SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-212
District Docket No. XIV-2013-0511E

IN THE MATTER OF	
FRANCIS B. BATCHA	
AN ATTORNEY AT LAW	

Decision

Argued: November 19, 2015

Decided: March 30, 2016

Maureen Bauman appeared on behalf of the Office of Attorney Ethics.

Matthew Marrone appeared on behalf of respondent.

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

This matter originally was before us on appeal from a post-hearing dismissal by the District IIIA Ethics Committee (DEC). We determined to treat the matter as a presentment and bring it on for oral argument.

For the reasons set forth below, we determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1994. At the relevant times, he maintained an office for the practice of law in Freehold. He has no prior discipline.

This matter stems from a real estate transaction in which the HUD-1 form did not accurately reflect the terms of the closing. In January 2004, Joan Bush, grievant, and her husband, Louis R. Bush, Jr.,[1] purchased a home in Egg Harbor Township. Shortly after their purchase, they began to face financial difficulties. Although they were not aware of it, foreclosure proceedings had been initiated against them. According to respondent, New Century Mortgage filed a complaint, in Superior Court, on December 10, 2004, and a lis pendens was filed on April 18, 2005. Unaware of the pending foreclosure, they began to pursue options, such as refinancing or obtaining a home equity loan, to retain their property.

Louis contacted two mortgage companies, including Mortgage Loan Specialists, Inc. (MLS). Mark Zamkoff was a mortgage broker and part owner of MLS. Zamkoff told the Bushes that, based on their financial circumstances, they were unable to obtain financing. Zamkoff convinced Louis that he would benefit from an alternative to refinancing, suggesting that he "would buy the

[1] Because Mr. Bush passed away on November 17, 2007, he was not a grievant in this matter.

house and then [they] would pay rent, and then [they] would be able to rebuild the credit and [they] both would be in the jobs long enough where [they] would be making more money." Louis decided that the Bushes would sell their house to Zamkoff for $275,000.

Although Joan was not happy with Zamkoff's proposal, she understood that she and Louis would give Zamkoff a $55,000 down payment that would be applied to the repurchase and an additional $20,000 for closing the sale. She explained at the ethics hearing that a lease, effective post-closing, obligated the Bushes to pay Zamkoff a monthly rental of $1,750 for the first year and that the rent would increase to $2,100 during the second year. They paid approximately $30,000 in rental payments over the two-year period, funds they believed were being applied towards Zamkoff's mortgage payments.

Respondent represented Zamkoff, as purchaser, at the July 29, 2005 closing. According to Joan, the sales contract and lease were not presented to the Bushes until the closing, where they were executed. Respondent contended that he had provided all the closing documents to the Bushes prior to the closing. In support of his argument, respondent referred to a fax cover page, dated July 20, 2005, that included several executed signature pages. Respondent explained that the complete documents had been sent to the Bushes, but they returned only

the signature pages. Joan, however, reiterated that the Bushes received only the signature pages and did not see the underlying documents until the date of closing. The only exception was a promissory note, which the Bushes executed before the closing.

The documents were executed by all parties at the time of the closing. The real estate contract reflected a purchase price of $275,000; a mortgage in the amount of $220,000; and a balance of $55,000 to be paid at closing by Zamkoff, by bank or certified check. The contract made no reference to a lease or promissory note. Respondent had prepared both the lease and promissory note.

Pursuant to the lease, Zamkoff was to rent the property to the Bushes, who would pay him $55,000 in lieu of a security deposit. The lease specifically stated "[i]n lieu of a security deposit and to the extent permitted by law the Tenant pledges any balance due to Tenant from Landlord under a certain note dated July , 2005 [sic] in the amount of $55,000 to secure Tenants' obligations hereunder . . . ."

The lease also included a nonrefundable fee of $26,500 to "THF Capital for arranging the lease option agreement" and stated that the Bushes "shall have the right to purchase the property at any time during the first two years of the lease for $275,000 provided that they are current on all lease payments and have not defaulted under [the] lease." The Bushes would be

responsible for reimbursing Zamkoff for any expenses incurred during the leasing period so that, at the time of repurchase, Zamkoff would net $275,000.

Joan believed that the $26,500 fee was for Zamkoff's closing costs for both proposed transactions: the original sale (Bushes to Zamkoff) and the repurchase of the property (Zamkoff to Bushes) two years later, "in case they can't save it." Joan testified that she was not aware of THF Capital's role in the transaction or of her obligation to make any payment to this company.

The Bushes also executed a promissory note by which Zamkoff borrowed money from them. Although respondent's file contained several versions of the document, the final promissory note in the amount of $55,257.77 was executed on July 29, 2005 by Zamkoff and the Bushes. The promissory note stated:

> Borrower's Promise to Pay Principal and Interest. In return for a loan I received of $55,257.77. [sic] I promise to pay to the order of the Lender the sum of $55,257.77 plus simple interest of 5% in one lump sum which is not due until the property at 30 School House Road, Egg Harbor New Jersey is purchased by the Lender or sold to a third party in a sale that "nets" at least $275,000 to me. Any amount under a net of $275,000 shall be deducted from the amount that I owe to the Lender.

Respondent prepared all of the documents for the July 29, 2005 closing. Respondent confirmed that he represented Zamkoff, not the Bushes, at the closing. The HUD-1, which Joan had not

seen prior to closing, indicated that the seller had "closing concessions" in the amount of $5,500. Joan believed that the $5,500 was for her closing costs. She claimed that respondent never explained to her or her husband any aspects of the closing documents. Joan was also unaware that she had paid $200 to respondent for document preparation. In contrast, respondent asserted that he had reviewed all of the closing documents, including the HUD-1, with all parties.

The Bushes' two mortgages, in the amounts of $149,225.39 and $14,674.23, were satisfied from the closing proceeds. Zamkoff obtained two loans from MLS, in the amounts of $207,250.77 and $13,750, to purchase the property.

The HUD-1 settlement statement reflected "CASH TO SELLER" of $77,631.58, which did not accurately reflect the funds the Bushes received from the transaction. Instead, on August 3, 2005, the Bushes received a wire transfer of $22,288.81, the only funds paid to them as a result of the sale of their property to Zamkoff. The HUD-1 also stated "CASH FROM BORROWER" of $55,257.77. Zamkoff, however, did not bring any cash to the closing. Joan knew that Zamkoff would not bring cash to the closing and that she would not receive $77,631.58, notwithstanding the representation on the HUD-1.

Respondent admitted knowing that, although the HUD-1 he had prepared reflected cash from the borrower of $55,257.77 and cash

to the seller of $77,631.58, these amounts were not correct. Nevertheless, respondent signed the certification on the HUD-1, which stated that the document was "a true and accurate account of the funds disbursed or to be disbursed by the undersigned as part of the settlement of this transaction."

Respondent testified that he had signed the certification, knowing the HUD-1 was not accurate, because all parties were aware of the lease and the promissory note and knew that Zamkoff was not going to bring $55,257.77 to the closing, only to have the Bushes return the funds to him as a security deposit on the lease. He said he made a "decision to net it" rather than have Zamkoff "go to the bank twice."

According to respondent, he was comfortable with his decision not to require Zamkoff to bring $55,000 to the closing because he knew that Zamkoff had sufficient funds to make the $55,257.77 payment reflected on the HUD-1. Although respondent admitted that he never reviewed a bank statement to confirm that these funds actually were in Zamkoff's account, he maintained that he had seen a mortgage application, which was signed and underwritten by the lender, showing that Zamkoff had $140,000 in liquid assets.

Respondent conceded that he did not include on the HUD-1 any reference to the promissory note Zamkoff had executed in favor of the Bushes or to the leaseback of the property by the

Bushes. As his expert would also testify, he asserted that he did not do so because the lease was a separate transaction from the purchase and the $55,000 was a security deposit for the lease.[2] Thus, he maintained that he properly excluded reference to those documents in the HUD-1. That notwithstanding, respondent admitted that the sale transaction was contingent on the $55,000 "being put back in."

Finally, based on the recorded mortgage and notice of assignment, respondent acknowledged the possibility that MLS, the lender, would sell the loan to Ohio Savings Bank. He explained that, although Ohio Savings Bank had wired the funds into his bank account, MLS was the actual lender. Respondent conceded that he had not provided MLS or Ohio Savings Bank with a copy of the promissory note or residential lease with the option to purchase.

Respondent's expert witness, Andrew Krantz, Esq., testified that, although there are no specific instructions on how to prepare a HUD-1, "the general rule is not to misstate any item on this form," noting that lenders rely on the information stated therein. Like respondent, Krantz testified that the leaseback accompanied by the note constituted a separate

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[2] No testimony was offered to explain why the $55,000, allegedly intended as a security deposit on the lease, resulted in the execution of a note for the repayment of that amount by Zamkoff to the Bushes at some point in the future.

transaction that was to occur "outside of closing," and was therefore properly excludable from the HUD-1. While admitting that the HUD-1 respondent prepared in this matter did not reflect the fact that Zamkoff did not bring $55,631 to the closing and that the Bushes did not receive $77,631 from the sale, he stated that there was a paper trail, consisting of the lease and note, "[reflecting] the bottom line." As noted earlier, the lease and note were neither referenced in the contract or HUD-1 nor attached to the HUD-1 (or otherwise provided to MLS and/or Ohio Savings Bank).

Unbeknownst to the Bushes and to respondent, Zamkoff refinanced the property in September or October 2005. The Bushes learned of the refinance when they were prepared to repurchase the property from Zamkoff, who told Joan that the purchase price would exceed $300,000 because he had "remortgaged it" and had not made any mortgage payments since January 2006. With the arrearages created by Zamkoff, the Bushes were unable to repurchase their home, which was sold at auction in November 2007. There is no allegation or evidence suggesting that respondent was aware of any intent on Zamkoff's part to refinance the property or of Zamkoff's actual post-closing refinance of the property and his subsequent default on the mortgage.

The complaint charged that respondent violated RPC 8.4(c) by (1) knowingly preparing a HUD-1 statement that contained false and misleading information, thus perpetrating a fraud against the lender, MLS, and any other lender who may have purchased the mortgage on the secondary market; and (2) falsely certifying the HUD-1 as a "true and accurate account of the funds disbursed or to be disbursed by [respondent] as part of the settlement of [the] transaction."

The hearing panel declined to find that respondent violated RPC 8.4(c). Further, the panel found uncontroverted respondent's expert testimony that "the out of closing agreement did not violate establish [sic] norms." The panel concluded that any harm to the Bushes was not the result of respondent's conduct and recommended dismissal of the complaint.

Following a de novo review, we are satisfied that the record clearly and convincingly establishes that respondent was guilty of unethical conduct.

The relevant facts in this matter are neither complicated nor disputed. The Bushes purchased a home in 2004. Shortly thereafter, they were facing financial difficulties and attempted to refinance the property or obtain a home equity loan. During their search for a financial remedy, they were put in contact with Zamkoff. Claiming the Bushes had no other options, Zamkoff proposed a sales/leaseback transaction by which

the Bushes would sell their property to him for $275,000 and he would allow them to remain in the home, pay rent, and, at the end of two years, purchase the property back from him.

Zamkoff retained respondent to represent him at the closing; the Bushes elected to proceed without counsel. Respondent prepared the closing documents, and the settlement took place on July 29, 2005. The parties executed all of the relevant documents (the sales contract, lease agreement, promissory note, and HUD-1 settlement statement) no later than the date of the closing.

The HUD-1 provided that the Bushes were to receive $77,631.58 from Zamkoff, the buyer, and that Zamkoff was to provide $55,257.77 at the closing. Zamkoff, however, did not bring any funds to the closing. Both Zamkoff and the Bushes were aware that Zamkoff would not provide any cash and that the Bushes would receive more than $20,000. On August 3, 2005, the Bushes received a wire transfer of $22,288.81, which represented the proceeds from the closing.

Respondent admitted that he prepared the HUD-1, that he knew that it reflected the cash from the borrower in the amount of $55,257.77 and the cash to the seller in the amount of $77,631.58, and that these HUD-1 entries were not accurate. Further, he affirmed the statement on the HUD-1 that the document was "a true and accurate account of the funds disbursed

or to be disbursed by the undersigned as part of the settlement of this transaction."

Respondent insisted that the parties to the transaction were fully aware of the funds to be exchanged and/or credited in actuality and that he merely "netted out" from the sale proceeds to the Bushes the amount they would be required to pay Zamkoff as security on the lease. Be that as it may, by his misrepresentations in the HUD-1 as to the disbursements made or to be made, respondent perpetrated a fraud on the lender, MLS, and on future potential lenders on the secondary market. Respondent's statement on the HUD-1 in respect of Zamkoff's side of the transaction affirmatively misrepresented that he paid the Bushes $55,000 at the closing, when, in fact, he became indebted to them in that amount and became saddled with even more debt. In effect, in light of respondent's own testimony that the sale was contingent on receipt of the $55,000 lease deposit, the Bushes effectively took back a mortgage on the property, a fact which clearly should have been disclosed to the lender. Instead, respondent's indication on the HUD-1, that Zamkoff brought $55,000 to the closing, created a misimpression of financial stability on his part. Indeed, had the true structure of the transaction been disclosed at the outset, it likely would have raised a red flag to the lender, and likely would have compromised Zamkoff's ability to secure the necessary financing

for the transaction.[3] It is noteworthy here that respondent admitted that he knew, based on the recorded mortgage and notice of assignment, of the possibility that MLS, the lender, would sell the loan to Ohio Savings Bank. Yet, despite that knowledge, and in addition to inaccurately reflecting the true nature of the transaction and exchange of funds, respondent did not provide MLS or Ohio Savings Bank with a copy of the promissory note or the residential lease with the option to purchase.

In our view, the facts clearly and convincingly establish that respondent is guilty of conduct involving dishonesty, fraud, deceit, or misrepresentation. The only remaining issue for us to determine is the appropriate quantum of discipline for respondent's misconduct.

The discipline imposed for misrepresentations on closing documents has ranged from a reprimand to a term of suspension, depending on the seriousness of the conduct, the presence of other ethics violations, the harm to the clients or third parties, the attorney's disciplinary history, and mitigating or aggravating factors. See, e.g., In re Barrett, 207 N.J. 34 (2011). In Barrett, the attorney engaged in misconduct similar

[3] The existence of the promissory note would have called into question the integrity of the entire transaction because it appeared to provide a vehicle for Zamkoff to remove any equity he should have had in the property by the required contribution of $55,000 of his own funds.

to respondent's. In that case, the homeowners' property was in foreclosure. In the Matter of Dennis J. Barrett, DRB 10-435 (June 3, 2011) (slip op. at 2). In an effort to "save their home," the homeowners engaged the services of a mortgage broker who, in turn, located an investor to buy their property, lease it back to them, and sell the property to them at a later date. Id. at 2-3. The attorney represented the investor; the homeowners were not represented. Id. at 3. The attorney admitted that he failed in his duty to disburse the funds in accordance with the settlement statement. Id. at 4. He certified that the homeowners had received $60,992.54, when he had disbursed only $8,700 to them. Ibid. Further, he certified that the investor brought $29,346 to the closing, when, in fact, he provided no funds. Ibid. The attorney, who had no record of discipline, was reprimanded for his violation of RPC 8.4(c). See also, In re Mulder, 205 N.J. 71 (2011) (reprimand for attorney who certified that the HUD-1 he prepared was a "true and accurate account of the funds disbursed or to be disbursed as part of the settlement of this transaction;" specifically, the attorney certified that a $41,000 sum listed on the HUD-1 was to satisfy a second mortgage; in fact, there was no second mortgage encumbering the property; the attorney's recklessness in either making or not detecting other inaccuracies on the HUD-1, on the deed, and on the affidavit of title was viewed as an aggravating factor;

mitigating circumstances justified only a reprimand); In re Spector, 157 N.J. 530 (1999) (reprimand imposed on attorney who concealed secondary financing to the lender through the use of dual HUD-1 statements, Fannie Mae affidavits, and certifications); In re Gahwyler, 208 N.J. 353 (2011) ("strong" censure imposed on attorney who made multiple misrepresentations on a HUD-1, including the amount of cash provided and received at closing; attorney also represented the putative buyers and sellers in the transaction, a violation of RPC 1.7(a)(1) and (b); mitigating factors included his unblemished disciplinary record of more than twenty years, his civic involvement, and the lack of personal gain); In re Khorozian, 205 N.J. 5 (2011) (censure imposed on attorney who represented the buyer in a fraudulent transaction in which a "straw buyer" bought the seller's property in name only, with the understanding that the seller would continue to reside there and would repurchase the property after one year; the attorney prepared four distinct HUD-1s, two of which contained misrepresentations of some form, such as concealing secondary financing or misstating the amount of funds that the buyer had contributed to the acquisition of the property; in aggravation, the attorney changed the entries on the documents after the parties had signed them); In re Nihamin, 217 N.J. 616 (2014) (three-month suspension for attorney who prepared HUD-1s that falsely indicated that earnest

money deposits had been made and also disbursed loan proceeds not in accordance with the lenders' instructions; prior admonition); In re De La Carrera, 181 N.J. 296 (2004) (three-month suspension in a default case in which the attorney, in one real estate matter, failed to disclose to the lender or on the HUD-1 the existence of a secondary mortgage taken by the sellers from the buyers, a practice prohibited by the lender; in two other matters, the attorney disbursed funds prior to receiving wire transfers, resulting in the negligent invasion of clients' trust funds); In re Nowak, 159 N.J. 520 (1999) (three-month suspension for attorney who prepared two HUD-1s that failed to disclose secondary financing and misrepresented the sale price and other information; the attorney also engaged in a conflict of interest by arranging for a loan from one client to another and by representing both the lender (holder of a second mortgage) and the buyers/borrowers); In re Swidler, 205 N.J. 260 (2011) (six-month suspension imposed in a default matter; in a real estate transaction, the attorney represented both parties without curing a conflict of interest; the attorney acted dishonestly in a subsequent transfer of title to property; specifically, in the first transaction, the buyer, Rai, gave a mortgage to Storcella, the seller; the attorney, who represented both parties, did not record the mortgage; later, the attorney represented Rai in the transfer of title to Rai's father, a transaction of which

Storcella was unaware; the attorney did not disclose to the title company that there was an open mortgage of record; the attorney was also guilty of grossly neglecting Storcella's interests, depositing a check for the transaction in his business account, rather than his trust account, and failing to cooperate with disciplinary authorities; prior reprimand and three-month suspension); In re Fink, 141 N.J. 231 (1995) (six-month suspension for attorney who failed to disclose the existence of secondary financing in five residential real estate transactions, prepared and took the acknowledgment on false HUD-1 statements, affidavits of title, and Fannie Mae affidavits and agreements, and failed to witness a power of attorney); In re Newton, 157 N.J. 526 (1999) (one-year suspension for attorney who prepared false and misleading HUD-1 statements, took a false jurat, and engaged in multiple conflicts of interest in real estate transactions); and In re Frost, 156 N.J. 416 (1998) (two-year suspension for attorney who prepared misleading closing documents, including the note and mortgage, the Fannie Mae affidavit, the affidavit of title, and the settlement statement; the attorney also breached an escrow agreement and failed to honor closing instructions; the attorney's ethics history included two private reprimands, a three-month suspension, and a six-month suspension).

Respondent's misconduct is this matter is factually similar to that of the attorney in Barrett, who received a reprimand. However, there are both mitigating and aggravating factors to consider. In mitigation, we note that respondent has no prior discipline since his admission to practice over twenty years ago.

On the other hand, and in aggravation, we are deeply disturbed by respondent's steadfast refusal to acknowledge and to accept that his conduct was unethical. Indeed, even during oral argument before us, respondent continued to deny any wrongdoing, instead justifying his conduct based on his perceived norms and trends of real estate practice. Regardless of what might be perceived as "business as usual," respondent, as well as all members of the bar, must appreciate both the obligations of attorneys to report the nature of a transaction honestly and accurately and the consequences to third parties of failure to do so. Violation of that very basic duty in the name of perceived business norms is inexcusable. The Rules of Professional Conduct require honest and forthright disclosures in our everyday professional dealings. Moreover, the public we serve rightfully expects it. Respondent has failed in his responsibility to follow that very basic precept and continues to deny his failure. Accordingly, we determined to impose a censure.

Members Clark and Singer voted for a reprimand. Member Zmirich did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Francis B. Batcha
Docket No. DRB 15-212

Argued: October 15, 2015

Decided: March 30, 2016

Disposition: Censure

Members	Disbar	Suspension	Reprimand	Censure	Disqualified	Did not participate
Frost				X		
Baugh				X		
Clark			X			
Gallipoli				X		
Hoberman				X		
Rivera				X		
Singer			X			
Zmirich						X
Total:			2	5		1

Ellen A. Brodsky
Chief Counsel