Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-230

IN THE MATTER OF	:
MARVIN S. DAVIDSON,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 8, 1993

Decided: June 8, 1994

Robert Novack appeared on behalf of the District VB Ethics Committee.

Anthony P. Ambrosio appeared on behalf of respondent.

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

This matter was before the Board on a recommendation for public discipline filed by the District V-B Ethics Committee ("DEC"). The formal complaints, consolidated for hearing, charged respondent with violations of RPC 1.7 (conflict of interest), RPC 1.8(e) (providing financial assistance to a client in connection with pending or contemplated litigation), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), RPC 8.4(d) (conduct prejudicial to the administration of justice), RPC 1.1(a) (gross neglect) and RPC 4.1 (false statement of material fact to a third person). Respondent was admitted to the New Jersey bar in 1969. He has no prior disciplinary history.

Respondent was charged with misconduct in two separate matters.

The LoPrete Matter (V-B-91-082E)

Sometime prior to March 1989, respondent was retained by Frank LoPrete, the estranged husband of grievant, Carol LoPrete, to represent him in the purchase of a residence in Roseland. Mr. LoPrete retained respondent at the suggestion of both his estranged wife and his daughter, Sherry Egan. At that time, Sherry was respondent's tenant, occupying a condominium unit owned by him. Although grievant, Carol LoPrete, was not an "authorized occupant" of respondent's condominium, she had been living with her daughter, Sherry, for several months, after she became ill. All parties agreed that respondent never had an attorney-client relationship with either grievant or Sherry. There is also no dispute that respondent was not retained to represent the interests of grievant and Sherry in the real estate transaction that is the subject matter of these proceedings.

Prior to his retention of respondent, Mr. LoPrete met with him on several occasions to cure rent arrearages owed by Sherry to forestall her eviction. Sherry was pregnant at the time. On each occasion that Mr. LoPrete satisfied the arrearages, respondent dismissed any pending summary dispossess actions.

In March 1989, Mr. LoPrete approached respondent with an executed contract for the purchase of the Roseland property. The contract listed Mr. LoPrete as the sole purchaser. Apparently, it

was Mr. LoPrete's intention to purchase the property for his estranged wife, Carol, and Sherry. That notwithstanding, Mr. LoPrete specifically advised respondent that title was to be acquired in his name only. Mr. LoPrete applied for and obtained a mortgage solely in his name. It is clear that neither Carol LoPrete nor Sherry had any active role in the pre-closing arrangements. Their involvement was limited to inquiries of respondent regarding the anticipated date of closing and of certain inspections.

Mr. LoPrete did not appear on the scheduled date of closing, March 2, 1989. Sherry appeared in his stead. Respondent testified that he had no prior notice of Mr. LoPrete's intention not to attend the closing. Rather, he learned from Sherry, at the closing, that her father had gone to Atlantic City for the day. Sherry testified that, while her father had given her no specific instructions in connection with the closing, she expected that she would be required to sign some documents for him. She assumed that her father had previously given her power of attorney to execute documents in his behalf. In fact, however, Mr. LoPrete had not previously executed a power of attorney conferring upon his daughter the authority to execute documents in his behalf. Rather, respondent admittedly prepared the power of attorney during the closing, when faced with his client's absence (Exhibit P-I).

The power of attorney itself contains an ostensible execution date of March 1, 1989 — one day before the closing, when respondent was still unaware that Mr. LoPrete would not be present

at the closing. In addition, the document lists Sherry Egan — not Frank LoPrete — as the person conferring the power. Furthermore, while respondent claimed that Sherry signed the power of attorney during the closing, Sherry testified that she neither signed nor saw it and that her purported signature appeared to be in her father's handwriting. Respondent never clearly explained why the power of attorney bore a March 1, 1989 date, when he allegedly did not know until the closing (March 2, 1989) that Mr. LoPrete would not attend. However, he seemed to suggest that, while the document had been prepared at the closing, he intended, in fact, to have Mr. LoPrete sign it at some later date to confirm, albeit after the fact, that Sherry had the authority to execute the necessary documents in his behalf. Respondent believed, however, that the power of attorney inadvertently found its way to a pile of documents for Sherry's signature at closing, none of which she admittedly read. Respondent, nevertheless, insisted that it was Sherry, indeed, who signed the document. He further acknowledged that the power of attorney was incorrectly prepared and, as such, invalid. Respondent's signature appears on the document as a witness.

Respondent testified that, when he learned from Sherry that Mr. LoPrete would not be attending the closing, he told her that he wanted to delay the closing so that he could have her father's signature. It is not clear whether he wanted to have Mr. LoPrete's signature on the power of attorney or whether he wanted it on all the closing documents. In any event, respondent maintained that

Sherry was vehemently opposed to any delay in the closing, due to her exigent circumstances. According to respondent, Sherry assured him that her father, his client, wanted to go ahead with the closing on that day. Respondent, therefore, prepared the power of attorney and proceeded to close title.

Among the documents to be executed at closing was a quitclaim deed to be signed by grievant, Carol LoPrete (Exhibit P-J). The mortgage lender apparently required grievant's signature on the quitclaim due to Mr. LoPrete's estranged status from grievant. Respondent testified that he first learned of the mortgage lender's demand when he received the closing package — on the closing day. He then telephoned grievant, in her daughter's presence, and informed her that she had to come to his office to sign the quitclaim deed, before he could proceed with the closing. Respondent testified that grievant refused to do so, claiming that she was too ill and that, since her daughter was already there signing documents for Mr. LoPrete, she could also sign the quitclaim for her. Respondent then gave Sherry the telephone receiver, whereupon she had a conversation with grievant. Respondent did not hear the two women discuss grievant's alleged authorization for Sherry to sign the quitclaim deed in her behalf. Nevertheless, allegedly upon grievant's insistence, respondent allowed Sherry to sign her mother's name to the quitclaim deed, despite the lack of a valid power of attorney from grievant to Sherry. In addition, respondent did not dictate a contemporaneous memo to his file describing the circumstances of grievant's alleged

oral authorization. The quitclaim deed bears the signature of respondent as a witness.

Sherry Egan, on the other hand, denied having signed the quitclaim deed in her mother's behalf. She testified that respondent had not telephoned her mother during the closing and that her mother never authorized her to sign the quitclaim deed. When shown a copy of the deed with her purported signature (in her mother's name), Sherry denied that the signature was hers or her mother's. She also testified that her father had later admitted to her that he had signed grievant's name on the quitclaim deed (Mr. LoPrete did not testify at the hearing.) Sherry testified further that she learned of the existence of the quitclaim deed, approximately one year after closing, from an attorney who was defending her on a suit for rent arrearages and damages filed by respondent against her and Mr. LoPrete. Apparently, that attorney had requested respondent's file on the closing during discovery (that transaction was the subject of a counterclaim) and discovered the quitclaim deed.

Respondent alleged that, during the course of that litigation, he received a telephone call from Sherry's attorney threatening that Sherry and her mother would "go to the ethics committee," if he did not withdraw his suit for arrearages and damages.

Incident to the closing, the mortgage lender also required the execution of an affidavit of title (See last page of Exhibit H). Although Sherry admitted having signed many documents in her father's name, none of which she had read, she equivocated when

shown a copy of the affidavit of title. While she could not absolutely state that she had not signed her father's name to that document by merely looking at the signature, she did express doubt when she saw that the signature was purportedly witnessed by a Ronald M. Gutwirth, Esq. This was so because no one was present during the closing, aside from herself and respondent. (The record is silent on the apparent absence of the sellers and/or their attorney.) It should be noted that the affidavit of title was purportedly witnessed by Gutwirth on March 3, 1989 — one day after the closing. Sherry also added that it was doubtful that she had signed the document because she could not recall seeing the language typed therein, indicating that a quitclaim deed had been executed by Carol LoPrete.

Respondent, in turn, testified that it was possible that Sherry had, indeed, signed a different affidavit of title that made no reference to a quitclaim deed. He did recall having to change the affidavit to include a reference to the execution of a quitclaim deed. In any event, he testified, he did not witness the signature appearing on that document. Rather, that document was apparently witnessed by an attorney in his building. Respondent assumed that Gutwirth acknowledged the signature because respondent was probably out of the building when it was signed.

During cross-examination, Sherry admitted that her memory of the events of the closing was unclear because it was such "a bad time" in her life. Specifically, she was on the verge of giving birth to her daughter — having been recently divorced —, she was

living in a one-bedroom condominium with an extremely ill mother, for whom she had to care, her sister had come to live with her from time to time, and they were in the process of preparing to move out of the condominium and into the house. It was, therefore, "so far as clearly thinking [not] the best time" both for herself and her mother. T67-78.[1] She further testified that getting out of the one-bedroom condominium and into the house was very important to her.

While respondent admitted that he should not have proceeded with the closing in the absence of a valid power of attorney from his client and in the absence of grievant's signature on the quitclaim deed (or a power of attorney authorizing her daughter to sign it in her behalf), he explained that he had done so because he believed that he had authorization from all the LoPretes. He also knew how anxious everyone was to get out of the condominium and into the house and he was pressured by all concerned to proceed that day. He, admittedly, also wanted Sherry to get out of his condominium, given her history of rent problems. In any event, respondent maintained that he did not intend to defraud anyone and, further, that no one was injured. To support this contention, respondent pointed to the fact that Mr. LoPrete has since executed a deed purporting to vest title in grievant and Sherry Egan. Unfortunately, respondent has never notified the mortgage lender that the mortgage documents were not executed by the borrower,

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[1] T denotes the hearing transcript of February 24, 1993.

Frank LoPrete, or by anyone authorized by a valid power of attorney.

* * *

The DEC found that "Frank LoPrete signed Sherry Egan's name to the defective [power of attorney] prepared by respondent after the closing, likely the same day that he signed Carol LoPrete's name to the quitclaim deed. Respondent participated in this conduct by falsely witnessing and acknowledging the Quitclaim Deed and falsely witnessing the defective Power of Attorney" (Hearing Panel Report at 10). The DEC, therefore, found respondent guilty of violations of RPC 4.1, RPC 8.4(c) and RPC 1.1(a), for his conduct in connection with the preparation and execution of the quitclaim deed, the power of attorney and the affidavit of title. The DEC further found respondent guilty of violations of RPC 3.4(a) (assuming that section is applicable to a "non-judicial" matter) and of RPC 4.3, for his conduct towards Sherry and grievant, which the DEC apparently perceived as unfair.

The DEC recommended public discipline for respondent's misconduct.

The Springer Matter (V-B-91-069E)

This matter arose out of respondent's representation of Ramona Arenas, who had sustained substantial injuries in an automobile accident on August 25, 1990. Ms. Arenas was one of two passengers in a car driven by Lilliana Berrocal. At the time respondent was

retained by Ms. Arenas, he was also representing her as a plaintiff in an action against a housing authority for injuries she had sustained when bitten by a rat. In addition to Ms. Arenas, respondent admittedly represented both the other passenger in the Berrocal vehicle and the driver, Lilliana Berrocal. Respondent, however, maintained that he represented all three individuals on their PIP claims only (claims against one or more insurance companies for the payment of medical expenses, wage loss and other related expenses, which insurers are statutorily required to pay, regardless of fault on the part of their insured). Respondent maintained that the three individuals shared common interests and that it was, therefore, permissible for him to represent all three in only the PIP aspect of the case. Respondent acknowledged that he could not represent both driver and one or more passengers in the liability aspect of the case where, in order to recover damages in behalf of a plaintiff, one must prove fault by the insured - in this case, the driver, Berrocal. According to respondent, he had explained that limitation to all three individuals, who had understood that respondent could not represent all of them in the bodily injury portion of the claim. There is no written documentation in the record to support this statement.

Apparently, at some point, Ms. Arenas became dissatisfied with respondent's services and sought the guidance of new counsel. In or about May 1991, Howard Springer, a partner in the law firm of Kravitzky, Springer and Feldman, filed a grievance against respondent alleging unethical conduct on respondent's part by

virtue of: (1) his representation of both driver and passengers in the same accident, in violation of RPC 1.7; (2) his advance payments to Ms. Arenas in connection with pending or contemplated litigation, in violation of RPC 1.8; (3) his interference with the attorney/client relationship between Springer and Ms. Arenas; (4) his falsely holding himself out to insurance carriers as the attorney representing the interests of Ms. Arenas; and (5) his improper solicitation of a client.

Respondent and Springer disagreed about the nature of Ms. Arenas' relationship with their respective firms. Respondent maintained that it was never Ms. Arenas' intention to retain the Springer firm. Rather, Ms. Arenas was, admittedly, unhappy with respondent for several reasons and sought only to consult with the Springer firm, as well as others. However, respondent contended, Ms. Arenas was pressured into signing a retainer agreement with the Springer firm. Ms. Arenas returned to respondent's office at some point after signing the Springer retainer in order to consult with him on the "rat bite" case respondent was handling for her. It was during that meeting that Ms. Arenas allegedly told respondent that she did not wish to be represented by the Springer firm. Respondent, therefore, encouraged her to seek other opinions on her case and introduced her to Ronald Gutwirth, an attorney who rented office space in respondent's building. Respondent did not attend or in any way participate in the meeting between Gutwirth and Ms. Arenas. That meeting ultimately resulted in Ms. Arenas' discharge of the Springer firm, after she apparently decided to retain

Gutwirth to represent her for her automobile accident injuries. Respondent learned this version of the events from Ms. Arenas.

Springer, on the other hand, maintained that, when Ms. Arenas first met with him, she was extremely unhappy with respondent's services, for a variety of reasons. Specifically, she did not feel that she was getting PIP benefits quickly enough, she apparently had some sort of argument with respondent (the nature of which Springer did not explore) and she seemed to be aware of some type of a conflict on respondent's part, in that he represented the two other individuals in the car. Ms. Arenas apparently felt, according to Springer, that she was not getting respondent's full attention. In any event, according to Springer, Ms. Arenas made it clear that she wanted the Springer firm to represent her. She, therefore, executed a retainer agreement there and then (See Exhibit P-N).

Springer testified that, although the retainer agreement did not specify, in detail, the scope of his firm's representation, it had always been his experience that the attorney handling a personal injury case in behalf of a plaintiff also handled the PIP portion of the claim. Thus, he believed that Ms. Arenas had retained his firm to handle both the bodily injury and the PIP aspects of her claim. This belief, he testified, was further reinforced by the fact that, in May 1991, Ms. Arenas came to his office with a PIP problem, which his firm tried to resolve for her. Unfortunately, his firm was apparently having problems dealing with the PIP carrier because respondent had, allegedly, continued to

contact the carrier to attempt to negotiate the bodily injury claim and the PIP claim in behalf of Ms. Arenas, even after the Springer firm notified respondent of its representation of Ms. Arenas. The carrier was, therefore, allegedly reluctant to deal with either respondent or the Springer firm. Respondent, however, testified that, on one occasion when he spoke with the PIP adjuster, he asked if there was any possibility that the carrier would settle any one of the passenger claims. He made that inquiry because the carrier had been making no payments to any of his three clients on their PIP claims. The adjuster responded in the negative and the conversation concluded.

According to Springer, during the somewhat short course of Springer's representation, respondent allegedly continued to discuss the automobile accident matter with Ms. Arenas and advised her that she had made a mistake in retaining the Springer firm and that he, respondent, could settle her bodily injury claim against the host driver of the vehicle (also his client). Springer learned this information from Ms. Arenas, whom Springer himself described as unreliable and not always forthright or credible — even with him. In short, Springer made it clear that he did not trust Ms. Arenas' word for many things. Ms. Arenas did not testify at the ethics hearing.

In any event, Springer testified that his firm filed a suit for bodily injuries in Ms. Arenas' behalf very soon after her initial retention of the firm. (That suit did not include a claim for PIP benefits against the carrier). Not long thereafter, on or

about April 24, 1991, Springer received a letter from Ronald Gutwirth advising that he now represented Ms. Arenas and that the Springer firm should no longer act in her behalf (See Exhibit P-O). Springer then met with Ms. Arenas, who proceeded to tell him the same story that she had previously told respondent, i.e., that she was pressured by respondent to discharge the Springer firm and to retain Gutwirth. However, she stated that she really wanted to be represented by the Springer firm and signed a statement and affidavit to that effect. Ms. Arenas' injuries were seemingly substantial enough to encourage Springer to tolerate, to some extent, Ms. Arenas' apparent manipulation of all involved. According to Springer, however, respondent continued to interfere with his representation of Ms. Arenas, by continually contacting the carrier in her behalf.

Respondent, of course, maintained that, while the Springer firm may have represented Ms. Arenas on the bodily injury portion of the claim, he continued to represent her on the PIP aspect of the case, with Ms. Arenas' apparent blessing. While it was perfectly clear to Springer and to the DEC hearing panel members, that Ms. Arenas was "burning the candle at both ends" and playing one attorney against the other to get the results she wanted, it is not entirely clear why respondent simply did not surrender the Arenas PIP claim to the Springer firm. Rather, respondent continued to handle the PIP aspect of her claim, with her apparent blessing, even after the Springer firm was discharged by Ms. Arenas a second time.

Ultimately, the Springer firm lost the Arenas case to yet another attorney, and respondent continued to represent all three individuals in a PIP suit against the carriers. He also represented the driver, Berrocal, in a subsequent suit for bodily injury against the driver of the other car. It is not clear whether there was a minimal coverage problem with the other vehicle involved in the accident, which might, conceivably, have created conflict problems for respondent. This was not explored during the hearing. The extent of respondent's disclosure to his clients is similarly unclear and was not explored, in any detail, during the hearing.

Finally, with respect to Springer's allegation that respondent advanced sums to Ms. Arenas, in violation of RPC 1.8(e), respondent admitted both in his answer and in his letters to the DEC investigator that he did, indeed, advance such sums to Ms. Arenas. He testified, however, that these sums were intended to enable her to purchase badly needed anti-seizure medication and that Ms. Arenas had literally cried to him, on occasion, because of her need for the medication and her inability to obtain it for lack of the necessary funds. While respondent suspected that some of the money may have been used by Ms. Arenas to purchase cigarettes, he intended only to help her obtain the medication and knew that PIP payments would not be forthcoming to cover the cost. Nor was medical coverage available in the "rat bite" case. (It is not known which incident necessitated the medication for which respondent had advanced sums).

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The DEC found that there was no clear and convincing evidence defining the scope of the Springer firm representation. The DEC was, therefore, unable to conclude that respondent interfered with that firm's representation of Ms. Arenas. The DEC was similarly unable to find clear and convincing evidence that respondent's communications with the carrier in Ms. Arenas' behalf were improper. The DEC did, however, find clear and convincing proof that respondent's representation of both the driver and passengers constituted a conflict of interest, in violation of RPC 1.7. It is not clear from the report whether that finding was based on the representation of all three individuals on the PIP claim only or based on the DEC's perception that respondent improperly acted on behalf of all plaintiffs in the liability of the case when he inquired of the adjuster whether payment to any of the three was a possibility under the liability portion of the policy.

Finally, in light of respondent's admission that he advanced Ms. Arenas sums during the course of and in connection with pending litigation, the DEC found respondent guilty of a violation of RPC 1.8(e).

The DEC recommended public discipline for respondent's conduct.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent acted unethically was fully supported by clear and convincing evidence.

In the LoPrete matter, respondent improperly witnessed and acknowledged all of the subject documents, with the exception of the affidavit of title. Respondent himself candidly admitted this fact. That he believed the signatures to have been authorized or that he was carrying out his client's wishes does not excuse his serious misconduct. Moreover, in order to further his client's objectives, respondent prepared a document that falsely purported to give Sherry Egan power of attorney on a date prior to the closing. That document, therefore, was intended to mislead whoever relied upon it that the authority to execute the documents had, indeed, been conferred the day before the closing.

The result of respondent's misconduct was a misrepresentation of material fact to a third person and had serious potential consequences to the mortgage lender. Specifically, should it become necessary, at any point in the future, for the mortgage lender to enforce the note against Frank LoPrete, it will learn, for the first time, that Frank LoPrete never agreed to be bound by the terms of the note because he never executed the note. Nor was the note executed by anyone in his behalf holding a valid power of attorney. Enforcement of the note may, thus, prove difficult, if not impossible. More egregious, however, is the fact that

respondent, in spite of the fiduciary obligation he owed to the mortgage lender to ensure that its interest was sound (See, e.g., In re Kasdan, 115 N.J. 472 (1989)), he has not yet seen fit to advise the lender of the precarious nature of its security. While respondent may not have initially intended to perpetrate a fraud by virtue of his misconduct, his continuing failure to inform the lender of the developments in this matter certainly constitutes a perpetuation of the fraud.

While the record clearly and convincingly supports a finding that respondent improperly witnessed and acknowledged several documents and further that he prepared a document containing false representations, the Board cannot agree with the DEC's findings that respondent witnessed and acknowledged forged signatures on the subject documents. The DEC appears to have based its finding with respect to the power of attorney on Sherry Egan's testimony denying signature of the document and identifying the signature as her father's handwriting. There is no independent corroborative evidence, such as expert analysis of the signature, or even testimony by Frank LoPrete, identifying the signature of his daughter's name as his handwriting. Rather, we are left only with the testimony of a witness whom the Board considered to be both biased and unreliable. This is so for several reasons. First, Sherry Egan admitted that, on the date of closing, she was not thinking clearly and was very confused. Admittedly, she signed many documents in her father's name on that date, none of which she read. In addition, her testimony should further be evaluated in

light of her inability to positively identify the handwriting on the affidavit of title as her own or her father's. Certainly, one's signature should be readily identifiable to oneself. Finally, it was obvious to the Board that Sherry Egan regarded respondent with a certain degree of animosity, as she held respondent responsible for the several months' delay in moving into the house at a time when it was so important for her to move in quickly. In addition, at the time the grievance was filed, Sherry Egan was a defendant in a suit that respondent had filed against her both for rent arrearages and for destroying respondent's property (the condominium). Respondent's claim against her had been decided in favor of respondent, on at least one occasion, through arbitration. On the other hand, Ms. Egan's counterclaim against respondent had not been considered at all. There is testimony to support the proposition that this grievance was filed against respondent in retaliation for his suit against her. The Board cannot, under these circumstances, find, to a clear and convincing standard, that respondent witnessed and acknowledged a forged signature.

The same is true with respect to the DEC's finding that respondent witnessed and acknowledged a forged signature on the quitclaim deed. In order to make the factual findings proposed by the DEC, one must be willing to accept Ms. Egan's testimony at face value, without any corroborative evidence. It is particularly noteworthy that Ms. Egan testified that her father signed the document not on the basis of her recognition of her father's

handwriting but, rather, on the basis of what her father allegedly admitted to her. Any credibility problems that exist with regard to her testimony are, thus, sorely compounded by testimony that is based on pure hearsay.

Finally, the DEC's finding that respondent witnessed and acknowledged a forged signature on the affidavit of title appears to rest upon its misapprehension that, one day after closing, respondent added to the affidavit of title signed by Ms. Egan a sentence regarding the execution of a quitclaim deed and then had Gutwirth execute the jurat on that document. That, however, was not the testimony. Rather, as noted earlier, respondent testified that he did, indeed, prepare another affidavit of title because the one originally and presumably executed by Ms. Egan at the closing did not contain a reference to the execution of a quitclaim, which reference respondent considered to be required by the mortgage lender. He further testified that he assumed Mr. LoPrete came in to sign the new affidavit at a time when respondent was out of the office. For that reason, Gutwirth apparently executed the jurat. Since neither Gutwirth nor Frank LoPrete testified at the hearing, there is no way of knowing what happened with respect to the execution of this particular document. In addition, as previously noted, Sherry Egan was unable to positively identify the signature on the affidavit of title as her own handwriting or that of her father. Again, under these circumstances, the Board is unable to conclude, by clear and convincing evidence, that respondent

witnessed and acknowledged a forged signature on the affidavit of title.

Finally, the Board is unable to agree with the DEC that respondent's conduct constituted a violation of RPC 4.3. There is no testimony or other evidence suggesting that either grievant or Sherry misunderstood, in any way, respondent's role in the real estate transaction, which would have triggered an obligation on his part to correct any such misapprehension. To the contrary, all parties agreed that there was no misunderstanding between them as to whom respondent represented and what he was retained to accomplish. Thus, the record does not support such a finding.

There is no question, however, that respondent improperly witnessed and acknowledged the subject documents and, further, that he prepared a power of attorney containing false representations, all in violation of RPC 8.4(c).

Respondent's conduct in the Springer matter, though not as serious as that in the LoPrete matter, was also unethical. As found by the DEC, respondent advanced funds to his client, in violation of RPC 1.8(c). While respondent's motives in advancing the funds may have been selfless, his conduct cannot be excused.

The DEC's dismissal of the allegations relating to respondent's interference with the attorney/client relationship between the Springer firm and Ms. Arenas is appropriate due to a lack of clear and convincing evidence.

The DEC's finding of a violation of RPC 1.7 for respondent's representation of both driver and passengers in the same matter

warrants further examination. First, as previously noted, it is not clear whether the DEC made this finding by virtue of respondent's admitted representation of all three individuals on the PIP claim only or whether it was made on the basis of respondent's admission that he inquired of the CSC adjuster whether payment under the liability portion of the policy could be made to any of the three individuals. If the finding was made solely by virtue of respondent's representation of all three individuals in the PIP claim only, it was clearly erroneous. As respondent correctly maintained, all three had common interests against the PIP carrier — that is, obtaining reimbursement for medical expenses and wage losses occasioned by injuries suffered during the accident. These benefits are payable by statute, regardless of fault of the insured driver. Respondent would not, therefore, need to act to the detriment of one client in order to benefit another in the prosecution of the PIP claims. In short, no real or perceived conflict existed.

Similarly, the record does not clearly and convincingly support a finding of a conflict on the basis of respondent's admission that, during the course of one of his conversations with the CSC adjuster, respondent inquired whether the carrier would be willing to make any payment under the liability portion of the policy. The Board considers such a single inquiry to be an insufficient basis for a finding of unethical conduct. There is no indication that, had the carrier been wiling to settle any of the bodily injury claims, respondent would have represented all of

them, even for purposes of settlement. Respondent indicated to the three individuals, more than once, that he could not represent both driver and passengers in the liability claim, if to do so would cause a conflict. It would seem, therefore, that respondent would not undertake representation of all three in the bodily injury action, even for settlement purposes, had the carrier been willing to do so. In short, a mere inquiry regarding the possibility of a settlement does not constitute unethical conduct or create a conflict of interest. The Board, therefore, recommends that this charge be dismissed.

There remains the issue of the appropriate quantum of discipline for respondent's violations of RPC 8.4(c) and RPC 1.8(e). Had respondent's conduct in the LoPrete matter consisted only of witnessing and acknowledging Sherry Egan's signatures of her parents' names, believing her parents to have, indeed, authorized her to do so, it would most likely have warranted the imposition of a private reprimand. However, respondent not only improperly witnessed and acknowledged the signature on certain documents, but he also proceeded to close title after preparing a document containing false representations. He had, thus, knowledge that there was no proper power of attorney for the execution of the documents. Respondent not only breached his fiduciary obligation to the mortgage lender to follow its closing instructions and to do all that is necessary and proper to insure the soundness of its interests, but he also, in effect, perpetrated a fraud on the mortgage lender, in violation of RPC 8.4(c). Moreover, as

previously noted, as of the date of the DEC hearing, respondent had not taken any measures to disabuse the mortgage lender of the belief that its interest was adequately protected by virtue of the apparently proper execution of documents, such as the security instrument, the note and the quitclaim deed, among others. Again, respondent's impropriety has the potential for serious consequences to the lender, in the event suit on the note were to become necessary. Respondent's failure to so notify the lender, especially in the face of his fiduciary relationship to it, is inexcusable.

Respondent's conduct in this matter may be analogized to that in In re Labendz, 95 N.J. 273 (1984). In that case, the Court suspended for one year an attorney who submitted a false loan application to secure a mortgage for his clients. Although the contract for sale provided for a purchase price of $100,000.00, the application falsely listed it as $107,000.00 to enable the clients to obtain a higher mortgage. See also In re Mocco, 75 N.J. 313 (1978) (attorney suspended for one year where, in an effort to assist a close acquaintance in a business transaction, he made various misrepresentations in business dealings, signed names of individuals on a mortgage without authorization, signed another's name as a notary public on an acknowledgement on a mortgage note, and prepared a form to be signed by another as president of a corporation, when he knew the individual did not hold such office).

It is true that respondent's misconduct was serious. However, the Board recognizes that the purpose of discipline is not the

punishment of the offender, but "the protection of the public against an attorney who cannot or will not measure up to the high standard of responsibility required of every member of the profession." In re Getchius, 88 N.J. 269, 276 (1982), citing In re Stout, 76 N.J. 321, 325 (1978). The severity of the discipline to be imposed must comport with the seriousness of the ethics infraction in light of all the relevant circumstances. In re Nigohosian, 86 N.J. 308, 315 (1982). Mitigating factors as well as aggravating factors are, therefore, relevant and may be considered.

The Board considers several mitigating factors to exist here. Most significant is respondent's total cooperation with and candor towards the DEC. The Board was similarly impressed by respondent's candor during the Board hearing. In addition, respondent appeared genuinely contrite for his misconduct, none of which was motivated by greed or personal gain. Finally, respondent has never before been the subject of discipline during his twenty-five years of practice.

Under a totality of the circumstances, the Board is of the view that respondent should receive a six-month suspension for his misconduct. The Board unanimously so recommends.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 6/5/1994

By: _____
Raymond R. Trombadore, Esq.
Chair
Disciplinary Review Board