SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-054
District Docket No. XIV-08-029E

IN THE MATTER OF	
WILLIAM E. GAHWYLER	
AN ATTORNEY AT LAW	

Decision

Argued: May 19, 2011

Decided: August 2, 2011

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

Kevin L. Bremer 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 filed by Special Master Bennett Wasserstrum. The complaint charged respondent with violating ten Rules of Professional Conduct, in connection with a real estate transaction. Specifically, the complaint charged respondent with violating RPC 1.2(d) (assisting a client in conduct the attorney

knows to be illegal, criminal, or fraudulent), RPC 1.5(b) (failure to communicate the basis or rate of his fee in writing), RPC 1.7(a)(1) (concurrent conflict of interest where the representation of one client will be directly adverse to another), RPC 1.7(a)(2) (concurrent conflict of interest where there was a significant risk that the representation of one or more clients would be materially limited by the attorney's responsibilities to another client, former client, third party or the attorney), RPC 1.15(b) (failure to promptly deliver funds to a client or third party), RPC 3.3(a)(1) (knowing false statement of material fact to a tribunal), RPC 4.1(a) (knowing false statement of material fact to a third party), RPC 8.4(b) (criminal act that adversely reflects on the attorney's honesty, trustworthiness or fitness as a lawyer), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice).

The special master recommended a reprimand. We determine to impose a strong censure.

Respondent was admitted to the New Jersey bar in 1990. He has no history of discipline.

The facts are as follows:

Sean and Nicole O'Brien were in the process of losing their house in foreclosure. They were contacted by Frederick Cleveland, who arranged financing through his business, to save their house from foreclosure. The O'Briens and Cleveland agreed to transfer title to Cleveland for $808,000. The O'Briens, however, would remain in the house and pay Cleveland $5,000 per month for two years, in an attempt to establish a "track record" to demonstrate to a new lender that they could afford the house. They could then buy back the house for approximately $650,000.

After the O'Briens accepted Cleveland's proposal, he filed a notice of settlement with the county clerk's office. In the meantime, however, the O'Briens had negotiated a superior deal with another "foreclosure rescuer." They entered into a contract to sell their house to the "rescuer" for $800,000.

The O'Briens gave that contract to their bankruptcy attorney, who moved for and obtained the approval of the sale from the bankruptcy court. However, because Cleveland had recorded a notice of settlement, the O'Briens could not convey clear title. The second transaction was then abandoned and the deal with Cleveland was revived. No one advised the bankruptcy court or the trustee that the approved sale had not taken place.

Respondent was not involved in the negotiation of the agreement between Cleveland and the O'Briens. He acted as settlement agent at Cleveland's request. He had represented Cleveland once in the past, but the representation was not ongoing.

In his amended answer to the complaint, respondent stated that he orally advised the parties of the potential conflict of interest between them. Moreover, respondent claimed that, at the time of the representation, he was unaware that the parties' interests, beyond their roles as buyer and seller of real estate, were adverse.[1]

Although respondent represented both parties at the closing, he failed to memorialize the rate or basis of his fee. He did so orally only. He testified that, to his knowledge, no attorney utilized a writing for a residential real estate fee. According to the HUD-1, respondent received $900 from borrower's funds and $900 from sellers' funds.

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[1] In a related bankruptcy court proceeding, Sean O'Brien stated that he did not consider respondent to be his attorney and never sought advice from him. O'Brien did not realize that respondent had charged him a legal fee.

The lender's closing instructions were as follows:

> Chase Bank USA, N.A. has verified a down payment of $161,600 and sales price of $808,000.00. Any variance in these figures or any other credits shown on the HUD-1, line 201-209, unless otherwise noted, must have written approval by Chase Bank USA, N.A. prior to closing the loan. If you, as the Settlement Agent, have actual knowledge that the source of funds is other than as described in the Closing Instructions, loan proceeds may not be disbursed and the mortgage lender must be contacted for further instructions.
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> [Ex.3.]

Line 303 of the HUD-1 form stated that Cleveland provided $187,978.91 in cash at the closing. Line 603 reflected that the O'Briens received $287,516.17 from the sale. Respondent's trust account records, however, revealed receipts and disbursements that varied from those on the HUD-1. Specifically, the O'Briens received only $15,000 from Cleveland, rather than $287,516.17. Similarly, Cleveland did not *pay* $187,978.91, but *received* $84,539.14.[2] Thus, the information on the HUD-1 that respondent prepared and

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[2] Line 501 reflected a $1,000 down payment that was not actually paid. Respondent did not know at the time of the closing that the funds had not been paid. The special master agreed with respondent's assertion that verification of that payment was the job of the lender and found no misconduct by respondent on that score.

submitted to Chase Bank was materially different from respondent's disbursement ledger.

Respondent admitted that the HUD-1 was inaccurate and that he did not contact the lender for permission to make disbursements other than as reflected on the HUD-1. He testified that the funds were disbursed according to the terms of the transaction, as explained to him. He did not disclose those terms to the lender. He acknowledged that certifying the accuracy of the HUD-1 was wrong.

At the ethics hearing, the following exchange took place between the presenter and respondent:

> Q. When you saw that Mr. Cleveland was not bringing to the table the amount that was shown on the HUD-1, as him bringing to the table, and you saw that the O'Briens were not getting the $287,000, you had to know that was wrong, didn't you?
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> A. Well, yes I do realize that it was wrong, and that's my mistake in allowing the transaction to move forward.
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> Q. Why did you go ahead with it?
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> A. That's the way they had negotiated it.
>
> Q. Why did you go ahead with it though as the attorney conducting that closing, why did you go ahead with it?
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> A. Retrospecting, that was a very stupid thing to do, I wish I could turn back time,

but obviously I can't do that, and made a big mistake.

[T55-4 to 19.][3]

At the closing, respondent became aware that "there was potentially an active bankruptcy" involving the O'Briens.[4] He was unable to recall with certainty what was said, but "[t]hey probably said something that they thought they owed some money to the bankruptcy court or trustee." He asked the O'Briens for the name of their bankruptcy attorney or any letters from the bankruptcy court, which the O'Briens were unable to provide. Also, before continuing with the closing, respondent contacted the title insurance company, which assured him that it had not uncovered any active bankruptcy proceedings and saw no obstacles to the closing. Respondent conceded that, in hindsight, he

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[3] "T" refers to the transcript of the hearing before the special master on September 29, 2010.

[4] Respondent was asked about his knowledge of a then pending motion before the bankruptcy court, seeking authorization to close title. Respondent replied that he was unaware of any filings before the bankruptcy court at that time.

"should have halted the closing and waited for additional documentation or conducted a more diligent search.[5]

The O'Briens wanted to be certain that Cleveland would be responsible for any funds owed in the bankruptcy. To that end, at the closing, respondent drafted a document reflecting the understanding between the parties. The document, executed by the parties, stated that, if the O'Briens were

> subjected to any complications and or expenses arising from a Chapter 13 Bankruptcy filed by them prior to [the closing date], Frederick Cleveland agrees to pay any and all fees associated with said bankruptcy including but not limited to paying off the balance due to complete the Chapter 13 Bankruptcy plan. Further, Frederick Cleveland will pay any and all fees up to but not in excess of $46,000.00.
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> [Ex.7.]

Respondent did not escrow any funds for Cleveland's potential obligation. He testified that there was no discussion of any funds being escrowed, which, he added, would have been reflected in the written agreement.

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[5] Respondent testified that there were two dismissed bankruptcy proceedings and that he thought that one of those might have been at issue. He now realizes that funds could not be due from a dismissed proceeding.

Following the closing, Sean O'Brien contacted the Chapter 13 trustee and confirmed that over $46,000 was needed to satisfy his plan. Although O'Brien requested the funds from Cleveland, no payment was forthcoming. Moreover, in the interim, although the O'Briens paid Cleveland $5,000 per month, Cleveland eventually defaulted on the mortgage loan, which prompted foreclosure proceedings.

In his amended answer, respondent admitted that he violated RPC 1.2(d), RPC 1.5(b), RPC 1.7(a)(1), RPC 1.7(a)(2), RPC 3.3(a)(1), and RPC 4.1(a). It is not clear whether he conceded a violation of RPC 8.4(c). He denied violating RPC 1.15(b), RPC 8.4(b), and RPC 8.4(d).

As to RPC 1.2(d), the special master found that the financial information on the HUD-1 was "materially false," calling respondent's misrepresentations on the form "reckless." The special master found that "Respondent falsely certified disbursements and funding to both parties who had conflicting requirements and expectations at the closing" and that "it should have been obvious at the time of preparation of the documents that the information being submitted and relied upon by the Lender was false." In the special master's view, the issue of a possible bankruptcy court order, requiring payment of $46,000 from the sale, should have

halted the proceedings, pending further inquiry. Moreover, he noted, knowing that the O'Briens were without counsel and that they had entered into an agreement with Cleveland to buy back the property, respondent should have advised the O'Briens that Cleveland was obtaining all of the net cash proceeds and that the principal amount needed for the repurchase of the property was greater than the O'Briens' mortgage liability.

With regard to RPC 1.5(b), the special master found that respondent violated that rule by not setting forth, in writing, the basis or rate of the fee charged to the O'Briens and Cleveland.

As to the charged violation of RPC 1.7(a)(1), the special master stated:

> The unrepresented sellers executed documents which were in fact fraudulent, they did not receive $287,516.17 as stated in the HUD-1, they were not explained the apparent conflict between what the purchaser had refinanced and the greater amount needed to repurchase under their arrangement with the purchaser and the Bankruptcy Order requiring $46,000.00 to be transferred to the Bankruptcy Trustee at the closing of title.
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> [SMR8].[6]

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[6] SMR refers to the special master's report, dated December 10, 2010.

The complaint also charged respondent with violating RPC 1.7(a)(2). In finding that respondent had violated that rule, the special master pointed to the following facts:

> 1. The knowledge of a potential responsibility of $46,000 from the Seller-O'Brien under a Bankruptcy Order was present and OAE-2 [the document that respondent prepared during the closing] was created.
> 2. Even if the Respondent claims he was not sure of the existing Bankruptcy Order, the Respondent did not escrow the $46,000 until resolution of this issue. All funds were released to the Purchaser-Cleveland.
> 3. The Seller-O'Briens should have received $287,000 from the closing but only received $15,000.00.
> 4. Cleveland should have paid $187,000.00 at the closing. Yet, he paid nothing and left the closing with $85,000.00 in his pocket;
> 5. Although described by the Respondent as a lease/buy agreement between the parties, the sellers were left in a financial situation in which the new Chase Bank debt was greater than their prior mortgage. Although the Respondent was not part of these pre-closing discussions, the Respondent had an obligation to stop the closing since it was apparent that the increased principal balance would have to be paid in event of a "buy-back." The purchaser received monies.
> 6. The Respondent had a direct obligation to the lender Chase Bank to inform them that the HUD-1 and the actual monies taken in and disbursed by the Respondent were false. At no point during the closing did the Lender become aware that the actual monies shown were false.
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> [SMR9.]

According to the special master respondent violated RPC 1.7(a)(2) by "permitting" a concurrent conflict of interest between the parties to the transaction and the lender.

As to both RPC 1.15(b) and RPC 3.3(a)(1), the special master again pointed to the false statements on the HUD-1, noting that the lender did not have information about what was actually occurring in the transaction in order to make "an informed decision."[7] The special master did not explain why the false statements violated RPC 1.15(b).

Similarly, the special master found that respondent violated RPC 4.1(a), noting the "gross disparity" between the receipts and disbursements shown on the HUD-1 and respondent's actual receipts and disbursements. The special master noted that the settlement statement did not reflect the sale/lease back/buy back option and that respondent never advised the lender that the HUD-1 receipts and disbursements were inaccurate.

The special master also found that respondent violated RPC 8.4(b). In his view, respondent's violations of the RPCs.

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[7] The bankruptcy judge found that respondent knew of and participated in Cleveland's scheme to defraud the O'Briens and held respondent liable for damages to the O'Briens.

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[7] The bankruptcy judge found that respondent knew of and participated in Cleveland's scheme to defraud the O'Briens and held respondent liable for damages to the O'Briens.

> emanated from a single real estate transaction which produced false documents perpetuating a real estate scheme unknown to a financial lender and in violation of the requirements of an outstanding Bankruptcy Court Order. I find that the Respondent violated RPC 8.4(b) in that his actions are contrary to the standards required of an attorney who is handling a real estate matter and presents an adverse image to the legal profession.
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> [SMR11.]

The special master further found that respondent violated RPC 8.4(c), when he misrepresented the "financial facts to the Lender, approving the final funding which furthered the scheme of the purchaser and seller." The special master concluded that respondent's preparation of the rider to the contract, which identified the bankruptcy court order, evidenced his "actual knowledge of the Order which required him to take immediate action – stop the closing." The special master rejected respondent's denial of knowledge of the bankruptcy order as incredible, in light of the rider to the contract.

Finally, the special master found that respondent violated RPC 8.4(d) "by preparing false and misleading documents (HUD-1) and by his failure to investigate the Bankruptcy filings of seller but prepared a document which did not effectuate the

requirements of the Bankruptcy Court Order effecting the proceeds of sale."

In assessing the appropriate measure of discipline for this respondent, the special master stated:

> The Standing Master has carefully considered and reviewed the testimony and evidence. The Respondent's admissions are [sic] set forth in the second responsive pleading filed by his attorney set forth ethical violations in the handling of the real estate transaction.
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> . . . .
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> After review of the records presented, the Standing Ethics Master finds that the conduct of the Respondent is unethical, supported by clear and convincing evidence as to RPC violations. The Standing Ethics Master recommends that the Respondent be disciplined by a reprimand for his violations of the RPCs. The Standing Ethics Master has reviewed the case law submitted by the parties with respect to the imposition of penalties and/or sanctions. Although the Respondent's initial responsive pleadings did not indicate his awareness of the RPC violation, his second responsive answer indicates his acceptance of that violations [sic]. The Respondent's testimony indicated that he was now aware of his Ethical violations. His violations were part of one real estate closing. The Respondent submitted into evidence statements and commentaries as to his community involvement, etc. in mitigation of any sanctions and penalties. The records submitted by the OAE do not indicate any prior Ethics violations. The Standing

> Ethics Master is also aware that case law submitted as to penalties and sanctions involving the suspension of a law license speaks to egregious actions and/or multiple violations, involving numerous transactions or the attorney receiving financial gain but cannot find a basis for an enhancement of the penalties.
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> [SMR14-SMR15.]

In recommending a reprimand, the special master relied on two cases, In re Gale, 195 N.J. 1 (2007) (reprimand), and In re Frohling, 205 N.J. 6 (2011) (censure). Gale stemmed from the attorney's participation in five fraudulent real estate transactions (property flips) in which she acted as the closing attorney. Although Gale prepared closing documents with false information, she had no actual knowledge of the scheme but, rather, was an unwitting participant. In imposing only a reprimand, we considered Gale's inability to differentiate good and evil due to depression and health concerns, her naiveté and trusting nature, her lack of benefit from the transaction, and her prior unblemished career of twenty-five years.

Frohling also stemmed from a series of "flip transactions" in which the attorney executed HUD-1 forms with falsified disbursements. Frohling argued that he was inexperienced in real estate transactions and did not realize that the documents

were part of a scheme to mislead the lender. Like the attorney in Gale, Frohling presented strong mitigating factors. He was censured because, unlike Gale, he had been previously disciplined (reprimand).

The special master also recommended that respondent be required to take four hours of classes on real estate transactions, two of which should focus on maintaining attorney financial records. In addition, for one year, respondent's handling of real estate or commercial transactions should be supervised by a proctor.

Upon a de novo review of the record, we are satisfied that the special master's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence.

We are unable to agree, however, with the special master's finding that respondent violated RPC 1.15(b) (failure to promptly disburse funds) and RPC 3.3(a)(1) (misrepresentation to a tribunal). As to the former, the record does not demonstrate what funds respondent failed to turn over and to whom. The parties at the closing agreed to the disbursements. Misrepresentations on the HUD-1 aside, there is no indication that respondent withheld funds that should have been disbursed. The alleged violation of RPC 1.15(b) is, thus, dismissed.

As to RPC 3.3(a)(1), in finding a violation of the rule, the special master pointed to respondent's misrepresentations on the HUD-1. The lender, however, is not a tribunal.

The complaint appears to base the violation of RPC 3.3(a)(1) on respondent's representation to the bankruptcy court that he was unaware of the pending bankruptcy at the closing. Specifically, the complaint states:

> 54. On April 28, 2008, the sellers' attorney filed a motion seeking to have Respondent and Cleveland disgorge and pay over to the Bankruptcy Trustee the funds they received at the closing that should have been paid to the Chapter 13 Trustee. . .
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> 55. On May 7, 2008, Respondent submitted opposition to the motion in which he stated that the debtors had failed to disclose the pending bankruptcy at the closing . . .
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> 56. That statement by respondent was false and he knew it to be false at the time he made it.
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> [C¶54-C¶56.][8]

Although suspicions abound, the evidence is not clear and convincing that respondent knew that there was an ongoing bankruptcy proceeding as of the day of the closing. Respondent

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[8] C refers to the complaint, dated September 25, 2009.

testified that he contacted the title company and was assured that there were no active bankruptcies. His testimony was unrefuted.[9] We must then assume that he received information from a reliable source that there was no pending bankruptcy proceeding, when the closing took place. The O'Briens' insistence on the rider to the contract to protect themselves, in case of future difficulties, is insufficient evidence that respondent had actual knowledge of the bankruptcy, at the time that he drafted the agreement. Moreover, although the bankruptcy court judge found that respondent knew of and participated in Cleveland's scheme to defraud the O'Briens, we have a higher standard of proof, which was not met by this record. The alleged violation of RPC 3.3(a)(1) is, therefore, dismissed.

As to the rules that respondent did violate, it is clear that he did not comply with the requirements of RPC 1.5(b), at least as to the O'Briens. He conceded that the parties were told of his fee arrangement only orally. Because, however, he had represented Cleveland in a prior real estate transaction, we

[9] The record does not indicate why no one from the title company was called to testify or asked to submit a certification proving or disproving respondent's contention.

do not find a violation of RPC 1.5(b) as to Cleveland. As to the O'Briens, our conclusion differs. Respondent had not previously represented them and, therefore, had to convey to them the basis or rate of his fee, in writing.

With regard to RPC 1.7, respondent testified that the O'Briens and Cleveland had already negotiated the terms of their agreement, prior to his involvement in the matter. Had he been involved in the negotiations, he would have violated Advisory Committee on Professional Ethics Opinion 243, 95 N.J.L.J. 1145 (November 9, 1972), which prohibits dual representation before the execution of a real estate contract. Nevertheless, he violated RPC 1.7(b), which requires informed consent from the parties, confirmed in writing, after full disclosure and consultation. Respondent did not do so.[10] We find, thus, that he violated RPC 1.7(a)(1) and (b)

Respondent's most serious transgressions were his misrepresentations on the HUD-1. When the numbers on the HUD-1

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[10] Of note is respondent's testimony that Sean O'Brien presented himself as a "bright," articulate business owner, who had "fallen on some hard times." The bankruptcy court judge referred to O'Brien as "a sophisticated, educated and experienced business person," with a degree in accounting.

did not "add up," respondent should have stopped the closing. He did not do so, thereby misleading the lender. His conduct in this regard violated RPC 1.2(d), RPC 4.1(a), RPC 8.4(b), and RPC 8.4(c).[11] The misrepresentations led to additional litigation in a bankruptcy court proceeding between the O'Briens, Cleveland, and respondent, causing the waste of judicial resources, a violation of RPC 8.4(d).

The discipline imposed for misrepresentations on closing documents, often accompanied by a violation of the conflict of interest rules, has ranged from a reprimand to a term of suspension, depending on the seriousness of the conduct, the presence of other ethics violations, the harm to the clients or third parties, the attorney's disciplinary history, and other

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[11] As to RPC 8.4(b), the HUD-1 form says: "[i]t is a crime to knowingly make false statements to the United States on this or any other similar form." It matters not that there was no criminal finding against respondent. In re Gallo, 178 N.J. 115, 121 (2002) (the scope of disciplinary review is not restricted, even though the attorney was neither charged with nor convicted of a crime). A violation of RPC 8.4(b) may be found even in the absence of a criminal conviction or guilty plea. In re McEnroe, 172 N.J. 324 (2002). There, we declined to find a violation of RPC 8.4(b) because the attorney had not been charged with the commission of a criminal offense. In the Matter of Eugene F. McEnroe, DRB 01-154 (January 29, 2002) (slip.op. at 14). The Court disagreed and found that the attorney's conduct violated RPC 8.4(b).

mitigating or aggravating factors. See, e.g., In re Mulder, 205 N.J. 71 (2011) (reprimand for attorney who certified that the RESPA that he prepared was a "true and accurate account of the funds disbursed or to be disbursed as part of the settlement of this transaction;" specifically, the attorney certified that a $41,000 sum listed on the RESPA was to satisfy a second mortgage; in fact, there was no second mortgage encumbering the property; the attorney's recklessness in either making or not detecting other inaccuracies on the RESPA, on the deed, and on the affidavit of title were viewed as aggravating factors; mitigating circumstances justified only a reprimand); In re Spector, 157 N.J. 530 (1999) (reprimand imposed on attorney who concealed secondary financing to the lender through the use of dual RESPA statements, "Fannie Mae" affidavits, and certifications); In re Sarsano, 153 N.J. 364 (1998) (attorney received a reprimand for concealing secondary financing from the primary lender and preparing two different RESPA statements); In re Blanch, 140 N.J. 519 (1995) (reprimand imposed on attorney who failed to disclose secondary financing to a mortgage company, contrary to its written instructions); In re Agrait, 171 N.J. 1 (2002) (reprimand for attorney who, despite being obligated to escrow a $16,000 deposit shown on a RESPA, failed to verify it

and collect it; in granting the mortgage, the lender relied on the attorney's representation about the deposit; the attorney also failed to disclose the existence of a second mortgage prohibited by the lender; the attorney' misconduct included misrepresentation, gross neglect, and failure to communicate to the client, in writing, the basis or rate of his fee); In re Soriano, N.J. (2011) (censure for attorney who assisted a client in a fraudulent real estate transaction by preparing and signing a RESPA statement that misrepresented key terms of the transaction; the attorney also engaged in a conflict of interest by representing both the sellers and the buyers and failed to memorialize the basis or rate of his fee; the attorney had received a reprimand for abdicating his responsibilities as an escrow agent in a business transaction, thereby permitting his clients (the buyers) to steal funds that he was required to hold in escrow for the purchase of a business, and for misrepresenting to the sellers that he held the escrow funds); In re Frohling, supra, 205 N.J. 6 ((strong) censure for an attorney who in three "flip" real estate transactions falsely certified on the settlement statements that he had received the necessary funds from the buyers and that all funds had been disbursed as represented on the statements; the attorney's

misrepresentations, recklessness, and abdication of his duties as closing agent facilitated fraudulent transactions; the attorney also engaged in conflicts of interest by representing both parties in the transactions and was found guilty of gross neglect and failure to supervise a nonlawyer employee; prior reprimand); In re Khorozian, 205 N.J. 5 (2011) (censure imposed on attorney who represented the buyer in a fraudulent transaction in which a "straw buyer" bought the seller's property in name only, with the understanding that the seller would continue to reside there and would buy back the property after one year; the seller was obligated to pay a portion of the monthly carrying charges; the attorney prepared four distinct HUD-1 forms, two of which contained misrepresentations of some sort, such as concealing secondary financing or misstating the amount of funds that the buyer had contributed to the acquisition of the property; aggravating factors included the fact that the attorney changed the entries on the forms after the parties had signed them and that he either allowed his paralegal to control an improper transaction or knowingly participated in a fraud and then feigned problems with recall of the important events and the representation); In re Scott, 192 N.J. 442 (2007) (censure for attorney who failed to review the

real estate contract before the closing; failed to resolve liens and judgments encumbering the property; prepared a false HUD-1 statement misrepresenting the amount due to the seller, the existence of a deposit, the receipt of cash from the buyer, and the amount of her fee, which was disguised as disbursements to the title company; prepared a second HUD-1 statement listing a "Gift of Equity" of $41,210.10; issued checks totaling $20,000 to the buyer and to the mortgage broker, based on undocumented loans and a repair credit, without obtaining the seller's written authorization; failed to submit the revised HUD-1 to the lender; failed to issue checks to the title company, despite entries on the HUD-1 indicating that she had done so; misrepresented to the mortgage broker that she was holding a deposit in escrow; and failed to disburse the balance of the closing proceeds to the seller; violations included RPC 1.1(a) (gross neglect), RPC 1.15(b), RPC 4.1(a), and RPC 8.4(c); the attorney had received a prior admonition and a reprimand); In re De La Carrera, 181 N.J. 296 (2004) (three-month suspension in a default case in which the attorney, in one real estate matter, failed to disclose to the lender or on the RESPA the existence of a secondary mortgage taken by the sellers from the buyers, a practice prohibited by the lender; in two other matters, the attorney disbursed funds

prior to receiving wire transfers, resulting in the negligent invasion of clients' trust funds); In re Nowak, 159 N.J. 520 (1999) (three-month suspension for attorney who prepared two settlement statements that failed to disclose secondary financing and misrepresented the sale price and other information; the attorney also engaged in a conflict of interest by arranging for a loan from one client to another and representing both the lender (holder of a second mortgage) and the buyers/borrowers); In re Swidler, 205 N.J. 260 (2011) (six-month suspension imposed in a default matter; in a real estate transaction in which the attorney represented both parties without curing a conflict of interest, the attorney acted dishonestly in a subsequent transfer of title to property; specifically, in the first transaction, the buyer, Rai, gave a mortgage to Storcella, the seller; the attorney, who represented both parties, did not record the mortgage; later, the attorney represented Rai in the transfer of title to Rai's father, a transaction of which Storcella was unaware; the attorney did not disclose to the title company that there was an open mortgage of record; the attorney was also guilty of grossly neglecting Storcella's interests, depositing a check for the transaction in his business account, rather than his trust account, and failing to cooperate with disciplinary

authorities; prior reprimand and three-month suspension); In re Fink, 141 N.J. 231 (1995) (six-month suspension for attorney who failed to disclose the existence of secondary financing in five residential real estate transactions, prepared and took the acknowledgment on false RESPA statements, affidavits of title, and Fannie Mae affidavits and agreements, and failed to witness a power of attorney); In re Alum, 162 N.J. 313 (2000) (one-year suspended suspension for attorney who participated in five real estate transactions involving "silent seconds" and "fictitious credits"; the attorney either failed to disclose to the primary lender the existence of secondary financing or prepared and signed false RESPA statements showing repair credits allegedly due to the buyers; in this fashion, the clients were able to obtain one hundred percent financing from the lender; because the attorney's transgressions had occurred eleven years before and, in the intervening years, his record had remained unblemished, the one-year suspension was suspended); In re Newton, 157 N.J. 526 (1999) (one-year suspension for attorney who prepared false and misleading RESPA statements, took a false jurat, and engaged in multiple conflicts of interest in real estate transactions); and In re Frost, 156 N.J. 416 (1998) (two-year suspension for attorney who prepared misleading closing documents, including the

note and mortgage, the Fannie Mae affidavit, the affidavit of title, and the settlement statement; the attorney also breached an escrow agreement and failed to honor closing instructions; the attorney's ethics history included two private reprimands, a three-month suspension, and a six-month suspension).

Viewed against the above precedent, respondent's conduct closely resembles that of the attorneys who received a censure. We are aware that the consequences of respondent's misconduct were serious. Cleveland defaulted on the mortgage on a home that the O'Briens intended to buy back. Judicial resources were wasted on an unnecessarily prolonged bankruptcy proceeding.

There is, however, some mitigation in this case. Respondent has been a member of the New Jersey bar since 1990; he has an unblemished record of over twenty years; his civic involvement is noteworthy; and his intentions were not ill-founded. There was no benefit to him, other than his fee.

In view of the foregoing, we are persuaded that a censure is sufficient discipline for respondent's ethics misdeeds. We caution him, however, that this is a strong censure and that future misconduct will be met with more severe discipline.

The special master suggested that respondent be required to take continuing education courses in real estate and

recordkeeping. As to the latter, there is no indication in the record that respondent's recordkeeping is flawed. The course is, therefore, unnecessary. As to the former, respondent testified that, prior to the O'Brien/Cleveland transaction, he had completed "hundreds" of closings. This is the first one that has brought him before us, in his twenty-plus years of practice. We, therefore, find no need for him to complete real estate courses or to be supervised by a proctor. From his testimony, it appears that he has learned his lesson.

Member Stanton abstained.

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

Disciplinary Review Board
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 William E. Gahwyler
Docket No. DRB 11-054

Argued: May 19, 2011

Decided: August 2, 2011

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Abstained	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton					X	
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			8		1	

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel