SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-413
District Docket Nos. XIV-2009-0027E; XIV-2009-0028E; XIV-2009-0029E; XIV-2009-0030E; XIV-2009-0031E; XIV-2009-0032E; XIV-2009-0033E; XIV-2009-0034E; XIV-2009-0035E; XIV-2009-0042E; XIV-2009-0043E; and XIV-2009-0188E

IN THE MATTER OF	
PETER ROSEN	
AN ATTORNEY AT LAW	

Decision

Argued: March 17, 2011

Decided: June 14, 2011

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

Barry N. Shinberg 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 on a recommendation for discipline (censure) by the District XA Ethics Committee (DEC). The complaint charged respondent with numerous RPC violations

for his conduct as the attorney for the seller of twelve condominium units. The units were located in a senior residential housing development, a retirement community known as Fox Hills of Rockaway (Fox Hills). With regard to all twelve grievants, respondent was charged with having violated RPC 1.2(d) (counseling or assisting Fox Hill in conduct that respondent knew was illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms he knew were expressly prohibited by law); RPC 1.2(e)(re-designated as RPC 1.4(d) as of January 1, 2004) (when a lawyer knows that a client expects assistance not permitted by the RPCs, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct); RPC 1.16(a) (failure to withdraw from the representation of a client if the representation results in violation of the RPCs or other law); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). In two of the matters (Stark and Ross), respondent was charged with having communicated directly with a party whom he knew was represented by counsel, in violation of RPC 4.2.

For the reasons detailed below, we determine to dismiss the complaint for lack of clear and convincing evidence of violations of the charged RPCs.

Respondent was admitted to the New Jersey bar in 1969. He has no prior discipline.

Respondent was an officer of Fox Hills, holding the title of Assistant Secretary. He conducted all 672 Fox Hills closings, including the twelve at issue in this ethics matter. He took direction principally from the Fox Hills Chief Operating Officer, who was also the mastermind behind the project, Morton Salkind.

Because of the nature and scope of the development, Fox Hills was subject to the Planned Real Estate Development Full Disclosure Act, N.J.S.A. §45:22A-21 et seq., and Full Disclosure Act Regulations, N.J.A.C. §5:26-1.1 et seq. (collectively, PREDFDA). PREDFDA requires a developer to use a sales contract approved by the New Jersey Department of Community Affairs (DCA). It also prohibits any material changes to any of the approved documents, including the contract of sale, without prior DCA approval.

PREDFDA also requires a developer to include, in its public offering statement, all existing or proposed special taxes or assessments, the party responsible for their payment, as well as a statement of the estimated title closing or settlement costs

that the developer charges and the buyer has to pay. N.J.A.C. §5:26-4.2(a)(19)&(20)).

Further, PREDFDA requires that the developer "immediately report to the Agency any material change in the information or documents contained in the public offering statement, with a request for amendments" and that "[n]o change in the public offering statement given to prospective purchasers shall be made without having been registered with the Agency." N.J.A.C. §5:26-4.5. "[A]ll contracts . . . for the disposition of a . . . unit . . . in a planned . . . retirement community shall be fair and reasonable and shall not impose undue restrictions or hardship upon the purchaser." N.J.A.C. §5:26-6.5 specifically prohibits certain contract provisions, including any provision that would unilaterally increase the purchase price of the unit without providing at least sixty days' notice and a right of rescission, or any provision that would force a purchaser to waive his or her rights under statutory law. See Ex. J-5 at N.J.A.C. §5:26-6.5(8).

When the twelve grievants in this matter signed their contracts, PREDFDA imposed a realty transfer fee (RTF) upon the seller, as a prerequisite to recording the deed: "[I]n addition to . . . recording fees . . . a fee is imposed upon grantors, at

the rate of $1.75 for each $500.00 of consideration or fractional part thereof recited in the deed." N.J.S.A. §46:15-7.

The Fox Hills contracts and public offering statement did not state that the seller would require the buyer to pay the RTF. Respondent admitted that the contracts did not contain any language that would shift the payment of the RTF to the buyer. As seen below, however, that is what the seller attempted to do.

With the exception of the Wolkenberg and Rehm matters, all twelve closings were originally scheduled to take place in either 2002 or early 2003. According to respondent, however, Fox Hills experienced significant delays caused by environmental problems and material shortages. During the period of delay, the value of the units appreciated substantially. Respondent testified that, for example, one unit sold for $200,000 and was re-sold for $400,000, two days later.

In July 2003, New Jersey passed legislation roughly doubling the RTF on each unit sold. Salkind was upset by that additional cost, as Fox Hills was already suffering increased material costs, delays, and legal fees associated with environmental issues. Respondent had advised Salkind, at the inception of the project, to include a price escalation clause in the sales contract for the units, but Salkind had rejected

that advice. Thus, according to respondent, the contracts contained no provision for Fox Hills to shift the escalating costs to its buyers.

On July 3, 2003, Salkind met with respondent and Fox Hills' vice-president, John Harris, and proposed that Fox Hills collect the RTF from the buyers, including those with signed contracts, like the grievants.

Respondent initially fought Salkind on this fee-shifting idea, stating that he thought it was "inappropriate" and "a mistake" to require the buyers to pay the RTF. Respondent asked for a few days to research the legality of imposing the RTF on the buyers. Respondent testified:

> The conclusion I came to after a couple days of research is that the statute said that the realty transfer fee is a fee which is imposed upon the grantor. It doesn't use the word shall pay and the way I understood statutory construction is when you use the word impose, it's not mandatory and as long as the seller made sure that it was paid somehow whether the seller paid it or somebody else paid it, that it was okay, that it did not have to physically be paid by the seller.
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> [3T30-12 to 22.] [1]

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[1] "3T" refers to the transcript of the September 3, 2010 DEC hearing.

Respondent told Salkind that the fee-shifting idea was in a "gray area" of law and that there appeared to be nothing illegal about requiring the buyers to pay it, as part of a negotiated process. He also warned Salkind that it would likely constitute a breach of contract to impress that obligation on buyers with fully negotiated contracts. He advised Salkind, who had not wanted the price escalation clause because it would look like "nickel and diming" the buyers, that the buyers and their attorneys would likely be very upset with the fee-shifting proposition. He told Salkind that they would be "inundated with lawsuits." Salkind replied, "Do it or I'll find somebody else." As seen below, respondent then set about collecting the RTF from buyers, including the twelve buyers at the center of this ethics matter.

At the ethics hearing, the panel chair questioned respondent about his beliefs at the time, as it related to the propriety of his actions:

> MR. O'CONNOR: Did you discuss in or around that time when [Salkind] said do it or I'll find someone else, did you discuss with him any limitations on what you could or could not do ethically in terms of going forward?
>
> THE WITNESS: No, I just said to him before I agree to do what you've asked me to do

> because I don't know if I will, I want to research it so that I'm comfortable in my own mind as to whether or not what you are asking me to do doesn't violate any rules or regulations or ethics that I know of. Once I made that determination that while it was a breach of contract, it didn't violate any other rules and [sic] I reluctantly agreed to go along.
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> [3T231-11 to 25.]

With Salkind's permission, respondent applied to the DCA to amend the public offering statement to require prospective buyers to pay the RTF, even though respondent did not consider that change a material fact.[2]

On September 5, 2003, the DCA issued a succinct written finding: "Be advised that the 5th Amendment on the above-named registration is deemed not acceptable for registration. The realty transfer fee is a seller's expense." As described more fully below, between early July and September 5, 2003, respondent handled closings in eight of the grievants' matters. In all of them, Fox Hills collected the RTF from the buyers.

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[2] This was the fifth amendment to the public offering statement and the only one handled by respondent. The prior four had been offered by the attorney who had prepared the original public offering documents.

After receipt of the DCA's denial of amendment, respondent handled the closings of the four remaining matters and collected the RTF from the buyers in those matters as well.

As seen below, the timing of respondent's notices to the buyers of the shifting of the RTF drew criticism from the ethics investigators. In a few instances, as few as four or five days stood between respondent's notice and the closing date. In others, that period was over a month. In one instance, fifty-three days separated the two events. There was an average of twenty-three days between respondent's first notice to buyers and the closing in these twelve matters.

Respondent denied anything nefarious about the timing of his notices, particularly that he had delayed them to put pressure on the buyers. Rather, he stated, he never had any contact at all with the individual Fox Hills buyers or their attorneys until the Fox Hills sales office notified him that a particular unit was completed and ready to close. He had no reason to contact them any sooner.

According to respondent, if any of the buyers had refused to pay the RTF, which did not happen, he was prepared to cancel the contract and return their deposit. He added that the buyers were likely entitled to the return of the cost of upgrades as well:

> However, in paragraph nine I believe, where it says if the seller defaults, and that's the paragraph dealing with title if title wasn't good, the buyer would get back their entire deposit and it didn't say excluding extras. So the way I viewed it at all these closings if they didn't want to pay the realty transfer fee, which was not in the contract, they weren't breaching the contract and that the seller would be obligated, we never got that far, to give them back all their money including the extras.
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> [3T97-4 to 15.]

When asked if he ever offered that insight to the buyers or their attorneys, respondent stated:

> Not directly, no, I can't recall any of those conversations where I said — I never said to anybody if you cancel the contract because you won't pay the realty transfer fee, you can't get your extras back, I never said that because I didn't know that to be the case.
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> [3T98-4 to 9.]

We now turn to each of the twelve closings.

I. THE GOLDBERG CLOSING — Docket No. XIV-2009-0027E

On May 10, 2002, Joseph and Marsha Goldberg signed a contract to purchase a unit at Fox Hills. The closing took place on August 14, 2003. On August 9, 2003, just four days before the closing, respondent wrote to their attorney, Rosa Conti, to

advise that "the seller requires that the buyer shall be responsible for the realty transfer fee."

At the DEC hearing, Marsha Goldberg testified that the couple had lived in their Florida property, waiting for the Fox Hills property to be completed. Belongings from their former New Jersey residence were also stored in New Jersey. When given a closing date of August 7, 2003, they drove up from Florida. On August 5, 2003, however, Fox Hills delayed the closing to August 14, 2003.

The Goldbergs then rented a motel room and rescheduled their movers for August 14, 2003. According to Mrs. Goldberg, she learned about the RTF from her lawyer, on the settlement date, in the parking lot, as they approached the closing.

When Conti raised the issue with respondent, at the closing, respondent stated that, if the Goldbergs chose not to pay the RTF, there would be no closing and a daily fee of $75 would be owed for every day thereafter that the matter was not settled.

According to Mrs. Goldberg, she felt that they had no choice but to pay the RTF of $2,284.40 and did so in order to close on their unit.

On cross-examination, respondent's counsel asked Mrs. Goldberg why she felt that the couple had no choice, when they could easily have stayed at a house that they owned in the Poconos. She countered that they had no other housing alternative in New Jersey, even though their daughter and grandchildren lived in New Jersey.

II. THE COHEN CLOSING — Docket No. XIV-2009-0028E

On August 25, 2001, Harriett F. Cohen contracted to purchase a unit at Fox Hills. The closing was held two years later, on August 15, 2003.

On August 9, 2003, six days before the closing, respondent informed Cohen's attorney, Larry J. Weiner, that "the seller requires that the buyer shall be responsible for the realty transfer fee."

Cohen testified that she first learned about the RTF from her attorney, at the closing. Cohen recalled having paid a realty transfer fee when she had sold her house months earlier and, therefore, did not understand why she was asked to pay the RTF as a buyer. Nevertheless, she paid the $881.40 because she "had nowhere to go." She recalled:

> I didn't even consider — I was here at a closing, I've been to other closings, it was a fait accompli so I didn't consider that at all at that point. Where was I going to go, back to the motel? Cost me 15,000 [sic] for [the] five months . . . I was there.
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> [1T31-15 to 20.][3]

In addition, she testified, she did not want to lose the $5,630 toward upgrades that had been installed specially for her. According to Cohen, respondent never advised her that the money for the extras would be returned if she canceled the transaction.[4]

III. THE DELUCA CLOSING — Docket No. XIV-2009-0029E

On August 16, 2001, Remo and Ida DeLuca purchased a unit at Fox Hills. The closing took place on August 29, 2003.

On July 24, 2003, thirty-four days before the closing, respondent wrote to the DeLucas, stating that "the seller shall require the buyer to pay the realty transfer fee."

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[3] "1T" refers to the transcript of the July 20, 2010 DEC hearing.

[4] The RESPA for the transaction incorrectly stated that the realty transfer fee had been paid outside of closing by Fox Hills. That document was prepared by Weiner, as settlement agent.

The DeLucas appeared at the closing with their attorney, Maryann Conners Brennan. According to Mr. DeLuca, respondent refused to close unless the DeLucas paid the RTF. In addition, Mr. DeLuca believed that if they refused to close, they would lose $3,500 in upgrades.

Mr. DeLuca recalled that, although they owned an apartment in Brigantine, where they ordinarily could have stayed, there was a mold problem at the apartment. Because they had nowhere to go, they paid the RTF, in the amount of $1,481.00.

IV. THE LESSER CLOSING - Docket No. XIV-2009-0030E

On February 2, 2002, Adrienne Lesser contracted for the purchase of a unit at Fox Hills. The closing took place on August 28, 2003.

On July 24, 2003, thirty-three days before the closing, respondent informed Lesser's attorney, Robert J. Scerbo, that the seller required the buyer to pay the RTF.

According to Lesser, at the closing, respondent refused to transfer title, unless she paid the RTF. She recalled that her attorney told her that, if she did not pay it, she would lose the condominium unit and her $13,256 in upgrades. Lesser had sold her house in New Jersey, was living with relatives in

Maryland, and was paying to store her furniture. "As far as I was concerned," she testified, "it was a fait accompli, we wouldn't have been [at the closing] if I weren't willing to pay." She then paid the $2,362.40 RTF and closed on the unit.

V. THE GREENBERG CLOSING – Docket No. XIV-2009-0031

On September 6, 2001, Seymour and Laura Greenberg purchased a unit at Fox Hills. The closing took place on August 29, 2003.

On July 24, 2003, thirty-four days before the closing, respondent informed the Greenbergs' attorney, Jeffrey Campisi, that the seller required the buyer to pay the RTF.

Laura Greenberg testified that respondent had scheduled their closing on the last day of their mortgage commitment, thereby putting pressure on them to close. Respondent countered that the Fox Hills office had not informed him that the Greenbergs were getting a mortgage loan.

At the closing, Campisi sought to place the words "under duress" on the RESPA, in order to indicate his clients' displeasure with the RTF. Respondent, however, would not allow it.

The Greenbergs also thought that they would lose $18,287.58 in upgrades, if they refused to close. Therefore, they believed

that they had no choice but to pay the RTF, which they did, in the amount of $1,656.50.

VI. THE MARKSON CLOSING – Docket No. XIV-2009-0032E

On June 25, 2002, Michael and Margaret Markson contracted for the purchase of a unit at Fox Hills. The closing took place on November 18, 2003.

On October 14, 2003, thirty-five days before the closing, respondent notified the Marksons that "[t]he seller shall require the buyer to pay the realty transfer fee." A few days later, on October 21, 2003, the Marksons retained attorney Scott Slezak to represent them. Thereafter, respondent communicated with the Marksons only through Slezak.

When, at the closing, the Marksons objected to the imposition of the RTF, respondent stated that, if they did not pay it, there would be no closing. Respondent advised them that they would also be subject to a daily late fee of $75, if the closing were delayed.

On the title closing statement, the RTF fee appears on a line stating, "Buyers (sic) contribution towards sellers (sic) closing costs." On the RESPA, it is reflected as "Closing

Contrib. to Fox Dev." The Marksons paid the $865 RTF as a contribution toward seller's closing costs.[5,6]

The Marksons believed that, if they refused to close, they would lose a substantial sum expended for upgrades to their unit.

VII. THE THEILLER CLOSING – Docket No. XIV-2009-0033E

On April 10, 2003, Charles and Louise Theiller contracted for the purchase of a unit at Fox Hills. The closing took place on November 5, 2003.

On October 31, 2003, five days before the closing, respondent advised Robert Bobrow, the Theillers' attorney, that "the seller is requiring that your client pay a 1% contribution towards seller's closing fees."

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[5] In a few of the later closings, the RTF was paid through a one percent buyer contribution toward seller's closing costs. The Markson matter fell into this category.

[6] The complaint does not charge respondent with any misconduct, such as misrepresentations or false statements arising out of the RESPA statements, which were all prepared by the attorneys for the buyers in these matters.

Charles Theiller testified that, at the closing, respondent and Bobrow discussed the RTF, which was included as a contribution toward seller's fees. Bobrow informed Theiller that it was "illegal" for respondent to require him to pay the RTF because it was not in the contract, but respondent refused to close, unless Theiller paid the additional amount. The Theillers then relented and gave respondent a personal check for $1,920, made out to Fox Hills.

The Theillers had paid more than $6,500 for upgrades, which they feared losing. Therefore, they paid the RTF and accepted title to their unit.

The Theillers also sought to deliver a "letter of duress," which cited respondent's delay in notifying them of the additional costs. Respondent refused to accept the letter. In a post-closing letter to respondent, Bobrow reiterated his displeasure at the requirement that the Theillers pay the RTF."

VIII. THE RUANE CLOSING – Docket No. XIV-2009-0034E

On October 4, 2001, Barbara Ruane and Robert McClughan contracted for the purchase of a unit at Fox Hills. The closing took place on October 24, 2003.

On October 14, 2003, ten days before the closing, respondent told their attorney, Paul Jemas, that the seller required the buyers to pay the RTF.

Jemas then contacted Salkind directly about the RTF. The two determined to split the RTF evenly between the buyers and Fox Hills. Respondent testified that he was unaware of that arrangement until the closing.

At the DEC hearing, Barbara Ruane testified that respondent had told her that, if she did not pay the RTF, the closing would be canceled. Moreover, she recalled that respondent had told her that, if she terminated the contract, she would get her deposit back, but would lose $25,000 in upgrades, a contention that respondent vehemently denied.

Ruane and McClughan paid the $1,473.20 RTF and closed on their unit.

IX. THE STARK CLOSING – Docket No. XIV-2009-0035E

On August 11, 2001, Richard and Eunice Stark contracted for the purchase of a unit at Fox Hills. The closing was held on September 15, 2003. On July 24, 2003, fifty-three days before the closing, respondent informed them that the "seller shall require the buyer to pay the realty transfer fee."

When respondent sent that letter, he did not know that the Starks had spoken with attorney Glenn F. Paterson about representing them. It was not until August 11, 2003, when Paterson called respondent to announce the representation, that respondent learned that Paterson had been retained. Thereafter, respondent directed all communications to Paterson.

In subsequent letters, dated August 12, September 3 and September 9, 2003, respondent reiterated that the buyers would be required to pay the RTF.

Richard Stark ultimately agreed to pay the $928 RTF because "we were told they wouldn't close unless we paid it."

The Starks were living with relatives while they awaited the closing on their unit, and had their belongings in storage. They also feared losing $4,065 in upgrades, if they canceled the contract.

X. THE ROSS CLOSING – Docket No. XIV-2009-0042E

On July 24, 2002, Monro and Cecile Ross contracted for the purchase of a unit at Fox Hills. The closing took place on August 20, 2003. On July 24, 2003, twenty-seven days before the closing, respondent wrote to the Rosses stating that "the seller shall require the buyer to pay the realty-transfer fee."

On July 31, 2003, respondent sent another letter, advising them to bring to the closing a check for $2,339.

Cecile testified about her knowledge of RTFs:

> I had a real estate license in New Jersey, I let it lapse when I went back to teach full time so I knew that the transfer fee would have to be paid by the seller. We had also sold a house several months before and we had to pay the transfer fee. I thought it was a mistake. I called up, I said there is a mistake on the Closing Statement never thinking that it was required and the secretary transferred me to Mr. Rosen and Mr. Rosen said it's not a mistake, the seller decided the buyer will pay and that's when we hired a lawyer.
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> [2T61-7 to 18.][7]

At the closing, the Rosses' attorney, Kenneth Kaplan, objected to their payment of the RTF, but respondent stated that without it, the closing would not proceed.

In addition to their deposit, the Rosses paid approximately $15,000 for upgrades to their unit. Monro testified that, having read the contract, he was afraid that they would lose those funds, if they did not close.

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[7] "2T" refers to the transcript of the August 3, 2010 DEC hearing.

Monro also testified that he had little choice but to pay the RTF because the couple had been living in a rental, first for six months, which was extended for another three months and then for one more month, awaiting the completion of their unit. When the closing date was finally set, it coincided with the end of their lease term. Because they had waited so long and had nowhere else to go, they determined to pay the $2,339 RTF and close on the unit.

XI. THE WOLKENBERG CLOSING – Docket No. XIV-2009-0043E

On February 20, 2003, Joseph and Janice Wolkenberg contracted to purchase a unit at Fox Hills. The settlement on their unit took place on August 28, 2003.

Respondent recalled that Mr. Wolkenberg's New York attorney, who was handling the sale of their New York house, called respondent to reschedule the Fox Hills closing because the New York closing had been delayed. Respondent complied with that request.

On July 24, 2003, twenty-eight days before the closing, respondent advised the Wolkenbergs that Fox Hills had required them to pay the RTF. A second letter, dated July 31, 2003,

requested that the Wolkenbergs bring a check to the closing for the payment of the RTF.

The Wolkenbergs were not represented by counsel at the Fox Hills closing. Joseph testified that he was trying to save money by not hiring an attorney. Because they had just sold their house in New York and had paid an RTF, as the seller, Joseph questioned respondent about it at the closing:

> I just mentioned to Mr. Rosen, I'm surprised, I don't understand why it is if I'm paying it in New York I also have to pay it in New Jersey and his response to me was that you are required to pay it in New Jersey. Now, at the closing I still thought I was required to pay it, it wasn't until a later date that Keith Paterson told me that what he told me at the closing is incorrect. At the closing I didn't know it was.
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> [2T138-9 to 18.]

Respondent denied ever having told the Wolkenbergs that it was the buyer's responsibility to pay the RTF:

> I have no specific recollection of the exact conversation except I wouldn't have said that because it wasn't true. What I said was that the . . . seller would not authorize me to close unless the buyers paid the realty transfer fee. . . . I would not have said that it was their responsibility.
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> [3T206-18 to 3T207-1.]

The following exchange took place between respondent and his attorney, at the ethics hearing:

> Q. Your comment to the buyers with reference to the realty transfer fee was what?
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> A. Was that if the seller is requiring the buyers [to] pay the realty transfer fee, if they don't pay it, I'm not authorized to close.
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> Q. And that was a consistent message with all of these buyers?
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> A. Everybody, their lawyers, everybody.
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> Q. And that is also consistent with your letter of July 24th?
>
> A. Right.
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> Q. Because Mr. Wolkenberg is really the only Grievant who is saying that you told him it was the buyer's responsibility.
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> A. Correct, I haven't seen anybody else claim that.
>
> Q. And otherwise, they are saying it was the builder, that you said it was the builder's requirement that they do that.
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> A. Correct, I was very consistent because I didn't like what I was doing and I was consistent in my message.
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> [3T122-1 to 23.]

The Wolkenbergs paid the RTF by a separate check for $1,933.40 and closed on their unit.

XII. THE REHM CLOSING – Docket No. XIV-2009-0188E

On February 9, 2003, John and Teresa Rehm purchased a unit at Fox Hills. Settlement was held on August 18, 2003.

On August 8, 2003, ten days before the closing, respondent informed the Rehms' attorney, David Pennella, that "it is my client's policy that the buyer shall be responsible for the realty transfer fee."

The Rehms did not testify at the DEC hearing, due to Mr. Rehm's poor health. Instead, John Rehm's certification was accepted, in lieu of testimony.

According to Rehm's certification, at the closing, respondent refused to close, unless they paid the RTF. The certification further states that, due to the Rehms' personal and financial circumstances, they believed that they had no choice but to pay the $1,949 RTF. They did so.

Fox Hills' practice of shifting the RTF to buyers resulted in civil litigation. One consolidated matter, Schaefer v. Fox Development Co., Inc., sought the return of the payment of the RTFs by more than one-hundred buyers, including the twelve present grievants.

Ultimately, Fox Hills returned $200,000 in RTFs and paid $100,000 for plaintiffs' attorney fees. Respondent testified

that Salkind was later convicted of tax evasion charges arising out of the Fox Hills development and that he was serving time in a federal penitentiary. Eleven of the within twelve grievants were made whole through the settlement. Only the DeLucas, who opted not to accept the settlement, received less: one-half of their RTF payment.

Another Morris County litigation, Lahndt v. Fox Hills Development Co., Inc., involved an unrelated Fox Hills buyer. In that transaction, when the buyer balked at the payment of the RTF, Fox Hills refused to transfer title. Lahndt then sought specific performance to force Fox Hills to close title. In addition, Lahndt sought to shift the RTF back to Fox Hills and to remove late fees imposed by Fox Hills.

The judge in that suit rendered an unreported decision, which was not made part of this record. However, his October 21, 2004 decision regarding damages was included in the record. While it does not address the RTF issue, it deals with the issues of deceit and fraud. Lahndt sought treble damages under the Consumer Fraud Act, on the basis that Fox Hills had deceived its buyers by waiting until the last minute to advise them of the RTF change. The judge specifically declined to find deceit or fraud:

> The Court finds that the wrongful conduct which forms the basis for the award of damages does not arise out of, nor result from 'any method, act or procedures declared unlawful . . .' under the [Consumer Fraud] Act. Plaintiff has not pointed to any regulation adopted under the authority of the CFA which defendant violated. Nor has he shown any decisional authority to support his argument. Viewed objectively, defendant's conduct in seeking to void the Contract was improper even though it had an arguably [sic] basis . . . The Court's ultimate rejection of defendant's justification does not amount to an unlawful commercial practice. In reliance on advice of counsel, defendant made a decision to refuse to close title. As the Court has determined, defendant's legal position was not well founded and is inconclusive. Defendant reasonably although incorrectly, believed it could refuse to close title. Defendant's conduct **does not amount to deception or fraud.** Accordingly, neither treble damages nor attorney fees and costs will be awarded. [Emphasis added]
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> [Ex.J-16a2 to 3.][8]

The DEC found respondent guilty of having violated RPC 1.2(d) for assisting Salkind in the preparation of Fox Hills closing documents that "he knew were prohibited by law." However, the DEC specifically declined to find that it was

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[8] "Ex.J" refers to a series of joint exhibits admitted into evidence in this matter.

illegal for Salkind to have shifted the RTF to the buyers, stating, "[t]o be clear, the panel's decision does not rest on any determination that it is illegal to force a buyer to pay the realty transfer fee, although we have serious doubt that the law permits this."

The DEC found that respondent violated RPC 1.2(e) (mistakenly cited as RPC 4.2(e)) and now RPC 1.4(d)), when he failed to advise Salkind of the relevant limitations on his conduct, knowing that Salkind expected assistance not permitted by the RPCs or other law.

The DEC found that, by failing to withdraw from the representation, when Salkind gave his ultimatum to collect the RTF from the buyers or he would find another attorney to do it, respondent violated RPC 1.16(a) (failure to withdraw from a representation that resulted in a violation of the RPCs or other law).

Finally, the DEC found that respondent violated RPC 8.4(c), characterizing his handling of the matter as deceitful, a failure "to alert . . . the grievants of the decision . . . to . . . shift the . . . realty transfer fee . . . immediately . . . rather than to wait until shortly before each closing to give the buyers this information." The DEC added "[h]aving

failed to include this charge as a legitimate item in the Public Offering Statement or contracts, it was wholly improper to foist these charges on these unsuspecting buyers at the last minute."

The DEC also found respondent guilty of placing "false information" in closing documents because a few of the RESPAs misidentified the seller as the party paying the RTF, "even though they were prepared by the attorneys for the buyer in those instances."[9] The DEC further found respondent's conduct "coercive and deceptive" and in violation of PREDFDA.

In aggravation, the DEC considered that respondent's conduct took place over many months, in twelve closings, and that there was ample time for him to change his mind, which he did not do. The DEC also faulted him for a perceived lack of contrition at the hearing, when maintaining his innocence.

The DEC found it a "strong" mitigating factor that respondent had no prior discipline in over forty years at the bar.

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[9] The complaint contained no information or charges related to false statements in RESPAs. As previously noted, all of the RESPAs in these transactions were prepared by the buyers' attorneys, not by respondent.

As indicated above, the DEC recommended a censure.

In its post-hearing, written summation to the DEC, the OAE sought specific findings with regard to RPC 1.2(d), arguing that "respondent had an ethical duty, imposed by RPC 1.2(d) not to counsel or assist his client's illegal, criminal or fraudulent conduct [emphasis added]. He utterly failed in that duty."

The OAE urged the imposition of a three-month to one-year suspension, likening respondent's conduct to that of two attorneys who had received three-month suspensions: one for helping to conceal assets (In re Orlow, 197 N.J. 507 (2009)) and the other for helping a client gain title to his father's house by falsely representing that the deceased father was still alive (In re Vella, 180 N.J. (2004)). The OAE also cited a one-year suspension case, In re Alum, 162 N.J. 313 (2000), where the attorney violated RPC 8.4(c) by participating in a series of real estate transactions in which the parties utilized improper "silent second" mortgages.

Upon a de novo review of the record we are unable to agree with the DEC's conclusion that respondent's conduct violated the Rules of Professional Conduct.

At the heart of this matter is the propriety of Salkind's practice of obtaining the RTF payment from the Fox Hills buyers. RPC 1.2 (d) and (e) state as follows:

> (d) A lawyer shall not counsel or assist a client in conduct that the lawyer knows is **illegal, criminal, or fraudulent,** or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.
>
> (e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct [emphasis added].[10]

Was the RTF payment shift illegal, criminal, or fraudulent? There is no suggestion in the record that it constituted criminal conduct, but was it fraudulent or illegal activity?

Respondent testified about his belief that Fox Hills' RTF payment shift was a breach of contract by Fox Hills because it was a fee to be paid by the seller. Respondent's belief may not have been unreasonable. Nothing in the public offering statement

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[10] Section (e) of the rule, in effect in 2003, was re-designated as RPC 1.4(d) on November 17, 2003, effective January 1, 2004.

or in the contract gave the buyers notice that it was their responsibility to pay the fee. They reasonably believed that such obligation remained with the seller.

But if, in respondent's view, Fox Hills was breaching its contract with the buyers, then respondent necessarily assisted his client in doing so. Was his conduct improper in any respect? Indeed, lawyers frequently assist clients in breaching their contracts. In doing so, the lawyer must advise the client of the consequences of such action, but it cannot be said that the lawyer's role in such instances is per se wrongful or fraudulent, unless the means that he used to accomplish that purpose was improper.

Fraudulent conduct is defined as "conduct involving bad faith, dishonesty, a lack of integrity, or of moral turpitude" Black's Law Dictionary, Seventh Edition, 672 (1999). Here, there was no attempt to hide the change. To the contrary, respondent was very careful to place Fox Hills' new requirement in all of his correspondence with the buyers and their attorneys. Although the OAE sought to establish that respondent purposely delayed the notices to the buyers, we find no such pattern of conduct over the course of these twelve matters. In fact, the average time between the notice and the closing was twenty-three days.

It was tied to respondent's notice from the sales office that a unit was ready for occupancy, not to a nefarious motive.

In addition, the record contains Judge MacKenzie's damages decision, which, although not binding on the disciplinary system, addressed fraud. There, the judge specifically found that, for purposes of the CFA, the fee-shifting requirement in the Lahndt closing, an identical closing, "does not arise out of, nor result from 'any method, act or procedures declared unlawful . . .' under the Act. . . . [and did] not amount to deception or fraud." Judge MacKenzie's finding illustrates that conduct that may be wrongful and in breach of contract need not be fraudulent or deceitful.

If respondent's conduct then was not criminal or fraudulent, was it illegal? We found no case law prohibiting the shifting of the RTF payment obligation from the seller to the buyer. Respondent, too, testified that he researched the issue before agreeing to conduct the closings on Fox Hills' behalf, but found no case law prohibiting the shifting of the RTF payment to the buyer. He explained, at the ethics hearing, that he had viewed the matter strictly as a civil litigation problem and had advised Salkind that imposing the RTF payment on buyers would constitute a breach of contract. He also warned his client

to expect certain and expensive civil litigation from the buyers.

Neither the PREDFDA statute nor the implementing regulations prohibit the shifting of the RTF payment to the buyer. In fact, a court has held that, if the seller does not pay the RTF, then the buyer must do so (and seek reimbursement from the seller), as a prerequisite to recording the deed. In Soldoveri v. Director, Division of Taxation, 3 N.J.Tax 392, 397 (1981), the tax court held that "payment of the realty transfer fee is a prerequisite to recording and that N.J.S.A. 46:15-7 merely fixes liability for the fee as between grantor and grantee."

Yet, in its summation, the OAE argued that the RTF change was illegal because it violated PREDFDA. If true, are all violations of civil statutes necessarily illegal? The OAE thought so, noting that Salkind had been fined for the violation.

True enough, Salkind was fined under PREDFDA. The undated notice of violation assessed an "administrative penalty" for not one, but several deficiencies: Fox Hills' failure to file a required audit of funds; its failure to provide a required budget for reserves; lack of proof of proper bonding; and

failure to report the RTF shift and to incorporate that change in Fox Hills' offering materials. The fines were strictly administrative, not criminal, in nature. Moreover, the fine for the RTF was imposed not because the RTF shifting to the buyer was illegal, but because Fox Hills had failed to report that change and to incorporate it in its public offering materials.

Even if we were to accept the OAE's illegality argument for a moment, the Fox Hills deficiency matter with the DCA was at an early stage, "on appeal," so to speak, respondent having sent the DCA a March 23, 2004 letter disputing the alleged violations and requesting a hearing. Almost two years later, on January 23, 2006, respondent withdrew from the representation. Another law firm took over before the DCA hearing. There is no final DCA determination in the record from which we could attach guilt to Fox Hills, let alone respondent.

We find no authority that suggests that shifting the RTF obligation from the seller to the buyer was illegal, in the sense that doing so violated a statute. Therefore, because respondent's conduct was not criminal, fraudulent or illegal under the facts of this case, we determine to dismiss the charges that he violated RPC 1.2(d) and (e) [since January 1, 2004, RPC 1.4(d)].

This is to be distinguished from the question of whether the manner in which the fee-shifting was accomplished was improper. Was Salkind's fee-shifting accomplished by coercion? Stated differently, did the grievants really have no choice but to pay the RTF, as they claimed? If so, would the conduct fall under RPC 8.4(c), because it was either dishonest or deceitful?

A contract is not legally valid if signed under coercion, defined as "compulsion by physical force or threat of physical force" (Black's Law Dictionary, Seventh Edition 252 (1999)). Economic coercion is the "improper use of economic power to compel another to submit to the wishes of the one who yields it" Ibid. Obviously, respondent did not use a threat of physical force against the buyers.

At first blush, it appears that Salkind and Fox Hills used their economic leverage over the buyers to force them to pay the RTF, which the buyers otherwise would not have done because it was the seller's obligation to pay it.

By the time the grievants' Fox Hills units were ready to close, they had virtually doubled in value. The grievants complained that they had no choice but to pay the RTF because they had already sold their houses, had nowhere else to go, and had waited through lengthy delays, through no fault of their

own, in Fox Hill's delivery of their units. They also worried that, if they canceled their contracts, they would lose the funds expended for upgrades. But the buyers also knew that canceling their contracts would leave Salkind to profit from the significant appreciation of their units.

To find that the grievants had "no choice" but to close on their units would not be accurate. It should be remembered that, with the exception of the Wolkenbergs, all of the grievants had engaged attorneys before their closings. Those attorneys presumably apprised them of their options, including (like Lahndt) filing an order to show cause for specific performance. The attorneys may have advised them that the expedient thing to do was to close now and sue Fox Hills later.

So, we are left with a respondent who used no force against the buyers and with buyers who were not without legal remedies, if they terminated their contracts. Understandably, they took the path of least resistance, which was also the least expensive route, and decided to pay the RTF, accept title, and sue Fox Hills later. Under those circumstances, we cannot conclude that respondent acted dishonestly by coercing them into completing the transactions.

Did respondent violate RPC 8.4(c) in any way by misrepresenting the transactions to the buyers? Grievant Wolkenberg testified that respondent told him, at the closing, that the RTF was the buyer's responsibility. Respondent vehemently denied having made that statement. He insisted that all buyers were told the same thing – that it was his client's position that the buyer would pay the RTF or he was not authorized to close. Respondent's testimony and Wolkenberg's recollections are in clear contrast. Nevertheless, there is additional evidence, proffered at the hearing for another purpose, that inures to respondent's benefit on this issue.

In a letter to respondent from Bobrow, the buyer's attorney in the Theiller matter, Bobrow quoted respondent as having said, at the Theillers' closing, that, if Bobrow left behind a letter from his clients, disagreeing with their payment of the RTF, then respondent was "not authorized to close and . . . the contract would be canceled." Those words, offered by an adversary in a different, but related matter, are entirely consistent with respondent's version of his statements to the buyers at their closings. We note that no other grievant claimed that respondent had said that the RTF was the buyer's responsibility. Furthermore, there is nothing in this record to

cast doubt on respondent's credibility. Thus, for lack of clear and convincing evidence that respondent lied to Wolkenberg about the RTF, we find no misrepresentation in this context.

Another area of respondent's actions might have implicated RPC 8.4(c) as well, with regard to dishonesty or deceit. The DEC found that respondent waited until the last possible minute to alert the buyers that they were to pay the RTF. We find no such pattern. At one end of the spectrum, the Goldbergs received notice just four days prior to their closing. At the other end, the Starks received notice fifty-three days before their closing. The average notice was sent twenty-three days before the closing — hardly at the last minute. It is more likely that, as respondent consistently testified, he notified the buyers about the RTF as soon as he became involved in a matter, that is, when Fox Hills' sales office advised him that a unit was ready to close. We find that the record does not establish to a clear and convincing standard that respondent acted dishonestly or deceitfully with the buyers.

The complaint also charged respondent with violating RPC 1.16(a) when he failed to turn down or terminate the Fox Hills representation, once that representation violated the Rules of Professional Conduct or other law. This rule would apply only if

we found respondent guilty of having violated RPC 1.2(d) or (e). Having dismissed those charged violations for the reasons stated above, we dismiss the RPC 1.16(a) charge as well.

Finally, in the Stark and Ross matters, respondent was charged with having communicated directly with the buyers, knowing that they were represented by counsel, in violation of RPC 4.2. The DEC correctly dismissed those charges. In fact, the OAE abandoned the charge in its summation to the DEC.

We cannot help the lingering sense that respondent's conduct on behalf of his client was unseemly. However, we find no clear and convincing evidence in this record that he violated any of the charged RPCs. He followed his client's improper instructions to unilaterally require the buyers to pay a fee at closing that was Fox Hills' responsibility. Salkind correctly strategized that, given all of the delays in delivering the units and the substantial increase in their values, the buyers would not cancel their contracts, but would pay the RTF.

As unsavory as respondent's involvement might have been in these matters, there is no clear and convincing evidence that he violated the charged rules. We, therefore, determine to dismiss the complaint in its entirety.

Vice-Chair Frost and Member Yamner recused themselves. Member Doremus did not participate.

Disciplinary Review Board
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Peter Rosen
Docket No. DRB 10-413

Argued: March 17, 2011

Decided: June 14, 2011

Disposition: Dismiss

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman				X		
Frost					X	
Baugh				X		
Clark				X		
Doremus						X
Stanton				X		
Wissinger				X		
Yamner					X	
Zmirich				X		
Total:				6	2	1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel