developer, were represented by independent counsel and there was no fiduciary relationship between respondent and the original owners that would have required respondent to reveal the second transaction to the original owners. Also, the focus of the OAE's case was that the lenders were defrauded because the transactions were used to inflate the actual value of the property in order to obtain a mortgage in excess of the property's value. The complaint does not allege and there is no evidence that the original owners were defrauded.

retaining him to close the transactions. With respect to the fact that Froomess did not bring any funds to the second closings, respondent and his secretary testified that they had been told that the funds had been paid outside the closings. The OAE did not present any evidence that the funds had not been paid by Froomess.

The OAE's expert opined that there could not have been any legitimate reason for the manner in which the deals were structured and that the principals of the lenders could not have known of the true nature of the transactions or they would never have made the loans. However, there was no evidence to support this opinion. In fact, the expert admitted that he had not reviewed, although they were available for his review, some of the documents indicating that the mortgage companies were aware of the fact that the properties were being "flipped."

There is a question as to whether respondent should have written "POC" on the line on the RESPA that shows the cash due from borrower. Respondent's secretary, who prepared the RESPA, testified that she never considered adding "POC" because she had never seen it done on that RESPA line. Respondent testified that he did not believe that "POC" was required for items on the first page of the RESPA. The RESPA regulations do not specifically require the use of "POC" for that line. See 24 CFR Pt. 3500, App. A. Therefore, it cannot be found that respondent's failure to indicate "POC" on the line showing the cash due from borrower was part of a scheme to defraud the lenders.

The clear and convincing standard requires evidence that produces "in the mind of the

trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." In re Purrazella, 134 N.J. 228, 240 (1993) (Citation omitted). In light of respondent's and his witnesses' unrebutted testimony, we cannot find, by clear and convincing evidence, that respondent assisted his clients in defrauding the lenders.[11]

However, an attorney's duty of inquiry does not end with obtaining some indication that the original lender knew of the "flip." It is – and was in 1989 -- common knowledge that mortgages are frequently sold on the secondary mortgage market.[12] The original mortgagee may be aware of irregularities in the transactions but not reveal such irregularities to the secondary mortgagee or may actually be a participant in a scheme to defraud the secondary mortgagee. The secondary mortgage purchaser relies on the accuracy of the mortgage and related real estate documents, including the RESPA. An attorney has an ethical obligation to assure the accuracy of those documents.

Respondent's certification on the RESPA that it was "a true and accurate account of this transaction" and that he had "caused the funds to be disbursed in accordance with this

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[11] Although respondent represented both Eveline Associates, the seller, and Gail Froomess, the purchaser, in the transactions, there is no evidence of a conflict of interest and the complaint did not allege such misconduct. Respondent testified that he was not involved in the negotiations of the deals and that they had already been structured when he was retained to close the transactions. It is not unethical for an attorney to represent the seller and purchaser after the execution of the real estate contract, although such dual representation during the negotiation of the contract would be a conflict of interest. See Opinion No. 243 of the Advisory Committee on Professional Ethics, 95 N.J.L.J. 1145 (1972).

[12] Although the issue was not explored at the hearing, it appears that all three mortgages had been sold. In fact, the First Northern mortgage on 16 Toledo Drive was refinanced because First Northern had been unable to sell its original mortgage

statement" in conjunction with his failure to indicate that he had not disbursed the funds due the seller from the borrower was a violation of RPC 8.4(c) (misrepresentation). Respondent also violated RPC 8.4(c) when he witnessed Gail and Eveline Froomess' signatures on the Fannie Mae affidavits in the 81 Tall Timber Drive and 16 Toledo Drive transactions. In each of the affidavits, Froomess represented that she was occupying or would, within thirty days of the closing date, occupy the property as her principal residence. Furthermore, the mortgage commitment for the 1 Toledo Drive transaction stated that the commitment was conditioned on Froomess' occupation of the property as her principal residence. Respondent was sent the commitment prior to closing and had to have Froomess sign it again at the closing. He was, thus, aware of the condition. Moreover, respondent was aware that Froomess was purchasing all three properties for investment, not as her residence. Therefore, he witnessed his clients' signatures on documents that contained misrepresentations. As settlement agent and the agent for the lenders, he had a responsibility to make sure that the documents were correct. Although the complaint did not specifically allege misrepresentations in connection with Froomess' occupancy of the properties, respondent was on notice that he was being charged with misrepresentations in the closing documents. Furthermore, respondent did not object to the admission of the documents. Therefore, we deem the complaint to be amended to conform to the proofs. In re Logan, 70 N.J. 222, 232 (1976).

In a case recently decided by the Court, In re Spector, 157 N.J. 530 (1999), a

reprimand was imposed where the attorney executed documents in three real estate transactions that contained false information. The documents included two different RESPA statements for each of three transactions and two Fannie Mae affidavits. The documents, which the attorney certified as being accurate, failed to include crucial information about repair credits and secondary financing. The attorney had argued that the false documents had been prepared in accordance with the lenders' instructions and that it was common practice, at that time, for lenders to discourage the disclosure of secondary financing or credits. In imposing only a reprimand, we took into consideration the fact that the misconduct occurred in 1988 and that the ethics complaint was not filed until 1996. However, we warned that knowingly submitting false information in connection with a real estate transaction constitutes serious unethical conduct and that attorneys who engaged in such conduct would face more serious discipline. In the Matter of Stephen R. Spector, DRB Decision at 11-12 (September 28,1998).

Respondent's misconduct occurred in 1989 and the complaint was not filed until 1998 – nine years later. Obviously, his misconduct predated the Board's warning that the submission of false information in connection with real estate transactions would result in discipline more serious than a reprimand. Furthermore, respondent was admitted to the bar in 1969 and has previously enjoyed a thirty-year unblemished legal career.

Based on the foregoing, a four-member majority of the Board determined that a reprimand was sufficient discipline for respondent's misconduct. One member voted for a

three-month suspension. Two members agreed with the DEC and voted to dismiss the complaint for lack of clear and convincing evidence that respondent had engaged in unethical conduct. Two members did not participate.

We further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 12/16/99

By: Michael R. Cole
MICHAEL R. COLE
Vice-Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Gregory V. Sharkey
Docket No. DRB 99-244

Argued: October 14, 1999

Decided: December 16, 1999

Disposition: Reprimand

Members	Disbar	Three-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling					x		
Cole			x				
Boylan							x
Brody		x					
Lolla			x				
Maudsley							x
Peterson					x		
Schwartz			x				
Wissinger			x				
Total:		1	4		2		2

* Member Thompson is on a temporary leave of absence

By Robyn M. Hill 12/22/99
Robyn M. Hill
Chief Counsel