SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-312
District Docket No. XIV-09-0404E

IN THE MATTER OF	:
CARL D. GENSIB	:
AN ATTORNEY AT LAW	:

Decision

Argued: November 17, 2011

Decided: December 22, 2011

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

David Dugan 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 disciplinary stipulation between respondent and the Office of Attorney Ethics (OAE). Respondent admitted that he was guilty of violating RPC 1.2(d) (counseling a client in conduct the attorney knows is illegal, criminal or fraudulent), RPC 1.5(b) (failure to set forth the basis or rate of his fee in writing), RPC 1.7(a)(1) (concurrent

conflict of interest where the representation of one client is adverse to another client), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The OAE recommended that respondent receive either a censure or a three-month suspension. We determine that a six-month suspension is the appropriate level of discipline in this case.

Respondent was admitted to the New Jersey bar in 1990. In 2005, he was reprimanded for improperly acknowledging the signatures of his clients on several documents in connection with a real estate closing, when they had not appeared before him. In addition, he knew that one client had signed the other's name. In re Gensib, 185 N.J. 345 (2005).

In 2011, respondent received a censure for failing to advise his real estate clients that he was inflating the cost of their title insurance to cover possible later charges from the title insurance company and for failing to memorialize the basis or rate of his fee. In re Gensib, 206 N.J. 140 (2011).

In this matter, respondent stipulated that, in five real estate closings where he acted as the settlement agent, he knowingly and falsely certified that the HUD-1 statements that he had prepared for each closing was an accurate accounting of

the funds deposited and disbursed in connection with each closing. The details of the five closings are as follows:

I. The Buono to Brody Transaction

Gina Brody entered into a contract to purchase property from Gregory A. Buono and Taressa Buono. The purchase price was $689,500. Respondent represented Brody, purportedly charging her $1,050. Although respondent had not regularly represented Brody, he did not communicate the basis or rate of his fee to her, in writing, before or within a reasonable time after commencing the representation.

Brody obtained a first and second mortgage loan from Pennsylvania Business Bank, in the amounts of $482,650 and $137,900, for a total of $620,500. On April 4, 2006, the lender wired the sums of $473,975.65 and $136,538.12 into respondent's attorney trust account. Respondent, who acted as settlement agent at the April 4, 2006 closing, prepared the HUD-1. He also prepared a second HUD-1 to reflect only the amounts attributable to the second mortgage of $137,900. The record does not divulge the reason for the second HUD-1.

The first HUD-1, reflecting both loans, contained a number of inaccuracies. Specifically, it showed that Brody tendered

$87,435.55 to respondent at the closing. In fact, Brody tendered only $31,000. Respondent then disbursed $4,919.70 to Brody. Thus, Brody gave respondent only $26,080.30 in connection with the closing.

In addition, the first HUD-1 showed that respondent collected a fee of $950 from the sellers and a fee of $750 from the buyer. In turn, the second HUD-1 showed that respondent collected a legal fee of $300 from the buyer on the $137,900 secondary financing. According to the first HUD-1 and second HUD-1 forms, respondent was to have collected a total fee of $2,000. Instead, respondent collected $4,133 as his legal and document preparation fees.

Moreover, the first HUD-1 showed that respondent was to disburse $70,596.26 to the sellers. That entry was false, as respondent disbursed only $15,120 to Taressa Buono.

The inaccuracies continued. The first HUD-1 showed a $10 payment to Omega Settlement Services for a flood certification fee, $205 for a title examination fee, and $3,741 for title insurance. Instead, only the $3,741 payment was made.

The first HUD-1 also showed that respondent was to disburse $14,200 to Real Estate Consortium, but he disbursed $14,102.59 instead.

Several additional disbursements, totaling $25,769.59, were not accurately reflected on the HUD-1 forms.

The two HUD-1 forms contained the following borrower's certification:

> I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction.
>
> [Ex.3;Ex.4.]

Brody, respondent's client, signed the borrower's certifications on the HUD-1 statements. Those certifications were false and Brody knew or should have known them to be false, when she signed them.

The HUD-1 statements contained the following settlement agent's certification, which respondent signed:

> The HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds disbursed or to be disbursed by the undersigned as part of the settlement of this transaction.
>
> [Ex.3;Ex.4.]

The certifications were false and respondent knew or should have known them to be false, at the time that he made them.

Respondent stipulated that he prepared the HUD-1 statements and forwarded them to the lender with knowledge that they contained false statements and that the lender and others would rely on them.

Respondent conceded that he violated RPC 1.2(d), RPC 1.5(b), and RPC 8.4(c).

II. The Kauffman to Segal Transaction

Respondent was the settlement agent in a real estate closing that took place in May 2006.[1] He represented the buyer, Barbara Segal, purportedly charging her a $750 legal fee. Although respondent did not regularly represent Segal, he failed to communicate to her the basis or rate of his fee, in writing, before or within a reasonable time after commencing the representation.

Respondent also provided legal services to the sellers, Joseph and Wanda Kauffman, purportedly charging them a fee of $950. Respondent did not meet the Kauffmans until the day of

[1] Although the HUD-1 form lists the closing date as May 3, 2006, the lender wired the loan proceeds to respondent's trust account on May 4, 2006. Other payments occurred on May 8, 2006. It appears, thus, that the May 3, 2006 date is inaccurate.

the closing. He did not communicate the basis or rate of his fee to the Kauffmans, in writing, before or within a reasonable time after commencing for the dual representation. Moreover, he did not obtain written informed consent from either Segal or the Kauffmans for the dual representation.

Segal contracted to purchase the property from the Kauffmans for $160,000. She obtained financing in the amount of $128,000 from First Magnus Financial Corp. On May 4, 2006, the lender wired $128,744.30 into respondent's trust account.

Respondent prepared a HUD-1 in connection with the closing. The HUD-1 showed that Segal paid $38,815.55 to respondent at the closing. In fact, on May 8, 2006, she paid respondent only $19,250 in connection with the closing. Respondent then disbursed $3,758.36 to Segal. Thus, Segal paid only $15,491.64.

The HUD-1 also showed that respondent collected a fee of $950 from the sellers for document preparation and a legal fee of $750 from the buyer, for a total of $1700. Instead, respondent collected a total fee of $4,492.70.

The HUD-1 showed further that $99,000 was to be paid to Wells Fargo to discharge the sellers' mortgage, with $5,000 being escrowed to discharge that mortgage, for a total pay-off

amount of $104,000. However, respondent disbursed $98,373.77 to Wells Fargo to discharge the sellers' mortgage.

Respondent made a number of additional disbursements, totaling $30,357.33, that were not reflected on the HUD-1.

The HUD-1 contained the following seller and borrower's certification, which Segal and the Kauffmans signed:

> I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction.
>
> [Ex.6.]

The certification was false and Segal and the Kauffmans knew or should have known it to be false, when they signed it.[2]

Respondent stipulated that he knew or should have known that the HUD-1 would be forwarded to the lender containing false statements and that he knew or should have known that the lender and others would rely on the representations contained therein.

Respondent conceded that he violated RPC 1.2(d), RPC 1.5(b), RPC 1.7(a)(1), and RPC 8.4(c).

---

[2] The line for respondent's signature on the HUD-1 is blank.

III. The Jackson to Lurski Transaction

Anne Lurski entered into a contract to purchase property from Cindy Jackson for $190,000. Respondent represented Lurski, purportedly charging her a $1,300 fee. Although respondent did not regularly represent Lurski, he did not communicate the basis or rate of his fee to her, in writing, before or within a reasonable time after commencing the representation.

Lurski obtained first and second mortgage loans from GreenPoint Mortgage Funding, Inc., in the amounts of $152,000 and $19,000. On July 13, 2006, the lender wired the sums of $152,200 and $18,850 into respondent's attorney trust account.

Respondent acted as the settlement agent at the closing of July 12, 2006. The HUD-1 that he prepared showed that Lurski paid him $30,017 at the closing. In fact, Lurski paid him only $2,391.94. Respondent also prepared a second HUD-1, representing only the amounts attributable to the $19,000 second mortgage.

