SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-424

IN THE MATTER OF

CAROL POWE NEWTON

AN ATTORNEY AT LAW

Decision

Argued: February 5, 1998

Decided: November 2, 1998

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Clark L. Cornwell, III 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 Special Master Bennett Wasserstrum.

Count one of a six-count complaint charged respondent with a violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) for taking acknowledgments on purchasers' affidavits of title that contained false information in order to induce mortgage lenders to make loans; taking the acknowledgment on purchasers' Federal National Mortgage Association ("Fannie Mae") affidavits that contained false information; and, as the settlement agent, preparing HUD-1 Uniform Settlement Statements ("RESPAs") that falsely listed deposit monies that were never received and net cash disbursements that were never made. Counts two through five charged respondent with violations of RPC 8.4(c) for improperly taking acknowledgments on closing documents purportedly signed by "purchasers/investors" ("investors"), when the documents were not signed in respondent's presence. Count six charged respondent with violations of RPC 1.7 (conflict of interest), RPC 1.1 (gross neglect) and RPC 8.4(c), for failing to advise her client of her participation in an earlier transaction with the other party, failing to record her client's deed, failing to provide clients with relevant closing documents and giving a client false information. The presenter withdrew count six of the complaint because he was unable to present testimony on this count.

The most serious charge in the complaint was that lenders were deceived into believing that the investors were going to occupy the subject properties as their primary residences. The lenders were, thus, fraudulently induced to lend money to the investors to purchase the properties through false closing documents prepared by respondent.

Respondent was admitted to the New Jersey bar in 1982. She maintains an office in Paterson, New Jersey.

Respondent has no history of discipline.

A procedural issue arose about respondent's attempt to expand the record by appending to her brief to the Board a handwriting analysis of certain signatures and a letter from an attorney whose office allegedly prepared the closing documents in a certain transaction. The presenter objected to respondent's submission, claiming that, if respondent wished to expand the record, she would have to make a motion before the Board. The presenter argued that he had been denied the opportunity to cross-examine the purported handwriting expert or the attorney. The Board agreed with the presenter and did not consider respondent's submission.

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At the time of the alleged conduct, respondent was a part-time municipal judge in Paterson, New Jersey. The allegations of the complaint stemmed from respondent's involvement with a company known as Diversified Financial Planning ("Diversified") of Fort Lee, New Jersey. The company stayed in business for only two years, between 1988 and 1990. The company's principal, William Hurst, was investigated by the Office of the Attorney General. An indictment was never returned, presumably because Hurst disappeared.

Diversified started a program called the Home Savers Program. Its goal was to do business with persons experiencing difficulties in making their mortgage payments or who were on the verge of defaulting on their mortgage loans. Diversified used a mortgage broker to obtain financing for these clients. Diversified also found investors to purchase the homes from the financially distressed clients, the sellers. Diversified would use the names and credit history of the investors to obtain financing through lending institutions. Different lenders were used when the same investor was involved in more than one transaction. The investors would be paid a fee or given some other inducement to lend their creditworthiness to these transactions. They were led to believe that they would not be responsible for any payments. They were often given indemnification agreements from Hurst and from one of Diversified's employees, Russell Raso.

According to the terms of the transaction, the sellers would enter into a lease/buy-back agreement with the investors. The sellers would remain on the premises as tenants in the property and would pay a monthly rental collected by Diversified. Diversified would make the mortgage payments. The sale lease/buy-back agreements gave the sellers a set period to buy back their property from the investors.

Respondent's role in these transactions was to act as the settlement agent in the title closings and purportedly represent the investors. The investors were introduced to respondent by Diversified through either Hurst or Raso. The sellers were represented by a number of local attorneys recommended either by respondent or by Diversified.

Gus P. Pangis, the Office of Attorney Ethics' ("OAE") Chief Auditor, testified about Diversified's Home Savers Program. Pangis explained that the investigation in the matter was difficult because of the age of the transaction. He was able to obtain the files of the Office of the Attorney General which had conducted an investigation into Diversified. The remaining documents came from respondent. He was unable to obtain much information from the lenders because of the age of the transactions and the fact that some had been taken over by the RTC.

According to Pangis, Diversified sought out individuals with poor credit ratings who were about to lose their homes and paired them with the investors. Pangis stated that William Hurst was the principal of Diversified. Russell Raso, a key employee, was responsible for identifying properties that "fit the type of investments that [Diversified] was making."

Pangis asserted that Diversified hired respondent to modify a lease/buy-back agreement to be used in the transactions and also to handle all of the closings. Homeowners, on the verge of foreclosure, would sell their homes to a "straw" purchaser, who would use his or her credit to obtain a new mortgage to pay off the old mortgage and any other liens on the properties. The parties to the transaction would execute a "lease/buy-back agreement," whereby the seller would lease his or her home back from the purchaser and have the opportunity to re-purchase the property at some point in the future. The seller's equity in the property at the time it was conveyed to the investor would become the seller's down payment if he or she were to re-purchase the property. Often, the rental payments that the seller was required to make to Diversified were larger than the original mortgage payments. According to Pangis, Diversified extracted unconscionable fees from the transaction, ranging anywhere from ten to forty percent of the mortgage amount. As a result, in all but one of the nine transactions the sellers defaulted on their payments and the lenders foreclosed on the properties.

Pangis explained that respondent represented the investors in all but one of the nine transactions. Her role was to "set up" the closing and to prepare much of the paperwork.

The sellers' attorneys whom Pangis interviewed informed him that most of the paperwork was prepared by respondent or her office.

According to Pangis, there were two steps to the closing. First, the sellers would execute the closing documents, including the lease agreement. Later, respondent would close title with the investors. The investors testified that they did not participate in some of the closings. Pangis explained, for example, that Molly Long only recalled participating in one closing, even though her name was used in connection with three transactions. Similarly, Josephine Gatchalian indicated that she only attended one closing, notwithstanding that her name was used in two transactions.

During his investigation, Pangis learned that, up until the closing, some of the sellers believed that respondent was their attorney. It was only at the closing that they learned that they were being represented by a different attorney, either Harry Cornish, Vickie Donaldson or Catherine Mitchell[1], all chosen by Diversified.

Pangis also stated that the deposits noted on the RESPAs did not exist. Often, the deposit amount was a figure determined by the sale price and the amount of the mortgage. The loans were "fast-track loans" that required little documentation and a twenty-five percent

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[1] These attorneys are no strangers to the disciplinary system. In 1996, Vickie A. Donaldson was disbarred by consent, admitting that she could not successfully defend herself against pending disciplinary charges alleging knowing misappropriation of clients' trust funds. In re Donaldson, 143 N.J. 535 (1996). Catherine P. Mitchell received a reprimand in 1995 for negligently misappropriating clients' trust funds and failing to maintain proper trust and business accounting records. In re Mitchell, 139 N.J. 608 (1995). Lastly, Harry Cornish received a five-year suspension retroactive to his temporary suspension in January 1980 for pre-Wilson misappropriation of clients' funds (mandatory disbarment under In re Wilson, 81 N.J. 426 (1979) was not retroactive). In re Cornish, 98 N.J. 500 (1985).

deposit. Respondent told Pangis that the deposits were not true deposits; they reflected the equity in the property, which would be used as a deposit on the repurchase by the seller. Diversified was designated as the agent for the buyer. Diversified collected the rents and paid the mortgage; the investors never handled the funds.

Pangis found problems with the documentation as well. Pangis testified that there were deposits reflected on the RESPA statements when, in fact, they were never received or delivered. There were also affidavits of title and Fannie Mae affidavits and agreements that certified, under penalty of perjury, that the borrowers (the investors) would be residing in the property. In most of these affidavits respondent was the individual who notarized or attested to the signatures.

According to Pangis, respondent did not believe that she had a duty to determine if the investors were living in the properties. She claimed that she advised the investors that the mortgagee could call in the mortgage loans if they learned that the investors were not occupying the premises. She also maintained that she told the investors that they would have to move into the properties. She disclaimed any responsibility for "following up" or insuring that the investors were actually living on the premises.

As to the deposits, respondent admitted to Pangis that they did not exist; the amounts stated merely represented the "sellers' " equity in the property. Respondent asserted that, since all of the funds were going to Diversified, the amounts were netted out in the transaction and she was not required to show a paper trail of the actual funds coming in and going out. In respondent's words, the "transaction netted itself out," it was a "wash."

Respondent did not believe that the allocation of the deposit funds had to be reflected on the RESPA statements.

Respondent did admit to Pangis, however, that she had reservations about the transactions. She stated that she once indicated to Hurst that it would be better if the funds were actually deposited and paid, a system that would indicate the time terms of the transaction. She told Pangis that she relied on Hurst's judgment and on his representations that the mortgage companies were aware of the true nature of the transactions. Respondent admitted to Pangis that her paperwork was sloppy, but denied intent to defraud anyone.

Pangis testified that, in all but one transaction, respondent acted as the settlement agent.

The Long Transactions

Pangis' review disclosed that, in the sale from Eldora C. James to Molly Long, which occurred on January 19, 1989, even though the RESPA reflected a deposit, no monies were actually paid by the investor. The RESPA also showed cash due to the seller, but neither of these entries were shown on respondent's client ledger card. In an affidavit of title, Long attested that she would be occupying the premises. Respondent took the acknowledgment on that document. The Fannie Mae affidavit and agreement similarly indicated that Long would be occupying the premises. However, there was no acknowledgment of Long's signature on those documents.

Similarly, Pangis noted that, in the sale to Molly Long from Harold Anderson on March 6, 1989, the RESPA statement did not portray an actual picture of the disbursements made. The RESPA reflected cash to the seller in the amount of $10,913, but no such payment was made. Although the RESPA indicated a deposit, respondent's client ledger card did not reflect the receipt of such a deposit. Respondent's explanation to Pangis was that, since the monies were going to be paid to Diversified through the buyer, they were being "netted out" of that part of the transaction; in other words, the deposit was often the same money that was to be used for the lease/buy-back and it was, therefore, a "wash." In this transaction, respondent took the acknowledgment on the affidavit of title and the Fannie Mae affidavit, both of which indicated that the borrower would be living in the property.

The next transaction in which Long was involved was a sale on May 26, 1989 from Francine McCummings. There, the RESPA statement indicated a $20,000 deposit and cash to seller in the amount of $21,170.94. Neither of these amounts were reflected in respondent's client ledger cards. The affidavit of title, which was notarized by respondent, again indicated that the buyer would be occupying the premises. Exhibit C-5-8, a May 31, 1989 letter from the lender's lawyers, indicated that they required a sworn affidavit of the borrower's intent to occupy the premises.

Molly Long testified via telephone from Houston, Texas. Long explained that she was introduced to the principals of Diversified through her husband, Monroe. At that time he was employed by Diversified. Long understood that Hurst was in the business of "[buying] properties to help people who couldn't meet their mortgages or payments, turn[ing] around and re-lease[ing] those properties to the people so they had a chance to make up their debts and payments and buy their properties back."

Long testified that Hurst introduced her to respondent as his attorney and that he wanted respondent to explain to her that what he was doing was lawful in New Jersey. Respondent and Hurst explained to Long that they wanted to use her creditworthiness and that she would not have to advance any money. Long was compensated for participating in the transaction. She never attended any closings. She was not aware of her involvement in the two other transactions with Anderson or McCummings until she received correspondence from the lender indicating that she owned property that was being foreclosed. Her reaction was one of surprise: "I was surprised, I had no idea of what it was all about."

Long recalled signing one document, but not others that also bore her signature. Long's credit was used in three transactions. In all three, the RESPA statements did not disclose a buy-back option figure; the affidavits of title and the Fannie Mae affidavit and agreement misrepresented that Long would be residing at the properties. The contract of sale did not disclose the lease/buy-back option. In one of Long's transactions, the lender sought several corrections, including that the buyer check the box dealing with representation about occupancy. Rather than contacting her client directly, respondent had Diversified take care of the changes.

<u>The Josephine Gatchalian Transactions</u>

Pangis testified about the transactions in which Josephine Gatchalian ("Josephine") was involved. On March 29, 1989 Caroline Dobbins sold her property to Josephine, as the investor. Paragraph twenty-seven of the contract of sale noted that the parties agreed to enter into a "buy-back option" after the title closing. The RESPA showed a deposit of $25,000 and cash to the seller in the amount of $18,108, neither of which was reflected in respondent's client ledger card. The affidavit of title was also notarized by respondent. Pangis explained that Josephine was William Hurst's secretary. She had been in this country for only three years when Hurst approached her about participating in the transactions. According to Pangis, Hurst had assured Josephine that the transaction was proper.

On March 16, 1989 Josephine purchased another property from Francis Williams. Respondent's ledger sheet for this matter reflected payments to Diversified in excess of $25,000. As in the other transactions, respondent's client ledger card did not show any disbursements to the seller, even though the RESPA reflected cash to seller in the amount of $34,139.45. Likewise, respondent's client ledger card did not record the $27,600 deposit shown on the RESPA statement. As to the affidavit of title in this matter, although respondent's name is listed on the acknowledgment section, she did not acknowledge her client's signature.

The documents for this transaction also included a letter from respondent indicating that respondent was the <u>seller</u>'s attorney and that she needed the pay-off amount for the mortgage. Respondent was actually representing Gatchalian, the investor.

Josephine Gatchalian (now Bird) testified that she was Bill Hurst's secretary. She worked for Diversified for approximately two years until 1990. Hurst explained to Josephine that the Home Owners Program was designed to help people who were incapable of getting a mortgage loan. She received a bonus of approximately $1,000 to participate in the Williams and Dobbins transactions.

Josephine testified that she was asked to sign a number of documents that she did not read. At the DEC hearing, Josephine recognized the RESPA statement and her signature on it. She stated, however, that it was blank when she signed it, as was the affidavit of title. She also signed a number of blank documents and explained that she was not concerned about signing blank documents because Hurst had assured her that everything was legal and that she had nothing to worry about because "we have [respondent] as a lawyer." Josephine did not give a deposit for the transactions and operated under the belief that respondent, Hurst and Raso represented her at the closings. According to Josephine, respondent did not explain any of the documents to her at the closing, but did witness her signature.

Josephine testified that she began getting demands for payment from the mortgagee because her mortgage payments were delinquent. She was surprised to receive the demands. She turned them over to Hurst and Raso, who promised her that they would take care of the problem.

Josephine first saw the loan applications submitted in her behalf during the Attorney General's investigation of Diversified's activities. The application misstated her salary as $55,000 when, at the time, she earned $200 only per week. Moreover, the application falsely stated that she owned a car.

The Solomon and Vilma Gatchalian Transactions

Josephine's relatives, Solomon and Vilma Gatchalian, also became involved in the Diversified transactions. On January 9, 1989 they purchased property from Wilfred and Vittoria Dorothea. The RESPA statement listed at number 509 a "buy back option" for $22,000. The contract rider in this transaction had computations showing a purchase price of $293,000 and a new second mortgage of $59,100 arriving at a net purchase price of $234,400. The RESPA statement did not list any secondary financing. It did, however, reflect deposit monies in the amount of $59,100. The RESPA statement showed that the seller was entitled to $32,926.81. Respondent's client ledger, however, showed only one payment to the Dorotheas in the amount of $11,400. The affidavit of title in this matter was also witnessed by respondent.

Vilma and Solomon Gatchalian also purchased property from George and Margaret Hargrove on December 19, 1988. The RESPA statement indicated a deposit in the amount of $27,000, as well as a "buy back option" at line number 509 for $12,000. The cash to sellers was listed as $10,564.09. The documents in this transaction included closing instructions from the lender that specified that there could be no secondary financing. Respondent's client ledger did not show either a payment to the sellers or a deposit. As to the affidavit of title, respondent again took the acknowledgment.

Solomon Gatchalian testified by telephone from Kalaheo, Hawaii. He explained that he learned of Diversified through his niece, Josephine, who was working as Hurst's secretary. Gatchalian understood that he was investing in a lease/buy-back agreement. His understanding was that he would buy the property, which would then be leased to the "legal" owner; within five years the owner would buy back the property. Diversified introduced Gatchalian to respondent to represent him in the transaction. Gatchalian's credit was used to purchase two properties. Gatchalian believed that Diversified supplied the down payment in the transactions. He recalled signing mortgage checks from a bank, payable to him and to respondent jointly. Gatchalian testified that he was requested to sign some blank documents in connection with the transaction. He believed that one of them was the RESPA statement. Hurst led Gatchalian to believe that, if the sellers repurchased the properties within two years, Gatchalian would obtain ten percent of the profits.

With regard to the second transaction, Gatchalian testified that he had authorized Hurst to represent him because he was about to go to the Phillippines. He, therefore, gave Hurst a power-of-attorney. Gatchalian thought that he would receive a portion of the profits here as well, if the seller exercised the buy-back option. Gatchalian believed that Hurst had prepared an application form, "presumably mortgage application form," which overstated Gatchalian's income. He did not learn about this misrepresentation until his return from the Phillippines. By then the transaction had already been completed.

Gatchalian believed that Hurst had prepared both mortgage applications. He reviewed one of them for accuracy before he signed it; the second application, however, had been prepared when he was in the Phillippines. He admitted that he had signed some blank documents in connection with the transaction. He also acknowledged that his involvement in the transaction was prompted by the promise of obtaining a profit.

After several months, the sellers failed to make their rental payments. Hurst assured Gatchalian that he would pursue payment from the sellers. Eventually, the bank foreclosed on the property. Gatchalian had obtained an indemnification agreement signed by Raso and Hurst. Respondent had explained the document to Gatchalian and had assured him that it was legal. However, when Gatchalian tried to enforce the indemnification agreement, Citicorp, the mortgagee, informed him that he was personally responsible for the loan. Gatchalian did not have an attorney in the foreclosure action. He agreed to pay Citicorp $10,000 in order to preserve his credit.

The Donahue Transaction

Pangis testified that Thomas and/or Margaret Donohue were involved in three transactions. Mr. Donahue had been asked to participate in the transactions because of an earlier association with Raso. In the first transaction, Mr. Donohue purchased property from Andrea Carlton and Rosalyn Holmes on June 22, 1989. The contract of sale indicated, at paragraph twenty-eight, that the parties had agreed to enter into a buy-back agreement "subsequent to the closing of title." The RESPA statement reflected a deposit and a cash amount to sellers that were not listed on respondent's client ledger card. Respondent also witnessed the signatures on the affidavit of title in this matter. The documents in this transaction also included a June 14, 1989 letter from respondent representing that she was the attorney for the sellers in the transaction and seeking the pay-off amount for a loan in the name of Andrea C. Holmes.

The next transaction involved a sale from Diana Scarbrough to Margaret Donohue on March 8, 1990. Respondent signed an addendum to the RESPA statement acknowledging its accuracy and her preparation of the document. However, the RESPA statement showed a deposit of $5,000 and cash to sellers in the amount of $32,186.18. Neither of these two entries was reflected in respondent's client ledger card. Both the affidavit of title and the Fannie Mae affidavit agreement were acknowledged by respondent. According to Pangis, the seller believed that respondent was her attorney in the transaction.

Pangis testified that both respondent and Raso confirmed that there was no cash exchange in the foregoing transactions. The equity in the property accrued to the seller because the seller was paying option fees to buy back the property in the future. At the time of the buy-back, the option fees would be paid to the buyer. Thus, the amounts were netted out between the seller and the buyer. None of the affidavits of title in the transaction reflected the existence of a lease/buy-back. Moreover, none of the affidavits disclosed the fact that the investor would not be living in the property. According to Pangis, the RESPA statements did not show the true amounts paid in the transaction. Respondent's explanation to Pangis was that the "monies were being netted out by the buyer and the seller and Mr. Hurst."

The last transaction involved a sale from Christine Riley to Thomas Donahue and ultimately to Erroll Brown. Respondent was not the settlement agent in this matter. Nonetheless, the Fannie Mae affidavits contained the same misrepresentations about occupancy. After the property was conveyed from Riley to Donohue, Erroll Brown expressed an interest in buying it. Therefore, Riley exercised her option to re-purchase the property and another contract of sale was executed between Riley and Brown. Pangis believed that respondent represented Brown in that transaction. The charges in this matter were ultimately abandoned because Brown did not testify.

Thomas Donohue had passed away prior to the ethics hearing. Thus, only Margaret Donohue testified about the transactions. Mrs. Donohue explained that her husband had known Raso for many years. Raso had asked Mr. Donohue to invest in the Home Savers Program. Mrs. Donohue testified that she was not entirely familiar with the details of the transactions, but believed that they were designed to give the sellers an opportunity to recover from their financial problems; later the sellers would buy back the properties. Mrs. Donohue testified that her husband insisted that she attend a closing. She recalled that she signed a number of documents in blank. Later, in 1990, she learned that her name had been used in connection with a second transaction. When she applied for a loan to purchase a car, a foreclosure appeared on her credit report. Afterwards, Mr. Donohue attempted to obtain an attorney to rectify the problem. The record is unclear as to whether their financial problems were resolved. According to Mrs. Donohue, her husband was probably aware that his name was being used in the subsequent transaction, "but he did not know they were going to turn out to be such crooked deals."

Mrs. Donohue recalled attending only one closing for a property located in New York. While it appears that Mrs. Donohue may have signed a power-of-attorney to Russell Raso, she was unaware that she had done so at the time. Mrs. Donohue testified that, at the closing, respondent had not explained the documents to her; in fact, she added, they had not conversed. She recalled that she signed a number of documents, although not at the same time; she signed "blank documents" at different times. Mrs. Donohue also recalled that, even though she signed a mortgage application, at the time she believed it was for property that she and her husband were planning to purchase in Florida.

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Pangis testified that, during the course of his investigation, he uncovered transcript testimony and affidavits of bank officers who averred that, if they had been aware of the lease/buy-back agreement, either the loan would have been denied or the conditions of the loan would have been different.

Pangis believed that respondent was representing both the buyers and Diversified for several reasons: respondent had made payments to Diversified that were inconsistent with the information that appeared on the RESPA statements and, therefore, must have conferred with Diversified about the distribution of the monies; there were payments from Diversified to respondent, labeled as legal fees; respondent had been retained by Diversified to prepare the lease/buy-back agreement; and, finally, respondent had a "connection" with Diversified because Diversified was the agent for the investor and she represented the buyers. Pangis believed that respondent did not protect her clients' interests – they lost money in the transactions, they did not fully understand the transactions or the consequences of their involvement in the transactions and, lastly, some of the investors had obtained indemnification agreements from Diversified that, respondent failed to explain, were worthless vis-à-vis the lenders.

Russell Raso also testified. He explained that he was a commissioned employee of Diversified and that he was compensated for the deals he assembled, based on the amount of the mortgage. Raso stated that the " investors" were "there for the sole purpose of allowing the tenant to remain in there" and to collect their fees. Raso confirmed that the investors were asked to provide only their credit rating and their ability to obtain a mortgage. Raso explained that Diversified used a mortgage broker to obtain loans for the transactions. According to Raso, respondent represented all of the buyers and Diversified referred the sellers to other attorneys.

When questioned as to why Diversified stopped doing business, Raso replied as follows:

> [O]ne day, I think there was . . . a bill to be paid . . . a sizeable sum, we needed money for one thing or another. And I walked into Bill's office. I said, Bill, you've got to pay this. And he looked at me and he shrugged his shoulders and said, There's no money. . . . .[W]e had another little account and that was gone too. . . . I never questioned Bill because, you know Bill took care of me when I was hurting. And I know he had a lot of deals going in New York. And all of a sudden, boom, the well ran dry.
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> As far as the doors closing, they closed rather quickly after that. But briefly we operated out of his apartment. . . . And then all of a sudden, that department became null and void and I don't know where Bill went.
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> * * *

> [W]e were . . . trying to dissolve the company and wrap it up. And then the next time I couldn't get him on the phone, and I went to the building and got the impression from the doorman that Bill had moved out in the middle of the night, or something like that. And after that, it was sianara [sic].

Raso claimed that the deposits in the transactions were just "a swap," a wash-out entry; they were only "paper" deposits.

According to Raso, respondent had been hired to revise a New York agreement for use in the New Jersey sale/lease-back transactions. Raso believed that Hurst had placed respondent "on retainer" for work in the sale/lease-back transactions and to do whatever work was required for Diversified. Raso believed that respondent's functions included reviewing contracts, helping out with business in New York and whatever else was needed.

Raso recalled that, at one point, respondent told Hurst that they had to show the payment of deposits. Raso did not recall the nature of respondent's concern, only that she was trying to protect Diversified and its business. As to the intent of the transaction, Raso explained the following:

> The structure was to allow the seller to remain in his house. The whole concept of a sale lease back was to prevent these people from losing their home and that's the way the thing was designed, to let everybody stay just where they were, save their home from the creditors.

Raso recalled that respondent prepared all the documents in connection with the closings "from the contract to the RESPA;" she was on Diversified's retainer to "keep everything legal." Raso did not believe that the banks were made aware of the sale/ lease-back agreements. According to Raso, the banks made the deals with the investors; the sale/lease-back evolved after the closings. Raso explained that the banks received only the contracts and, possibly, the rider about termite inspection.

* * *

Respondent, in turn, testified that she has been a part-time municipal judge in Paterson for twelve years. As of the date of the DEC hearing, she had been the presiding judge for the last three years.

According to respondent, Raso introduced her to Hurst. At the time she met Hurst, Diversified had an attorney, Vickie Donaldson, who was representing the investors in Diversified's transactions. Raso and Hurst told respondent that Donaldson was hard to reach; they wanted to know if respondent would be more accessible. She agreed to represent the investors.

Respondent explained that, when she reviewed one of the first transactions, the contract provided for the use of secondary financing, which was prohibited by the mortgage commitment. She, therefore, informed Diversified that the closing could not take place; Diversified would have to obtain another mortgage or "do something else." Then she, Raso and Hurst conferred to try to develop a plan to accomplish the same goal without secondary financing. It was then that she came up with the "rider to the contract" or lease/buy-back provision. Respondent admitted that, while she had a number of people review the lease/ buy-back agreement, she did not recall "faxing" it to the bank at that time "because I didn't know if they would change the Commitment." Respondent testified that, because of the prohibition on secondary financing, the revised contract was drafted to omit any reference to secondary financing ; instead, a new mechanism was employed providing for a "deposit on the buy-back." According to respondent, instead of a second mortgage there would be an exchange of title.

Respondent explained that the contract of sale included two attachments: the "rider to the contract," which set forth further covenants and conditions, and the "contract rider," which incorporated the terms of the lease/buy-back. Respondent implied that the lenders might not have seen the riders. Respondent claimed that to insure that everyone was protected — the bank, the seller and the buyer — she inserted "the option fee" on the RESPA statement. Respondent also claimed that she included a provision in the sales contract that "the parties agree that they will enter into a buy back agreement subsequent to closing of title."

Respondent's counsel attempted to clarify that, when respondent "saw the Contracts, it had the Contract and a Lease Buy-Back Rider, and if she wasn't satisfied that it was both, she would make an entry on the RESPA statement so the bank had disclosure." Of course the disclosure on the RESPA statement came after the fact, that is, after the mortgage was granted. It was only included on two RESPA statements and it made no reference to the lease/buy-back. Similarly, only two of the contracts of sale included language about a re-purchase and made no reference to a "lease-back."

As to the discrepancies over the deposit on respondent's ledger cards and the RESPA statements, respondent testified as follows:

> [Since I knew] it was going to be a deposit on the buy-back and it was going to be exactly the same or some figure close to that, I didn't do a paper trail of the deposit, you know. I didn't say, show me a check, or did you exchange checks, or when did you do that, because conceptually, I knew that it was going to be a wash out.

Respondent also testified that she trusted that someone would have verified the deposit. She explained that, if she were representing a buyer, unless she needed the funds to go into her trust account, she would not verify whether or not the seller had received the deposit. She assumed that the seller had received it. She further explained that the cash to seller was disbursed in credits on the second transaction. The lease/buy-back provided for several months of reserves for repayment of closing costs and for a consultation fee. Respondent admitted that she did not make the lenders fully aware of how the money was disbursed.

Respondent claimed that it was not until June 1990 that she realized that there was a problem with the transactions. Specifically, respondent had represented the investor in the Garner transaction. Respondent had obtained the mortgage proceeds check, deposited them into her trust account and disbursed the funds. After the closing, Ms. Garner "went to another attorney who advised her to get out of the transaction." Garner's attorney rescinded the contract under the "three-day rescission rule," which respondent believed was not applicable. She testified that, because of problems that had arisen in other transactions, where sellers failed to pay their rent, she advised Diversified and her client, the investor, to get out of the deal.

According to respondent, the transaction was canceled. As a result, she suffered huge losses because the mortgage had already been paid off and had cleared her trust account. In addition, she had given Hurst a check in the amount of approximately $37,000 for the option fees, the reserves and his fees. When respondent requested that Hurst return the funds, he told her that he did not have the money. Respondent thereafter advised the lender that they wanted to cancel the transaction. She informed the lender that the transaction involved a "sale/lease-back" and that there were other problems in a similar transaction. The lender told respondent that it was unaware of the true nature of the transaction and requested a copy of the contract and attachments. Upon receipt of the information, the lender told respondent that it was never provided with "paragraph twenty-six [the language about the buy back after the closing], and it did not have the rider to the contract." The lender informed respondent that, if it had been aware of the true nature of the transaction, the interest rate on the mortgage loan would have been higher.

Afterwards respondent told Raso and Hurst that she could no longer represent them and that she wanted Hurst to refund the $37,000 check that she had given him. He did not. Respondent contended that, as a result of the mortgage cancellation, she lost about $40,000. She retained an attorney to file suit against Hurst, but after she recouped only $5,000 Hurst disappeared. According to respondent, there was an outstanding warrant for Hurst's arrest. He was ultimately arrested, but posted bail and again disappeared.

Respondent claimed that she did not know which documents Diversified had submitted to the lenders in the other transactions. She testified that she was aware only that, in the Garner transaction, the bank had no notice of the sale/lease-back provisions. Respondent contended that, in all the transactions, she had reviewed the documents with her clients. She stated that the closings were handled in stages; the first stage was a "dry closing" or an "escrow closing," where they first closed on the "buy/sell" portion and then on the "lease/back-buy back" portion. Afterwards, respondent had met with the investors, had reviewed all of the documents and had executed the mortgage documents. The investors and the sellers never met and did not attend the mortgage closing together. Respondent denied that any of the documents had been signed in blank by the investors. She claimed that most of the documents had been prepared by the bank and, therefore, could not have been signed in blank. Respondent asserted that she had reviewed the documents with her clients, who had no questions about the transaction. She added that it would not have mattered what she had told them anyway because they listened either to "Raso, Hurst or their husbands."

Respondent specifically recalled the transactions involving the Gatchalians. A question had arisen about the owner-occupancy requirement and the execution of the Fannie Mae affidavit and agreement. Respondent purportedly advised the Gatchalians that the document required that they live in the property or the bank could accelerate the mortgage payments. Respondent claimed that Hurst, however, told the Gatchalians not to worry, that he would straighten it out with the bank. She, nevertheless, instructed Mr. Gatchalian that, if he signed the document, he would have to live there, "I don't know for how long, that's something you have to ask the bank, 'cause I really don't know how long a bank requires you to live in a house before you can move out." Respondent added that Gatchalian had then signed the affidavit.

At a deposition in a separate matter, however, respondent admitted that she knew that the investors would not be living in the properties:

> [T]here was never any intention that they [the investors] would move into the house and never any intention that the person selling the house would get their equity. The only way they would receive the equity from the home would be if they sold it, which they had a right to do. If they sold their option which they had a right to do during the five year period.

See 4T170-171[2], which quotes respondent's testimony at the deposition. Confronted with this prior testimony, respondent then admitted that she knew that the investors did not intend to live in the properties. Her knowledge notwithstanding, respondent took the acknowledgment on multiple affidavits that indicated that the investors were going to occupy the premises. In some cases, the investors had purchased more than one property. Still, respondent asserted that she advised her clients that they would have to make arrangements to live on the premises.

At the OAE demand audit, the presenter asked respondent why she had permitted her clients to sign the affidavits, when she knew they were not going to live on the properties. Respondent replied merely, "because they wanted to."

As to the fact that some of the investors had purchased multiple dwellings and, therefore, could not be expected to reside in all at the same time, respondent stated that it is not unusual for people to own more than one property. She denied having any obligation to

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[2] 4T denotes the transcript of the June 24, 1997 DEC hearing.

insure that the individuals had actually moved into the houses or to warn the lenders that they had not moved in. Respondent claimed that, when the lenders made occupancy a specific condition of underwriting the loan, she did not know whether the investors had made arrangements to live in the properties, because she never "followed up." Respondent conceded that it had not occurred to her to advise her clients not to go through with the transactions.

In short, respondent admitted that she knew that the buyers were not going to live in the property and that the equity was only a "paper transaction."

In the alternative, respondent claimed that she did not use the affidavits of title for the purpose of certifying occupancy, even though she knew that they included such a statement. She attempted to justify her conduct by saying that banks typically do not rely on affidavits of title to be assured of occupancy by borrowers. In her view, the purpose of affidavits of title is to dispose of judgments, prior marriages and other issues that have to do with title, not occupancy.

Some of the witnesses testified that the closings were conducted without their knowledge or approval. For example, as noted earlier, Gatchalian claimed that he and his wife were out of the country during one of the closings. Respondent's reaction to this statement was to accuse Gatchalian of lying.

As to the issue of simultaneous representation of Diversified and the investors, respondent's contention was that she did not act as Diversified's attorney. She later admitted that she indirectly represented Diversified.

Carolyn Dobbins testified in respondent's behalf. Dobbins was one of the sellers involved in the lease/buy-back agreement. Josephine Gatchalian was the purchaser in the transaction. When Dobbins asked whom respondent had represented in the transaction, Dobbins answered "Diversified." Dobbins believed, however, that respondent had also represented her. Dobbins understood the transaction to mean that she had the option to either sell the property or live in the property as a tenant for five years and then buy it back.

Dobbins remained in the house until she lost it, presumably through foreclosure. At some point, Dobbins stopped making her payments and received an eviction notice from Diversified. Dobbins discussed the matter with respondent and requested that she intercede to stop the eviction or the foreclosure proceedings. Respondent apparently informed her that, because she represented Diversified, she could not help her and Dobbins would have to retain other counsel.

Dobbins testified unequivocally that respondent had represented Diversified. Although respondent's counsel attempted to elicit from Dobbins a response that respondent may have told Dobbins that she was representing the "investors" for Diversified, Dobbins clearly stated, "if I asked her to represent me or asked her a question where it concerned Diversified, she made it very clear that she represented Diversified," not the investor.

Dolores Garner, too, testified before the special master. She chronicled her involvement in the transaction as follows:

When she experienced difficulties in making her mortgage payments, she approached Diversified about refinancing her mortgage. She learned about Diversified from the newspapers. She then met with respondent, who explained the nature of the transaction. At the closing, she was represented by an attorney chosen by respondent. Garner testified that, although she had an attorney, respondent had told her that it was not necessary to use that attorney in the transaction.

After the transaction closed, Garner began having second thoughts. She, therefore, consulted with her own attorney who immediately contacted respondent and canceled the transaction. Garner explained that, when she reviewed the lease/buy-back document, she did not understand how it worked and went to her attorney for assistance. The attorney then advised her that, if she became involved in the lease/buy-back transaction, she would not be able to extricate herself from it and that it would be extremely costly to her.

According to Garner, she did not initially retain her attorney for the transaction because she was "fighting a deadline" and she believed that the people at Diversified would help her with her problems. She stated that respondent had led her to believe that she was not selling her house, only refinancing it.

* * *

The special master found misrepresentations in the affidavits of title and Fannie May affidavits; he also found that false information was included in the RESPA statements, in violation of RPC 8.4(c), in the transactions with Molly Long, Margaret Donohue, Josephine Gatchalian and Solomon and Vilma Gatchalian. He did not find any violations in the Roslyn to Thomas Donohue transaction because Thomas could not testify.

As to counts two, three, four and five, dealing with the taking of jurats out of the presence of the affiants, the special master found a violation of RPC 8.4(c) only as to the affidavits of Solomon and Vilma Gatchalian and Josephine Gatchalian. The special master did not find clear and convincing evidence that respondent had taken a false jurat in the Molly Long or Margaret Donohue transactions.

The special master found that respondent was not an active participant in Diversified's scheme; that she was not involved in the contract or application stages; that Diversified controlled the information disseminated to and from the lender; that Diversified was the deciding party as to the ultimate figures and disbursements in the closing; that Diversified took large sums of money over normal commissions and always had its representatives present at the closing of title or on occasions when respondent met with the investors; and that respondent had not participated in any fraudulent scheme. The special master found, however, that the fact that respondent allegedly was not involved in the execution of the contract or mortgage application did not shield her from her responsibilities to her clients or her fiduciary duties toward the lending institutions.

The special master concluded that the testimony of the clients indicated that they had failed or "refused" to question respondent about the documents they were signing or to seek legal advice about the effect of the transactions. The special master found that this failure to communicate with respondent, their attorney, perpetuated Diversified's actions.

In recommending the imposition of discipline, the special master found compelling mitigation in this matter. The special master found that respondent was a positive force in the community, devoting attention to those projects that benefitted the community. The special master did not consider that respondent's position as a municipal judge required the imposition of additional discipline for her ethics offenses. The special master also took into account that, when the Garner closing was aborted, respondent had to utilize personal funds and that respondent discontinued her participation in the transactions when she found out that the banks were unaware of the lease/buy-back arrangement.

Despite acknowledging that Diversified's checks to respondent created a strong presumption that she was employed by Diversified, the special master found that she was acting as the investors' attorney only.

The special master recommended the imposition of a three-month suspension for the taking of false jurats and for acknowledging her clients' signatures on documents which contained false and misleading language.

* * *

Upon a de novo review of the record, the Board is satisfied that the evidence clearly and convincingly establishes that respondent's conduct was unethical.

Surprisingly, the special master did not find a conflict of interest in this matter, even though respondent admitted that it was hard to separate whether she represented Diversified or the people that Diversified referred to her. Respondent also admitted that she did not act in the best interests of her clients. She justified her conduct by claiming that the investors would have proceeded with the transactions in any event because they relied on Hurst to straighten out any problems. Respondent conceded that, although it did not occur to her to advise her clients not to go through with the transactions, had they asked her for advice, she would have advised them not to complete the "investment."

It is undeniable, thus, that respondent put the interests of Diversified above the interests of her clients, in violation of RPC 1.7. She abrogated her duty to advise them of the undesirable nature of the transactions and the possible adverse consequences that could result. Because of her allegiance to Diversified, her clients suffered serious financial injury, including bad credit histories and, in Solomon Gatchalian's case, the payment of $10,000 to a mortgage company to return his credit record to good standing.

Moreover, sellers and buyers alike were confused as to whom respondent actually represented. For example, Dobbins, respondent's own witness, testified that she believed that respondent represented her as the seller as well as Diversified. Moreover, although respondent purportedly represented the buyers' interests, she wrote letters holding herself out as the sellers' attorney too. Thus, there was a conflict not only in respondent's representation of Diversified and the buyers, but also of the buyers and the sellers.

Had a conflict of interest been respondent's only transgression and had no dire consequences resulted from the dual representation, then a reprimand might have been the appropriate discipline. In re Guidone, 139, N.J. 272 (1994); and In re Berkowitz, 136 N.J.

134 (1994). Respondent's failure to protect her clients' interests was, however, exacerbated by other serious misconduct. She included false and misleading statements in the RESPA statements in nine transactions and took false jurats in at least one matter. The special master found that Josephine Gatchalian signed blank affidavits of title at the office of Diversified in the presence of Hurst, Raso and respondent's secretary. Notwithstanding that respondent was not present, she took the jurat on the documents. The special master also found that, as to the transaction between Mr. and Mrs. Gatchalian and the Dorotheas, the Gatchalians did not sign any of the documents and did not attend the closing because they were in the Phillippines. The special master, thus, determined that the jurat with respect to this closing, too, was false as it was not executed in the presence of respondent. Although the complaint did not specifically charge respondent with such a violation as to Mr. and Mrs. Gatchalian, she was clearly on notice that false jurats were an issue in this case. It is also unquestionable that she took an improper jurat in the Dobbs to Josephine Gatchalian transaction.

Respondent breached her duty as an officer authorized to take acknowledgments "to refrain from acts or omissions which constitute negligence, the duty which [is owed] not only to persons with whom he [or she] has privity but also to any member of the public who, in reasonable contemplation, might rely on [his or her] certification." Immerman v. Ostertag, 83 N.J. Super. 364, 369 (Law Div. 1964). "[T]he administering as well as the taking of an oath should always be done with utmost seriousness and faithfulness; and, of course, the jurat must be executed with absolute honesty." Id. at 371-372.

The most serious act of misconduct in this matter, however, was respondent's participation in a scheme to defraud the lenders. This scheme was facilitated by entries on the RESPA statements and, more directly, by the misrepresentations in the affidavits of title that respondent acknowledged.

The false representations consisted of eight instances where the investors attested that they would be living on the premises. Although respondent claimed initially that she did not know of the misrepresentations, the evidence clearly and convincingly shows otherwise. Respondent's excuses as to why the affidavits of title contained misinformation are not believable. She claimed that she did not know whether the investors were living in the property because it was not her obligation to verify their residence. However, she was instrumental in drafting the lease/buy-back agreements, which were specifically created to avoid secondary financing and to allow the "sellers," not the investors, to remain on the premises. In addition, respondent contended that she herself had warned the investors about the harmful consequences to them if they did not reside on the premises. She allegedly informed them that they would have to make arrangements to live in the property to avoid an acceleration of the loan payments. These statements belie any claims that respondent did not know that the investors would not be living in the property.

Most convincing, however, is the fact that respondent unambiguously admitted at an earlier deposition that she knew that the investors would not be living in the property. She then attempted to justify her false acknowledgments to the affidavits by claiming that banks typically do not rely on that information in the affidavit of title. Of course, respondent was wrong. One of the purposes of the affidavit of title is to assure the lender that the borrower will be living in the property. In fact, at least one lender requested that the investor declare her intention to live in the property. As the record shows, had the lenders been aware otherwise, either the terms of the loans would have changed or the loans might not have been granted. Respondent's attempted explanation is, therefore, untenable.

Respondent also claimed that she believed, up until the Garner transaction, that the banks were aware of the lease/buy-back agreement. This contention, too, is not believable. Early on in respondent's testimony she admitted that, when the first transaction occurred, she purposefully did not provide that information to the lender because she feared that the lender would change the conditions of the loan. Respondent testified that, ultimately, when she became "concerned" that the banks were not aware of the lease/buy-back, she inserted the language "buy-back option" on the RESPA statements and on the contract of sale. However, not only were these entries included in only a few of the transactions, but they were not sufficient to give the lenders notice of the true nature of the transactions. The reference to a "buy-back" certainly does not evoke the same consequences of a "lease-back." In truth, the sellers, not the investors, were responsible for the mortgage payments. Had the banks been aware of this arrangement and of the poor credit risks of the sellers, the loans might not have been made. The lenders, however, detrimentally relied on the misrepresentations in the affidavits in granting the mortgage loans. Thereafter the banks sustained economic harm, as there were foreclosures in eight of the nine transactions.

Finally, respondent's claim that she did not know that the lenders were not given the information about the lease/buy-back agreements does not ring true. Respondent testified that, after Garner, she notified Diversified that she would no longer participate in the transactions because the lenders were not made aware of the lease/buy-back agreements. This testimony is difficult to accept. It is much more reasonable to conclude that respondent was motivated to withdraw from the representation by her realization of the dangers of the transaction once she lost $40,000 in Garner. It was not long after that Diversified closed its doors. Accordingly, she could not have continued to participate in the transactions even if she wanted to.

Respondent, thus, clearly assisted Diversified in perpetrating a fraud. Her conduct in this regard violated RPC 8.4(c) (conduct including dishonesty, fraud, deceit or misrepresentation).

The quantum of discipline is the only issue left for determination. The Board recently imposed a two-year suspension In the Matter of Jack N. Frost, DRB Docket No. 97-168 (decided December 16, 1997) (the Supreme Court has recently granted a petition for review in that matter). While the two-year suspension may have been predicated, in part, on Frost's extensive ethics history, his offenses in that matter were serious enough to merit stern discipline: he breached an escrow agreement, failed to honor closing instructions and prepared misleading closing documents, that is, the note and the mortgage, the Fannie Mae affidavit, the affidavit of title and the settlement statement.

A six-month suspension was recently imposed In re Fink, 141 N.J. 231 (1995). In that matter the attorney failed to disclose the existence of secondary financing in five residential real estate transactions. The attorney also prepared and took the acknowledgment on false RESPA statements, affidavits of title and Fannie Mae affidavits and agreements. Even though the attorney had notice of a potential problem in not disclosing the secondary financing he, nevertheless, proceeded with the transactions after being assured by the real estate agent in the matter that the lending banks had knowledge of the secondary financing. The attorney never independently verified the information.

Finally, In re Labendz, 95 N.J. 273 (1984), the attorney assisted his clients in submitting a fraudulent mortgage application. The lender's policy limited loans to seventy-five percent of the purchase price of the property. Although the buyers required a mortgage in the amount of $80,000, the maximum loan they could obtain was $75,000, based on the contract price of $100,000. To assist his clients in obtaining a larger loan, the attorney altered the contract submitted with the mortgage application to reflect a sale price of $107,000. The Court suspended the attorney for one year.

Respondent knowingly participated in fraudulent activity, took at least one false jurat and, in eight transactions, acknowledged documents that contained misrepresentations (affidavits of title, Fannie Mae affidavits and agreements and RESPA statements). As a municipal court judge, respondent was held to a higher standard of conduct. See In re Magid, 139 N.J. 449, 459 (1995), and In re McLaughlin, 165 N.J. 457 (1987).

The Board has given great weight to the harm respondent caused to the lenders, the investors and the sellers. After consideration of the relevant circumstances, the Board has unanimously determined to suspend respondent for a one-year period.

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

Dated: 11/2/98

By: ______________________
LEE M. HYMERLING
Chair
Disciplinary Review Board