The first HUD-1 showed that respondent collected from the seller a fee of $950 for document preparation and a legal fee of $750 from the buyer. The second HUD-1 showed that he collected a legal fee of $380 from the buyer on the $19,000 secondary financing. According to those entries, respondent should have

collected a total of $2,080. Instead, he collected a total of $4,941.

The first HUD-1 showed that Jackson paid respondent $2,000 at the closing. In fact, Jackson gave respondent no money for the closing. In addition, the first HUD-1 showed that respondent disbursed $868 for the "realty transfer fee" on the property. However, the recorded deed showed that the "realty tax" paid for the property was $250.

In addition, respondent made several disbursements, totaling $11,701, that were not reflected on either HUD-1.

The HUD-1 statements contained the following borrower's certifications:

> I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction.
>
> [Ex.10;Ex.11.]

Lurski signed the borrower's certifications on the HUD-1 statements. The certifications were false and Lurski knew or should have known them to be false, when she signed them.

The HUD-1 statements contained the following settlement agent's certifications, which respondent signed:

> The HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds disbursed or to be disbursed by the undersigned as part of the settlement of this transaction.
>
> [Ex.10;Ex.11.]

Respondent's certifications on the HUD-1 statements were false and he knew or should have known them to be false at the time he made them.

Respondent stipulated that the HUD-1 statements did not accurately reflect the sums that he received and disbursed in connection with the closing and that he prepared and forwarded them to the lender, knowing that they contained false statements and knowing that the lender and others would rely on them.

Respondent admitted that he violated RPC 1.2(d), RPC 1.5(b), and RPC 8.4(c).

IV. The Johnson to Daniels Transaction

James Daniels entered into a contract to purchase property from Anthony Johnson for $191,000. Respondent provided legal services to Daniels, purportedly charging him $750. Respondent did not regularly represent Daniels and did not communicate the basis or rate of his fee to him, in writing, before or within a reasonable time after commencing the representation.

Respondent also provided legal services to Johnson, purportedly charging him $950. Respondent did not regularly represent Johnson and did not communicate the basis or rate of his fee to him, in writing, before or within a reasonable time after commencing the representation. Furthermore, respondent did not obtain written informed consent from either Daniels or Johnson for the dual representation.

Daniels obtained mortgage financing from Gateway Funding Diversified Mortgage Services, in the amount of $171,900. On October 21, 2006, the lender wired the sum of $168,924.53 into respondent's attorney trust account.

Respondent, who acted as settlement agent at the closing of October 20, 2006, prepared a HUD-1 form for the closing. The HUD-1 showed that Daniels paid respondent $23,640.47 at the closing. In fact, Daniels gave no funds to respondent for the closing.

The HUD-1 also showed that respondent collected $950 from the seller for document preparation and a legal fee of $750 from the buyer. According to those entries, respondent should have collected $1,700. Instead, he received a total of $4,396.20.

The HUD-1 further showed (1) that Johnson received $23,640.47 from the sale of the property, when, in fact, he

received only $2,500; (2) that respondent was to disburse $205 to the title company, Property Transfer Services, Inc. (PTS), for the title examination and $1,954 for the title insurance, for a total of $2,159; instead, respondent disbursed only $1,654 to PTS; (3) that respondent was to disburse $750 to the surveying company, instead of the $500 that was paid; (4) that respondent was to disburse $874.70 for the "realty transfer fee," instead of the $252.50 paid to the Mercer County Clerk's Office; and (5) that respondent was to disburse $82,893.06 to pay off the seller's mortgage and to hold $35,000 in escrow for that mortgage and repairs to the property; as of November 14, 2006, respondent had disbursed all but $3,000 from his attorney trust account; other than a disbursement to pay off the seller's mortgage of $82,893.06, however, the designated escrow amounts were not disbursed as reflected on the HUD-1.

Respondent made a number of additional disbursements, totaling $67,656.03, that were not reflected on the HUD-1.

The HUD-1 contained the following seller and borrower's certification:

> I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and

> disbursements made on my account or by me in this transaction.
>
> [Ex.14.]

Daniels signed the borrower's certification on the HUD-1. That certification was false and Daniels knew or should have known it to be false, when he signed it.

The HUD-1 contained the following settlement agent's certification:

> The HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds disbursed or to be disbursed by the undersigned as part of the settlement of this transaction.
>
> [Ex.14.]

Respondent executed the HUD-1 closing agent certification, which was false and which he knew or should have known to be false, when he signed it. Respondent stipulated that he knew or should have known that HUD-1 would be forwarded to the lender and that the lender and others would rely on the representations contained therein.

Respondent admitted that he violated RPC 1.2(d), RPC 1.5(b), RPC 1.7(a)(1), and RPC 8.4(c).

V. The Przybylski and Helfrich to Youl Transaction

In October 2006, Asif Youl entered into a contract to purchase property from Carol Przybylski and her former husband, Harry Helfrich, for $290,700. Respondent represented Youl, purportedly charging him a $750 fee. Respondent did not regularly represent Youl and did not communicate the basis or rate of his fee to him, in writing, before or within a reasonable time after commencing the representation.

Youl obtained mortgage financing in the amount of $261,630. On November 10, 2006, the lender wired the sum of $263,808.87 into respondent's attorney trust account. Respondent acted as settlement agent at the closing of November 9, 2006 and prepared the HUD-1 for the closing.

The HUD-1 showed that Youl paid $41,904.07 to respondent at the closing. In fact, Youl did not pay that sum at the closing, but paid $16,170 five days later, on November 14, 2006. Respondent then disbursed $15,125 to Youl from the sellers' proceeds. Accordingly, Youl paid only $1,045 to respondent in connection with the closing.

The HUD-1 also showed that respondent collected a fee of $750 from the buyer, when, in fact, he collected $5,094.08 from the closing.

The HUD-1 also reflects an entry of "OTHER DEBTS — MULTI-SOLUTIONS" (Multi), showing that $84,105.75 of the seller's proceeds was to be paid to Multi. In fact, respondent disbursed $34,408.17 and $1,045 to Multi, for a total of $35,453.17.[3]

Respondent made several disbursements, totaling $25,125, that were not reflected on the HUD-1.

The HUD-1 contained the following buyer's certification:

> I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction.
>
> [Ex.17.]

Youl signed the borrower's certification on the HUD-1. That certification was false and Youl knew or should have known it to be false when he signed it.

The HUD-1 contained the following settlement agent's certification:

> The HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds disbursed or to be disbursed by

---

[3] Exhibit 16, the client transaction sheet for Youl, indicates that respondent disbursed $32,408.17 and $1,045 to Multi. It is not apparent from the record whether that entry is erroneous in the exhibit or in the stipulation.

> the undersigned as part of the settlement of this transaction.
>
> [Ex.17].

Respondent executed the HUD-1 closing agent certification, which was false and which he knew or should have known to be false, at the time that he made it. Respondent stipulated that he knew or should have known that the HUD-1 would be forwarded to the lender with those false statements and that the lender and others would rely on those statements.

Respondent admitted that he violated RPC 1.2(d), RPC 1.5(b), and RPC 8.4(c).

The stipulation provides clear and convincing evidence that respondent violated each of the stipulated RPCs, specifically, RPC 1.2(d), RPC 1.5(b), RPC 1.7(a)(1), and RPC 8.4(c). In his brief, respondent's counsel conceded that respondent was guilty of unethical conduct. Counsel presented mitigating factors, however:

> The pattern was the same in each instance. Respondent was presented with an executed agreement of sale containing a somewhat inflated selling price. Mortgage proceeds were wired to respondent's trust account by a mortgage lender. At the closing respondent completed HUD forms reflecting the written agreement's selling price. However, in reality the selling price was lower, the buyer's personal

financial contribution to the transaction was lower and the net proceeds to the seller were lower. These alternate amounts were anticipated and agreed upon by the seller and buyer, but were not disclosed to the mortgage lender.

Fraud was committed in each of the five transactions which are the subject of this disciplinary matter - fraud against the mortgage lender. It is important to note, however, that the fraud did not originate with respondent. In each instance respondent was presented with a fraudulent plan formulated by the seller and buyer. Respondent's role was secondary. His ethical wrongdoing was essentially a failure to blow the whistle on his clients, allowing himself to facilitate their wishes.

. . .

RPC 8.4(c) prohibits four types of misconduct: dishonesty, fraud, deceit and misrepresentation. RPC 1.0(d) defines fraud for the purposes of the RPCs as involving "a purpose to deceive." Respondent submits that what he did in the course of the five closings did not involve a purpose to deceive on his part. That may have been the case with his clients, but it was not true of him. His misconduct was not so serious. His misconduct would be best categorized as "misrepresentation." He recorded false figures on the HUD forms and misrepresented them to be true when he signed as closing attorney. That is the extent of respondent's RPC 8.4(c) violation. Respondent's other actions at the closing - reformulating amounts received from the buyer and paid to the seller - did not involve misrepresentation. Respondent was doing exactly what the transacting parties

> wanted him to do. As noted earlier, respondent violated RPC 1.2(d) by "assisting" his client with receipts and disbursements, but that did not involve any violation of RPC 8.4(c).

Although counsel argued that respondent was not the mastermind of the five instances of fraud on the lender, the stipulated conduct establishes that he willingly facilitated the fraud by his assistance to the clients in that deceitful enterprise. For a fee, respondent agreed to prepare false documents for his clients and to lend his name, as attorney and settlement agent, in furtherance of the fraud that took place. He also engaged in a conflict of interest in two of the five transactions and, in all five, did not memorialize the fee arrangement.

The discipline imposed for misrepresentations on closing documents has ranged from a reprimand to a term of suspension, depending on the seriousness of the conduct, the presence of other ethics violations, the harm to the clients or third parties, the attorney's disciplinary history, and other mitigating or aggravating factors. See, e.g., In re Barrett, 207 N.J. 34 (2011) (attorney reprimanded for misrepresenting that a RESPA statement that he signed was a complete and accurate account of the funds received and disbursed as part of the

transaction; the RESPA reflected the payment of nearly $61,000 to the sellers, whereas the attorney disbursed only $8700 to them; the RESPA also listed a $29,000 payment by the buyer, who paid nothing; finally, two disbursements totaling more than $24,000 were left off the RESPA altogether; the attorney had no record of discipline); 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's misconduct included misrepresentation, gross neglect, and failure to communicate to the client, in writing, the basis or rate of his fee); In re Gahwyler, 208 N.J. 353 (2011) (censure for attorney who, in one real estate transaction, did not memorialize his fee arrangement, engaged in a conflict of interest by representing both sides, misrepresented the parties' disbursements and receipts on the RESPA statement, and certified the accuracy of those figures, thereby misleading the lender; the attorney's misrepresentations led to litigation in bankruptcy court involving the parties and the attorney; that the attorney had an unblemished record of over twenty years, that his civic involvement was noteworthy, and that his intentions were not ill-founded were viewed as mitigating

factors);[4] In re Soriano, 206 N.J. 138 (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; also, the attorney 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, 205 N.J. 6 (2011) ((strong) censure for 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

[4] Our decision reflected that the censure was a "strong" one. In the Matter of William E. Gahwyler, DRB 11-054 (August 2, 2011) (slip op. at 27).

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 he 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 a 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; 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; failed to witness a power of attorney; and made a false statement to a prosecutor about the closing documents (no prior discipline); In re Alum, 162 N.J. 313 (2000) (one-year suspended suspension for attorney who participated in seven 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, 159 N.J. 526 (1999) (one-year suspension for attorney who prepared false and misleading RESPA statements in eight transactions, 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).

The conduct in Soriano (censure) is close to that of respondent, in that not only was Soriano guilty of preparing a fraudulent RESPA, but he also engaged in a conflict of interest, failed to memorialize the basis or rate of his fee, and had an ethics record, a reprimand. Respondent has received a reprimand and a censure. Soriano's conduct was limited to one transaction, however, unlike respondent's, which encompassed five. In Gahwyler, too, the attorney's conduct was similar to respondent's. Both cases involved violations of RPC 1.2(d), RPC 1.5(b), RPC 1.7(a), and RPC 8.4(c). Gahwyler received a censure.

What distinguishes respondent's conduct from Soriano's and Gahwyler's is not only his disciplinary record (a reprimand and a censure, as opposed to a reprimand in Soriano and no prior discipline in Gahwyler) but, more significantly, the fact that, in both Soriano and Gahwyler, the misconduct was confined to one transaction, as opposed to five, as here.

When multiple transactions were involved, stronger sanctions were imposed (Fink, Newton, and Alum). Given the number of transactions at issue here, a suspension is warranted. The OAE recommended that we impose either a censure or a three-month suspension, clearly viewing this matter with a more clement eye than we do. The stipulation noted that respondent cooperated with the OAE, a factor not generally considered in mitigation, given that attorneys have an obligation to cooperate with disciplinary authorities. More properly, what we do consider in mitigation was respondent's quick acknowledgment of wrongdoing by admitting his conduct and stipulating the violations.

That being said, what period of suspension is appropriate for this respondent? The Court imposed a three-month suspension in Nowak, where only one transaction was involved. Here, five are at stake. Therefore, a three-month suspension does not adequately address the extent of respondent's infractions.

More appropriately, the next level of discipline, a six-month suspension is the right degree of sanction for respondent's transgressions. Fink involved misrepresentations in the same number of transactions at issue here, five. Fink received a six-month suspension. It is true that a serious

aggravating factor was present in Fink: the attorney's misrepresentation to a prosecutor. On the other hand, respondent's prior reprimand and censure operate as a factor that aggravates his conduct (Fink had no disciplinary record). On balance, thus, the circumstances present in Fink and here are analogous.

In our view, discipline stronger than a six-month suspension would be excessive in this case. Conduct that warranted a one-year suspension was considerably more serious than respondent's.

In In re Newton, supra, 159 N.J. 732, where a one-year suspension was imposed, the misconduct arose from nine transactions, nearly double the number present here. Moreover, there was serious economic harm to the lender, specifically, foreclosure actions in eight of the nine transactions. Very significantly, Newton was a municipal court judge at the time, a circumstance that held her to a higher standard.

A one-year suspension was also imposed in In re Alum, supra, 162 N.J. 313. Like respondent, Alum admitted his misconduct and was contrite. Because of the passage of time since the misconduct, he was placed on probation and the suspension was suspended. Alum's conduct, however, extended to

seven matters – two more than here. We are aware that Alum had no prior discipline and that respondent has been disciplined twice. On the other hand, respondent readily admitted his conduct by entering into a stipulation with the OAE. In Alum, there was a considerable amount of "finger-pointing." Alum alleged that his law firm "trained" him to conceal secondary financing in real estate transactions, (the record did not support his contention in this regard); that such practice was rampant in the county where he worked; that fourteen other attorneys that he named in a letter to the OAE were equally guilty of such practices (the OAE caused a protective order to be issued, given that those attorneys were not being investigated); that, "because everyone else was doing it," be allowed himself to participate in "silent seconds;" and that to single him out for "selective prosecution" was unfair.

A careful comparison between respondent's conduct and that of Fink, Newton, and Alum persuades us that a six-month suspension is the right level of sanction in this matter.

Chair Pashman and member Clark would impose a three-month suspension. Member Wissinger did not participate.

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

Disciplinary Review Board
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 Carl D. Gensib
Docket No. DRB 11-312

Argued: November 17, 2011

Decided: December 22, 2011

Disposition: Six-month suspension

Members	Disbar	Three-month Suspension	Six-month Suspension	Disqualified	Did not participate
Pashman		X			
Frost			X		
Baugh			X		
Clark		X			
Doremus			X		
Wissinger					X
Yamner			X		
Zmirich			X		
Total:		2	5		1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel