SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-191
District Docket No. XIV-2010-0658E

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

Decision

Argued: September 20, 2012

Decided: December 5, 2012

Janice Richter appeared on behalf of the Office of Attorney Ethics.

Andrew Cevasco 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 (three-year suspension) filed by special master Melinda L. Singer. We originally considered this matter at our November 2010 session, as a default. Although we denied respondent's motion to vacate the default, we, nevertheless, remanded the matter for a new investigation. It is now before us after a three-day ethics hearing.

The complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.4(b) and (c) (failure to comply with a client's reasonable requests for information and failure to explain a matter to the extent necessary for the client to make informed decisions about the representation), RPC 1.5(b) (failure to communicate the basis or rate of the fee in writing), RPC 1.7(a)(1) and (2) (concurrent conflict of interest), RPC 1.15(a) and (b) (failure to safeguard client property and failure to promptly deliver property to a client or third party), RPC 4.1(a) (false statement of material fact to a third person), RPC 8.4(b) (commission of a criminal act that reflects adversely on the attorney's honesty, trustworthiness or fitness as an attorney), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Prior to the ethics hearing, the special master granted the Office of Attorney Ethics' (OAE) request to amend the complaint to charge respondent with violating RPC 1.5(a) (unreasonable fee), RPC 1.15(a) (negligent misappropriation), and RPC 1.15(d) (failure to maintain required attorney books and records).

The OAE recommended a one- to two-year suspension.

We determine to impose a one-year suspension.

Respondent was admitted to the New Jersey bar in 1990. In 2011, he was censured for misrepresentations on closing

documents, conflict of interest, and failure to set forth the basis or rate of his fee, in writing. In re Gahwyler, 208 N.J. 353 (2011).

The facts that gave rise to this matter are as follows:

On December 19, 2006, respondent acted as the settlement agent in a real estate transaction fraught with improprieties. He was approached by a mortgage broker to represent the buyer, Erika Brown. The seller was Mary Bryant McCutchen, by her attorney-in-fact, Ronald A. Thompson, who was her grandson.[1] Thompson had a power-of-attorney to act on McCutchen's behalf.[2] The terms of the transaction had been agreed upon, before respondent became involved. Respondent represented both parties to the transaction. According to respondent, no one told him that the transaction was a sale/leaseback agreement.

Respondent had never spoken to Brown or Thompson, before they arrived at the closing. Likewise, he had never spoken to McCutchen. He did not recall discussing a conflict of interest with either Brown or Thompson, who did not give their informed written consent to respondent's dual representation. Respondent

[1] McCutchen died in August 2010.

[2] Joseph Cooper, McCutchen's cousin, testified that the power-of-attorney had been created so that Thompson could pay McCutchen's bills if she were hospitalized.

knew that the dual representation was a conflict of interest, but went ahead with the closing nevertheless. At the ethics hearing, he recognized that he should not have allowed the closing to proceed without another attorney.

Although respondent had not previously regularly represented either Brown or McCutchen or her attorney-in-fact, Thompson, he failed to communicate the basis or rate of his fee, in writing, to either party. He contended that he had told Brown and Thompson the amount of his fee, at the closing.

Brown's side of the HUD-1 lists a legal fee to respondent of $950, recording/transfer charges of $500, and additional miscellaneous costs of $75, for a total of $1,525.[3] Respondent, however, paid himself $3,000, on January 30, 2007. He conceded that he could not explain how he had arrived at that number or why he had waited so long to write the check. The $3,000 disbursement does not appear on the HUD-1.

Respondent charged McCutchen $5,000 for a legal fee and $1,000 for additional charges, for a total of $6,000. He testified that the mortgage broker, Otis Duffy, who was at the

[3] The recording/transfer charges actually add up to $600.

closing, told him what to charge as his fee.[4] He admitted that he had never charged a $6,000 fee for representing a seller at a closing; indeed, $6,000 was "multiples" of what he would normally charge. He acknowledged that, in hindsight, the fee should have been a "red flag," but explained that, at the time, he viewed it as a "golden goose."

Respondent listed on the HUD-1 attorney Raymond Murphy, as the seller's attorney. He testified that, four or five days before the closing, he had left a message for Murphy, about representing the sellers in the transaction, but had learned, at "the 11th hour," that Murphy could not handle the closing. According to respondent, he had prepared the HUD-1 in advance, anticipating that Murphy would represent the seller and that, in error, he had never removed Murphy's name from the form.

Murphy testified at the ethics hearing. He told the special master that he does not handle real estate closings, did not know and had never represented Brown, Thompson or McCutchen, had no knowledge of the closing, had received no documents or money from the closing, and had not consented to the entry of his name on the HUD-1. He and respondent had represented the

[4] Respondent had participated in a few other transactions with Duffy.

same client approximately fifteen years ago and had had some "dealings" from time to time. To Murphy's best recollection, they had last spoken in a professional capacity "several years ago." He did not recall respondent ever having called him to handle a residential closing with him.

Turning now to the McCutchen/Brown transaction, the record shows that the purchase price of the property was $210,000. Mortgage financing was arranged through First Magnus Financial Corp. (Magnus). Prior to the closing, respondent received a $211,841.10 wire transfer into his trust account, representing the net loan proceeds. He did not deposit any additional funds into his trust account for the closing.

The HUD-1 reflected that Brown had brought $9,579.31 to the closing. That was untrue. Brown had brought no funds to the closing. The HUD-1 also reflected that the seller had received $200,220.46. In fact, in January 2007, respondent disbursed $35,000 from his trust account to McCutchen. That disbursement is not reflected on the HUD-1. McCutchen received no other funds from the sale.

Respondent also made the following disbursements, totaling $152,641.15, that did not appear on the HUD-1:

DATE	CHECK#	TO/FOR	AMOUNT	EXHIBIT#
12/19/06	1104	Infinite Investment	$50,000	Ex. OAE-6
12/19/06	1106	Ford Motor Credit Corp.	$18,665	Ex. OAE-8
01/08/07	1134	City of Newark	$15,000	Ex. OAE-15
12/19/06	1153	Infinite Investment	$68,976.15	Ex. OAE-16

He did not disclose to Magnus that the disbursements were not as shown on the HUD-1.

The HUD-1 contained the following standard 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." The HUD-1 also contained the following statement: "WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment." Respondent executed the closing agent certification. He admitted that, at the time that he signed the certification, he knew that the HUD-1 did not accurately reflect the transaction and that a number of disbursements were not listed on the form. He also admitted that he prepared and forwarded the HUD-1 to the

lender, knowing that it contained materially false entries and knowing that the lender and others would rely on it.

Respondent received $211,841.10 in connection with the closing, but disbursed only $207,714.62, leaving a balance of $4,126.48. He disbursed the $4,126.48 to McCutchen/Thompson, in May 2011, after the OAE began investigating this matter. He was unaware that McCutchen was deceased by that date. As of the date of the hearing before the special master, he had put a stop-payment on the check and the funds remained in his attorney account. He was planning to send them to Thompson, as McCutchen's heir, with a letter instructing him to cash the check within two months. Otherwise, he would send the funds to the court clerk.[5]

The testimony of the witnesses/principal parties to the transaction before the special master was often contradictory. For ease of review, the testimony of key witnesses is set out separately below.

---

[5] In its brief, the OAE explained that respondent was not charged with knowing misappropriation because his trust account records were in "utter disarray."

Respondent

Respondent testified that he reviewed the closing documents with Brown and Thompson and that they and Duffy were present at the closing.

Respondent explained to Thompson that he was selling the property. Respondent had no reason to think that Thompson, who "seemed like an intelligent, articulate guy," did not understand the transaction. Thompson never stated that the transaction was supposed to be a refinance. Respondent did not know that the transaction was a sale/lease back and that the property would be bought back from Brown. It was not until "years after the closing" that respondent learned the nature of the transaction.

Respondent learned, at the closing, that Brown was not bringing the $9,579.31 listed on the HUD-1.

As mentioned previously, there were liens on McCutchen's property, all of which were cleared. In a quiet title proceeding that arose from this matter, respondent forwarded to Abbott Gorin, McCutchen's attorney, a copy of the check paying

off the Ford lien.[6] Rather than showing a payment of $18,665, the amount reflected on respondent's bank statement, the check Gorin received shows a payment of $21,665. Respondent conceded that the numbers on the check that Gorin received looked like his handwriting, but denied altering the check, stating that he had no reason to have done so. He had no explanation for the amount discrepancy.

Respondent made two payments to Infinite Investment, a company that belongs to Almone Little, a long-time friend of Thompson. Specifically, on the day of closing, respondent wrote a check for $50,000 to Infinite Investment. He wrote the check at Thompson's instruction, adding that the seller's agent may direct where the funds should go. He had no reason to believe that Thompson was instructing him to do anything inappropriate. He wrote "Broker's Commission" on the $50,000 check. His testimony on this score weighed heavily in the special master's findings. The following exchange took place between the presenter and respondent:

---

[6] Respondent did not have the original check, which was not returned by his bank.

Q. All right. I'm referring you now to OAE-6, which is the $50,000 check to Infinite Investment Group.

A. Umm-hum.

Q. Now, that has the notation McCutchen/Brown broker commission. Now, that's your handwriting, isn't it?

A. Yes, it is.

Q. Okay. Now, why did you write broker commission there?

A. I don't — that was written at the direction of Mr. Ronald Thompson and I can't tell you right now why I would have put that statement, or the line under the memo line, broker commission.

Q. Well, you didn't write these checks out at the closing?

A. That check — was it written at the closing?

Q. That check you did write at the closing.

A. I believe so.

Q. So which checks did you write at the closing? Just that one?

A. No. I would have to say any check that was dated with December 19th, the date of the closing.

Q. You wrote at the closing.

A. To the best of my recollection.

Q. Okay. And Mr. Thompson told you to write broker's commission on this; is that what your testimony is?

A. No. I did not say that.

[SPECIAL MASTER]: You just said that.

Can we have a read back?

(The court reporter read back previous testimony.)

[PRESENTER]:

Q. So did Mr. Thompson tell you to write broker commission or —

A. When I said Mr. Thompson directed me to write that check in the amount I was referring to Infinite Investment in the amount of $50,000. I don't know why broker commission was written there. I don't recall whether he said that. I'm not sure why broker commission was there.

Q. Did you have any invoice indicating that there was a brokerage commission due in the amount of $50,000?

A. No. This was, again, at the direction of Mr. Thompson verbally.

[3T80-17 to 3T82-18.][7]

[7] 3T refers to the transcript of the November 22, 2011 hearing before the special master.

On January 19, 2007, respondent wrote a second check to Infinite Investment, for $68,976.15, at Thompson's instruction. Thompson picked up that check from respondent's office, along with the $35,000 check for McCutchen.

The presenter asked respondent if it "disturb[ed]" him to distribute almost $120,000 in sales proceeds to someone other than McCutchen or Thompson, without McCutchen's being present. Respondent replied:

> I did it at the direction of the seller's agent. I had no -- my understanding is I had no obligation to pick up the phone and call Mary McCutchen. I didn't have a phone number for her, either. He had a valid Power of Attorney which I was entitled to rely on and followed his direction.
>
> [3T98.]

In mitigation, respondent presented his activities for the Leukemia/Lymphoma Society and other charitable organizations.

He also introduced two character witnesses and submitted a number of character letters.

Ronald A. Thompson[8]

McCutchen's house was in need of repairs and it had to be made wheelchair accessible so that Thompson, an accident victim, could reside there.

Thompson contacted a friend of his, Almone Little, who was involved in real estate, explaining the repairs/modifications that had to be made to the house. Little advised him that "he had a way for [him] to do it and that [he] didn't have to worry about anything, everything that, you know, everything would be taken care of." Little did not tell Thompson that the transaction was a sale/buy back. Thompson was under the impression that the transaction was a loan for him to do the repairs.

Little was present at the closing. Brown was leaving the closing when Thompson was entering. She was introduced to him as the girlfriend of a mutual friend. He did not speak to her beyond the introduction. Thompson did not realize that Brown was buying the property.

---

[8] Thompson's criminal record was discussed on the record, presumably to call his credibility into question. The record does not reveal if respondent knew of Thompson's criminal past.

Thompson met respondent at the closing. He did not recall respondent's informing him that he was taking a $5,000 legal fee.

During the closing, respondent read the documents to Thompson and asked if he understood them. Thompson replied that he did. He testified further that he believed that Little "took care of everything" and "as [respondent] was reading, I was signing and I was - some things I heard, some things I didn't hear." Thompson left the closing "empty handed," without copies of the closing documents and without any funds.

In a subsequent, related proceeding to quiet title, Thompson signed a certification in which he stated that Little had told him that Brown worked in respondent's office. Thompson also stated that neither respondent nor Little had told him that he was conveying title to Brown. However, during his testimony before the special master, Thompson conceded that respondent might have said so and that he was not listening.

As stated previously, the HUD-1 reflected a sale price of $210,000 and cash to seller in the amount of $220,220.46. Thompson received no money at the closing. He was not there, when the checks were disbursed.

Following the closing, Little told Thompson that they had the loan and that the repairs to the property could be made. Little told Thompson that he would contact him, "when the time came for the checks." At some point, Little deposited $35,000 in Thompson's account. In the certification in the quiet title action, Thompson stated that he did not direct that any checks be written from the sale proceeds and that he "did not receive a $35,000.00 check from Attorney Gahwyler made payable to me as Power of Attorney for Mary McCutchen." Thompson testified that the certification was accurate, in that he did not receive a check from respondent. Rather, Little deposited the check in his account.

As for the two checks to Infinite Investment, totaling $118,976.15, Thompson did not know why Little had received those funds. He would not have authorized that disbursement. When asked if he had directed respondent to give the $200,000 to a third party, Thompson stated "No. If I had known that I was getting $200,000, I would have known that I was selling the house and I would have quickly backed out of that." He thought that the HUD-1 was an appraisal of the house.

At some point Thompson learned that "everything wasn't legit," and he called Little, who eventually stopped returning his calls.

Erika Brown

Little was a friend of Lorenzo Hobbs, who, at the time of the transaction, was Brown's boyfriend (now her husband). Brown and Hobbs were looking for a property to buy and contacted Little, who advised them that "Thompson's property" was going into foreclosure and that he wanted to sell it. The property was a three-family house. Brown did a walk-through of the property with Little, in McCutchen's presence. Brown did not know that McCutchen was unaware of why she was there.

Brown was introduced to Thompson at the closing, but they did not have a conversation. Brown did not speak to respondent until the closing. He explained the closing documents to her, but she did not have copies of the documents, when she left the closing. Brown knew that respondent was receiving a fee, which he explained on the documentation. She did not see any checks written or disbursed at the closing. She assumed that the seller was receiving the closing proceeds. She did not authorize respondent to pay Infinite Investment. Until the

hearing, she was unaware that Little had received roughly $120,000. She did not understand that McCutchen had the right to buy back the property within one year.[9]

Brown's understanding was that McCutchen would be remaining in the property. Brown received rent payments through Little's company, Infinite Investment, for March and April 2007. Brown believed that Little was making the payments on Thompson's behalf. After April 2007, Brown was unable to contact Little.

In July or August 2007, the property was going into foreclosure. At that time, Brown approached McCutchen and advised her that she was selling the property. Brown ascertained, from McCutchen's response, that she did not know that Brown owned the property.[10] Brown attempted to contact respondent, but had difficulty doing so because he was changing

---

[9] The facts surrounding this transaction are hazy at best. There is no written contract of sale for the property in the record. Thus, the source of the right to re-purchase the house is unclear.

[10] Brown testified that McCutchen suffered from Alzheimer's Disease. In late December 2007 or early January 2008, Brown went to the house and McCutchen gave her the keys to the house. Brown did not believe that McCutchen understood that Brown owned the house.

his office location.[11] In August 2007, she located him and asked for copies of the closing documents, which she received.

Sometime after August 2007, Thompson told her that he had given the sale proceeds to Little. Thompson never denied having sold the house to her. Ultimately, McCutchen reacquired the house and obtained a reverse mortgage.

Almone Little

Little testified that McCutchen's house was in need of repairs. After she was unable to refinance, Thompson approached him for assistance. He suggested that they sell the house to someone they knew, use the equity to repair the house, and then buy it back.[12] He explained the transaction to McCutchen and Thompson. Thompson's testimony that he had been unaware that the house was being sold was not truthful.

---

[11] Respondent moved to a different office in the same building. His telephone and fax numbers remained the same and his name remained on the building directory.

[12] It is unclear how Thompson would use the equity to repair a house that he no longer owned.

Little did not speak to respondent until the day of the closing. Rather, Matthew Gardner, an employee of AMS mortgage, contacted respondent about handling the closing and was present at the closing. Little negotiated the terms of the transaction between Brown and Thompson. He explained the transaction as follows:

> A. Ronald wasn't working at the time, so the plan was for him to basically find a job, get his credit in order, and in a year or two, once he was qualified for a mortgage, he would buy the home back.
>
> Q. Were these terms reduced to writing anyplace?
> A. No.[13]
>
> Q. Was Mr. Gahwyler informed of any of these terms?
>
> A. I don't believe so, no.
> [2T59-14 to 23.][14]

Little testified that Thompson and Brown were in the room for the closing at the same time. He confirmed that Brown did not bring $9,579.31 to the closing and that McCutchen did not

---

[13] Later, Little testified that there was a contract for the McCutchen-to-Brown transaction, but not for the sale back from Brown.

[14] 2T refers to the transcript of the November 21, 2011 hearing before the special master.

receive $200,000. Rather, Infinite Investment, Little's company, received a check for $50,000, at the closing, and a second check on January 19, 2007 for $68,976.15. It was Gardner who directed respondent to pay the funds to Infinite Investment. Little did not know why "Broker Commission" was written on the $50,000 check. He did not direct respondent to write it.

Little explained that his company received the funds because they were taking the equity to repair the house. The $50,000 and $68,976.15 payments went toward those repairs. He did not have any proof of payments made toward those repairs. He also paid the mortgage from the closing proceeds and rent collected, although he did not recall for how long he had made the payments or how much he had paid toward the mortgage - perhaps $30,000. Contrary to Thompson's testimony, Little did not give him $35,000. Rather, those funds came from respondent.

Little denied that he stopped returning Thompson's calls. He stopped returning Brown's calls, when he learned that McCutchen had not given permission to sell the house. He felt "harassed" when the deal "blew up" and he panicked. Eventually, he began talking to Brown again. Little speculated that, between the time that he explained the transaction to McCutchen

and the closing, she must have changed her mind about selling the property.

Abbott Gorin

Abbott Gorin represented McCutchen in her proceeding to get the house returned to her. According to Gorin, McCutchen's understanding of the transaction was that Thompson was assisting her in getting a new boiler and handicap access for the house. She thought this was being accomplished through a refinancing. Thompson never told Gorin that Little was holding the money for McCutchen.

Gorin's testimony differed directly from the other witnesses' testimony on some points. Specifically, McCutchen told Gorin that she never met with Little, prior to the closing. Thompson told Gorin that an unidentified individual had told him that Brown worked in respondent's office. Thompson insisted to Gorin that he was not at the closing at the same time as Brown.

Gorin filed a motion to quiet title in the Chancery Division. The complaint was amended to include respondent as a defendant. Ultimately, title to the house was conveyed from Brown to McCutchen and the latter obtained a reverse mortgage.

In its brief to the special master, the OAE urged the imposition of a suspension of three months to one year. In its brief to us, however, the discipline sought was a one- to two-year suspension. Respondent's counsel asked us to impose no more than a censure.

At the conclusion of the ethics hearing, the special master found respondent not credible:[15]

> It is hereby found that Respondent's testimony is not credible. Respondent's self interest induced testimony most favorable to himself.
>
> Respondent has a history of violating RPC 4.1(a), RPC 8.4(b) and RPC 8.4(c). These three violations are violations of the Rules of Professional Conduct that reflect adversely on his credibility. **(Exhibit OAE-42).**
>
> Additionally, Respondent admitted facts sufficient to substantiate additional violations of RPC 4.1(a), RPC 8.4(b) and RPC 8.4(c).
>
> These misrepresentations bear on the issue of making same in a sworn statement.
>
> The Special Ethics Master finds that the Respondent's credibility and his

[15] Because we generally defer to the trier of fact on credibility issues, we have recounted the whole of the special master's discussion on this key issue.

inability to tell the truth are at the central issue of this Hearing. Specifically, Trust Account check number 1106 was discussed at length during the Hearing. **(T11/22/11, p71-p.81).** Respondent provided one version of a check **(Exhibit OAE-8)** made out to Ford Motor Credit Corp. originally in the amount of $18,665.00.

During the course of the Hearing, it was discovered that the Respondent falsified this check that he provided to McCutchen's attorney, Abbott Gorin. Mr. Gorin was representing Seller McCutchen in several proceedings among which were a Complaint to Quiet Title, so that the property could be reverted back to Mary McCutchen, the original owner of the property. OAE-40 is the same check, number 1106. However, it appears that Respondent altered the amount of the check to be $21,665.00 made out to Ford Motor Credit Company. The inescapable conclusion is that Respondent altered, modified, changed or amended a Trust Account check that he knew was to be used in a Court proceeding as an Exhibit on behalf of Attorney Gorin who then was representing McCutchen in her lawsuit as to a Complaint for Quiet Title on the property in question.

There are further indications of the utter lack of credibility of Respondent's testimony.

The Respondent admitted that he signed the Certification relative to the HUD-1 Settlement Statement knowing that it was false. **(T11/22/11, p.71-6).**

An example of his glaring lack of credibility is the following colloquy.

When asked why he wrote the words "Broker Commission" on Trust Account check number 1104, the following occurred:

> Q. Okay. Now why did you write broker commission there?
>
> A. I don't -- that was written at the direction of Mr. Ronald Thompson and I can't tell you right now why I would have put that statement, or the line under the memo line, broker commission. **(T 11/22/11, p.80-25)**; and
>
> Q. Okay. And Mr. Thompson told you to write broker's commission on this, is that what your testimony is?
>
> A. No. I did not say that. **(T 11/22/11, p.81-21)**.

Obviously, this testimony is in contradiction to itself.

The Special Ethics Master finds that the doctrine of "false in one false in all should be utilized in the instant case." The doctrine is to be used when a witness utilizes a falsehood that is willful and material.

[SMR16-7 to SMR18-2.][16]

As to the alleged violation of RPC 1.5(b) (failure to communicate the basis or rate of the fee in writing), respondent admitted that he represented Brown and McCutchen/Thompson and

[16] SMR refers to the special master's report.

that he had not previously regularly represented them. He further admitted that he did not provide either party with the required writing setting forth the basis or rate of his fee. The special master found that respondent violated RPC 1.5(b) twice, both as to Brown and as to McCutchen/Thompson.

The special master also found that respondent violated RPC 1.5(a) (overreaching) in charging McCutchen $6,000. In the special master's view, respondent "knew that the fee was grossly excessive and that the taking of that fee was unethical."

As to respondent's listing Murphy's name on the HUD-1, the special master stated:

> Most alarming to this Special Ethics Master was the fact that Respondent attempted to hide this $6,000.00 fee. The Respondent in his creation of the HUD-1 Settlement Statement placed another attorney's name on the document as Seller's attorney.
>
> Testimony was taken of the other attorney named on the HUD-1 Statement, which is Raymond Murphy, Esq. Mr. Murphy testified that he had nothing to do with this closing, had not talked to the Respondent for a period of time, had no knowledge of this closing, and did not receive any fee from this closing. [citation omitted].
>
> The pattern of deception and fraud is rampant in the false and fraudulent HUD-1 Settlement Statement as to another attorney, Raymond Murphy, incorrectly being placed as

> the Seller's attorney on the statement when in fact that never occurred. It is perhaps most egregious in the sense that the Respondent knew that his actions were wrong and then placed other victims into his web.
>
> Mr. Murphy was one such victim along with others in this real estate transaction.
>
> [SMR6-SMR7].

In connection with RPC 1.7(a)(1) and (2), the special master pointed to respondent's admission that he represented both buyer and seller in this transaction, a sale/lease back, and concluded that he violated both rules. This transaction "occurred with one party in financial distress" and fits the definition of a transaction in which dual representation is not allowed. Respondent admitted that he did not discuss the conflict with the parties and that they did not provide informed consent to his dual role.

The special master stated that both Brown and Thompson testified that they did not know that this was a sale/leaseback. Rather, Brown thought she was buying the property and Thompson thought he was refinancing.

The special master pointed to the extent of the monetary loss to McCutchen in concluding that this was an actual conflict of interest. McCutchen received "perhaps" $35,000, when she should have received over $200,000. Brown, according to the

HUD-1, brought $9,500 to the closing. In fact, she paid nothing. A "stranger to title" received almost $120,000 from the sale. The special master "place[d] the burden of this result clearly on the shoulders of the Respondent," who concealed two improper payments that did not appear on the HUD-1 to Infinite Investment, totaling approximately 120,000. In the special master's view, that fact went to the issue of respondent's knowledge of the real estate "scam." The representation of one client was directly adverse to the other party's interests. Respondent's representation of buyer and seller posed a significant risk of harm to both. There was no waiver of the conflict in writing. Thus, respondent violated RPC 1.7(a)(1) and (2).

As to RPC 1.15(a),(b), and (d), the special master observed that McCutchen should have received $200,220.46. She received only $35,000. Further, respondent did not disburse funds as shown on the HUD-1. Rather, he made a number of disbursements that were not authorized by the client, and were not evidenced on the HUD-1. "Respondent created a fictitious document that glaringly omitted $152,641.15 of the entire purchase price. This constitutes an egregious departure from his ethical duties." Moreover, as of the date of the special master's

report, respondent still had not turned over $4,126.48. Respondent's retaining the funds for almost five years without justification "is tantamount to misappropriation." In light of McCutchen's death, respondent's failure to provide her funds "equals a deprivation of a client receiving their money."

The special master termed "an intervening issue" the disorganization of respondent's trust account records, noting the OAE's contention that he may not have known that he was still holding McCutchen's funds. Respondent's failure to safeguard funds is evidenced by his not knowing he held $4,126.48 of McCutchen's money. In addition, he disbursed sale proceeds to individuals or entities that were not entitled to them, specifically, Infinite Investment and/or Almone Little. Respondent violated RPC 1.15(a) and (b).

The special master further found that respondent violated RPC 1.15(d) by failing to maintain "accurate, contemporaneous records" of the funds he received and disbursed in the McCutchen/Brown transaction.

With regard to RPC 4.1, the special master noted that the HUD-1 reflects that Brown had brought $9,579.31 to the closing. That entry was false. Respondent testified that he did not speak to Brown or Thompson, prior to the closing. In the

special master's view "[o]ne possible conclusion that can be drawn from said testimony is that the Respondent knew that this transaction was a 'sale-leaseback' fraudulent sham closing." The HUD-1 contained "voluminous misrepresentations, omissions and inaccuracies." "Most alarmingly," respondent did not disburse $200,220.46 in sales proceeds to McCutchen, contradicting the entry on the HUD-1.

The special master also noted respondent's admission that he had prepared the HUD-1 and forwarded it to the lender, knowing that it had material inaccuracies. He knew that the lender and others would rely on the representations in the HUD-1. Respondent did not amend the HUD-1 to reflect the actual disbursements or notify the lender that the disbursements were different from those reflected on the HUD-1.

As to RPC 8.4(b), the special master recited the numerous omissions and inaccuracies on the HUD-1 and noted respondent's admission that he knew that he was creating a false HUD-1. The special master pointed to respondent's execution of the settlement agent's certification on the HUD-1 and to the warning that it is a crime to make false statements on the HUD-1. Respondent's certification that the figures on the HUD-1 were accurate violated RPC 8.4(b). Moreover, his preparation,

execution and transmission to the lender of the HUD-1, knowing that it contained false information, violated RPC 4.1 and RPC 8.4(c).

The special master concluded:

> The Special Ethics Master finds that there is clear and convincing evidence that Respondent engaged in multiple acts of unethical conduct. This arose out of his participation in a scheme to commit fraud. The result [sic] of Respondent's actions are far flung. Specifically, an elderly woman lost her only asset, which was her home. She literally died owing a bank on a reverse mortgage for an asset that was once hers. The Respondent disbursed the majority of the net sales proceeds to an individual who was never entitled to receive any monies from this closing. The original owner of the home's grandson never received the handicap access for which he sought financing.
>
> But for the Respondent, this transaction never would have occurred. It is the Special Ethics Master's opinion that the Respondent was, for lack of a better word, the key man. He facilitated and helped to accomplish this fraud. He was the gatekeeper at the closing and let the gate swing wide open to allow this devastating fraud to occur. He did nothing to ensure that he was acting in his clients' best interest [sic].
>
> [SMR18.]

In her report, the special master noted the "egregious circumstances surrounding respondent's conflict of interest, in essence quoting directly from the OAE's brief:

1) Mrs. McCutchen's loss of her net sales proceeds;

2) The financial burden imposed on Mrs. McCutchen when she was compelled to obtain a reverse mortgage in order to re-acquire her home;

3) Respondent's failure to take even the clearest and simplest steps to ensure that this closing was in his clients' best interests;

4) Respondent's payment of almost $120,000.00 in net sales proceeds to an individual who was not entitled to receive anything;

5) Respondent's preparation of a HUD-1 Settlement Statement he knew to be false;

6) Respondent's knowingly false certification to the mortgage lender; and

7) Respondent's grossly excessive attorney fee to the Seller.

[SMR19-SMR20.]

As to the measure of discipline, the special master recounted respondent's prior bout with the disciplinary system, which resulted in a censure and recommended that his "multiple serious violations" be met with a suspension. The special master pointed to In re Berkowoitz, 136 N.J. 148 (1994), which calls for the imposition of at least a reprimand for a conflict

of interest and In re Guidone, 139 N.J. 272 (1994), which calls for the imposition of discipline greater than a reprimand, where there has been economic harm to the client from the conflict of interest.

The special master noted that, more recently, a three-year suspension was imposed for misconduct that was "eerily similar" to respondent's. In In re Thomas, 183 N.J. 230 (2005), the buyer contributed virtually no money toward the purchase, the seller received no funds for the sale of the property, and the mortgage broker/realtor, and possibly the attorney, received the sale proceeds. In this case, the buyer provided no funds, the mortgage broker/lender received funds, respondent received funds, and it was questionable what, if anything, the seller received.

The special master weighed the mitigating factors (presumably, respondent's charity work) and unspecified aggravating factors, as well as respondent's "almost indifferent attitude" and the summations filed by the OAE and respondent. The special master concluded that a three-year suspension is the appropriate measure of discipline for respondent's violations of RPC 1.1(a), RPC 1.4(b), RPC 1.4(c), RPC 1.5(a), RPC 1.5(b), RPC

1.7(a)(1) and (2), RPC 1.15(a), (b) and (d), RPC 4.1(a), RPC 8.4(b) and RPC 8.4(c).[17]

Following a de novo review of the record, we are satisfied that the conclusion of the special master that respondent is guilty of unethical conduct is supported by clear and convincing evidence. We are unable to agree, however, with the special master's findings as to some of the rules violated, namely, RPC 1.1(a), RPC 1.4(b), RPC 1.4(c), RPC 1.15(a), and RPC 1.15(d).

As to gross neglect (RPC 1.1(a)), setting aside the numerous improprieties involved in the transaction, there is no indication that respondent's handling of the closing itself was performed negligently. There are no allegations that proper payments were not made, that documents were not filed, or liens were not paid. There was dishonesty involved, but not neglect. The two should not be confused. The alleged violation of RPC 1.1(a) is, therefore, dismissed.

---

[17] The special master based her finding that respondent violated RPC 8.4(c) not only on the misrepresentations on the HUD-1, but also on the alteration of the check to pay off the Ford lien sent to Gorin. The complaint does not mention this check. Therefore, a finding that respondent violated RPC 8.4(c), based on this fact, is improper. R. 1:20-4(b).

As to failure to communicate (RPC 1.4(b) and (c)), the record contains no indication that Brown and Thompson were unable to contact respondent. The only inkling in this area is Brown's testimony that she could not reach respondent because he had changed offices. However, respondent testified that his new office was in the same building and that his telephone and fax numbers had not changed. Moreover, the delay in Brown's ability to reach respondent appeared to be quite brief.

As for Thompson, there was no testimony that he had tried to communicate with respondent, after the closing. In any event, it is unclear what exactly respondent was supposed to communicate to them. Someone was obviously advising them about the closing because they knew where it was held and when to be there. The allegation that respondent violated RPC 1.4(b) is, therefore, dismissed as well.

As to RPC 1.4(c), respondent testified that he reviewed the closing documents with Brown and Thompson. Brown and Thompson confirmed that respondent went over the documents with them. That rule is violated if an attorney fails to supply the client with detailed information to allow the client to make informed decisions about the representation. Brown clearly knew the transaction in which she was engaging -- buying McCutchen's

house and renting it back to her. Thompson claimed that he did not know that he was selling McCutchen's house, but that claim defied credulity. The allegation that he violated RPC 1.4(c) is, thus, also dismissed.

As to the charged violation of RPC 1.15(a), the special master determined that respondent's failure to disburse to McCutchen the $4,126.48 that remained in his trust account for five years was tantamount to misappropriation.[18] That conclusion is not well-founded. That a client may have been deprived of funds does not equate to an attorney's taking of the funds. Indeed, the OAE's review indicated that respondent's trust account was in such a state of disarray that he may not even have known that he still had the funds in the account. There was no evidence that respondent's bank statements dipped below the amount he still held for McCutchen, which would be conclusive evidence of a negligent misappropriation. Thus, the finding that respondent violated RPC 1.15(a) by negligently misappropriating his client's funds is not supported by the record.

---

[18] Presumably, the special master meant negligent misappropriation, inasmuch as she did not recommend that respondent be disbarred.

Moreover, the record does not provide clear and convincing evidence that respondent violated the rule by failing to safeguard clients' funds. The OAE apparently could not make heads or tails out of respondent's trust account records. It is not clear, however, what respondent knew about these funds. That the money sat in his account, undistributed but intact, is not a violation of RPC 1.15(a).

Finally, with regard to RPC 1.15(d), the OAE provided no testimony about the condition of respondent's attorney books and records. This alleged rule violation seems to be supported only by the statement in the complaint that, "[d]ue to the volume and number of transactions in respondent's trust account, the OAE could not determine whether respondent retained the $4,126.48 due to this client in his trust account or disbursed those funds to himself or others in connection with other matters unrelated to McCutchen or Thompson." That allegation was not established by clear and convincing evidence at the hearing. It is, therefore, dismissed.

On the other hand, the special master's findings regarding RPC 1.5(a) and (b), RPC 1.7(a)(1) and (2), RPC 1.15(b), RPC 4.1(a), RPC 8.4(b), and RPC 8.4(c) were amply supported by the evidence. The record contains clear and convincing evidence of

respondent's violation of each of these rules, regardless of whether he was, as the special master called him, the "key man" in the transaction, simply a player, or an innocent bystander.

As to an excessive fee (RPC 1.5(a)), respondent admitted that his $6,000 fee for handling a closing was "multiples" of what he would normally charge. He added that the mortgage broker had told him what he should charge his clients, an amount that he viewed as a "golden goose." His violation on this score is clear.

With regard to RPC 1.5(b), respondent conceded that he did not communicate the basis or rate of his fee, in writing, to Brown or Thompson. He violated RPC 1.5(b) as to both clients.

As to the conflict of interest charges (RPC 1.7(a)(1) and (2)), setting aside the shady nature of the transaction and respondent's knowledge or lack thereof, it is unquestionable that he did not discuss the conflict with his clients and did not obtain their written waiver, as required by the rules. In finding that respondent engaged in a conflict, the special master placed much emphasis on the harm to McCutchen. However, that she was harmed is not relevant to the finding of a conflict, only to the measure of discipline.

The special master premised her finding that respondent violated RPC 1.7(a)(1) and (2) on his representation of both sides in a sale/lease back transaction. Respondent, however, claimed that he was unaware, until well after the closing, that it was a sale/lease back and not a straight sale. Indeed, Little testified that respondent was not informed of the sale/lease back agreement. That being the case, if respondent thought this was a simple sale, he could have represented both sides if he had complied with the safeguards of the rule. Because the terms of the transaction had been agreed to prior to his involvement, if respondent had obtained a waiver from both sides, after full disclosure, the representation would have been permissible. He admittedly failed to do so. Thus, whether he knew this was a sale/leaseback or not, he violated RPC 1.7(a)(1) and (2).

Respondent is also guilty of violating RPC 1.15(b). There is no explanation in the record for his failure to disburse the $4,126.48 that he held from the closing proceeds, after all necessary payments had been made. Indeed, he was never asked why he retained the funds. Whatever his reason was, if he had one, the money should have been promptly disbursed to McCutchen.

Respondent's violations of RPC 4.1(a) and RPC 8.4(b) and (c) go hand in hand. His misrepresentations on the HUD-1 were egregious. Over $152,000 in disbursements from the closing proceeds do not appear on the HUD-1.[19] Even if we accept respondent's contention that he made the disbursements as directed by Thompson, there was no reason why he could not have amended the HUD-1 to correctly reflect the payments from the closing proceeds. Moreover, the HUD-1 falsely reflected a $9,579.31 payment from Brown. In fact, she brought no funds to the closing.

Respondent's signature on the settlement agent's certification, stating that the HUD-1 was an accurate reflection of the funds disbursed or to be disbursed, was a misrepresentation not only to the lender but to any third party reviewing the documents in the future. Respondent, thus, violated RPC 4.1(a) and RPC 8.4(c). Moreover, the HUD-1 provides clear warning that making misrepresentations on the form is a criminal offense, a violation of RPC 8.4(b).

---

[19] Indeed, some of his omissions were for legitimate disbursements, such as paying off the two liens on the property. There is simply no explanation for why they were not recorded on the HUD-1.

That all being said, what degree of discipline is appropriate for this respondent? The special master recommended that we impose a three-year suspension. The OAE urges the imposition of a one- to two-year suspension and respondent's counsel deems a censure sufficient discipline. We seek guidance in established precedent.

The discipline for misrepresentations on closing documents has ranged from a reprimand to a term of suspension, depending on the seriousness of the misconduct, 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:

Reprimand: In re Barrett, 207 N.J. 34 (2011) (attorney misrepresented 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 $8,700 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) (attorney 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 meant 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 Gale, 195 N.J. 1 (2007) (attorney engaged in a pattern of gross neglect and misrepresentation in a series of five real estate matters by knowingly inserting information on RESPAs that was inaccurate and that was supplied to her by a non-client on whom she improperly relied; we considered in mitigation the attorney's emotional and physical difficulties during the time in question); and In re Agrait, 171 N.J. 1 (2001) (despite being obligated to escrow a $16,000 deposit shown on a RESPA, attorney 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).

Censure: In re Gahwyler, 208 N.J. 353 (2011) (attorney certified the accuracy of a HUD-1 knowing that the entries were not correct, failed to provide a written fee agreement, and represented the buyer and seller in a real estate transaction without first obtaining a written waiver of the conflict); In re Soriano, 206 N.J. 138 (2011) (attorney assisted a client in a fraudulent real estate transaction by preparing and signing a RESPA statement that misrepresented key terms of the transaction; in addition, 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 prior 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 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) (attorney 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); and In re Scott, 192 N.J. 442 (2007) (attorney

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; the attorney had received a prior admonition and a reprimand).

Three-month suspension: In re De La Carrera, 181 N.J. 296 (2004) (in a default case, the attorney, in one real estate matter, failed to disclose to the lender or on the RESPA the existence of a second mortgage taken by the sellers, 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) (attorney 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 private holder of a second mortgage and the buyers/borrowers).

Six-month suspension: In re Gensib, 209 N.J. 421 (2012) (attorney prepared false RESPA statements in five transactions, engaged in a conflict of interest in two of the five, and had no written fee agreement in all five matters; prior reprimand and censure); In re Swidler, 205 N.J. 260 (2011) (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); and In re Fink, 141 N.J. 231 (1995) (attorney 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 lied to a prosecutor about the RESPA).

One-year suspension: In re Thomas, 181 N.J. 327 (2004) ("Thomas I") attorney involved in a conspiracy to defraud a mortgage lender, prepared a HUD-1 real estate form that contained numerous misrepresentations; the attorney also knowingly made false statements of material fact in connection with the disciplinary matter, engaged in an improper conflict of interest and grossly neglected the case; prior admonition); In re Alum, 162 N.J. 313 (2000) (attorney 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 suspension was suspended and he was placed on probation); and In re Newton, 157 N.J. 526 (1999) (attorney prepared false and misleading RESPA statements, took a false jurat, and engaged in multiple conflicts of interest in real estate transactions).

Two-year suspension: In re Frost, 156 N.J. 416 (1998) (attorney 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).

Three-year suspension: In re Thomas, 183 N.J. 230 (2005) ("Thomas II") (attorney engaged in a fraudulent real estate transaction where the buyer contributed virtually no funds towards the purchase, the seller received no consideration for the sale of her house and a "mortgage broker/realtor", and

possibly the attorney, received all of the sale proceeds; prior admonition and one-year suspension).

Looking only at the found RPC violations, respondent's misconduct is most similar to his own prior disciplinary case, In re Gahwyler, supra, 208 N.J. 353, where he certified the accuracy of a HUD-1 knowing that the entries were incorrect, failed to provide a written fee agreement, and represented the buyer and seller in a real estate transaction without first obtaining a written waiver of the conflict. There, he received a censure. True, in this case, respondent is guilty of additional violations, specifically, charging an excessive fee and failing to promptly disburse client funds. Those added factors could elevate the discipline one notch to a three-month suspension.

However, add to the mix the egregious fraud here and it seems clear that more serious discipline is mandated. If we were to make a leap of faith and accept that respondent did not know that an elderly woman was being swindled out of her own home, the circumstances of the transaction had to inform respondent that something was "up." Respondent testified that, prior to December 2006, when the closing took place, real estate (residential and commercial) made up approximately sixty to

sixty-five percent of his practice. In the present closing, the mortgage broker told respondent to take a fee for himself that was "multiples" of any prior fee he had received for a closing; the buyer brought no funds to the closing; and the seller received almost nothing from the sale of her house. Respondent is not a novice to real estate practice. It simply defies credulity that he did not know that he was facilitating a fraud. Moreover, considering the altered check that respondent sent to Gorin in the quiet title proceeding and his placing on the HUD-1 the name of an attorney who had absolutely nothing to do with the closing, respondent has little, if any, credibility regarding his knowledge of the fraud.

Taking these additional factors into account, the special master's reliance on In re Thomas, supra, 183 N.J. 230 ("Thomas II"), at first blush, seems well-placed. There, as previously noted, the buyer contributed virtually no funds towards the purchase, the seller received no consideration for the sale of her house and a "mortgage broker/realtor," and possibly the attorney, received all of the sale proceeds.

Respondent, however, does not deserve the same discipline meted out in Thomas II. First, Thomas was guilty of numerous additional violations not found in this case. Specifically, the

HUD-1 that Thomas prepared listed several expenses/fees that were never paid; Thomas viewed his role as that of attorney for the mortgage company and claimed that he did not represent either party, although both parties to the transaction had a reasonable belief that he was acting as their attorney; Thomas did not explain the closing documents to the parties; he failed to deposit funds in his trust account; he was guilty of gross neglect in his handling of the closing; and he was guilty of failure to communicate and failure to safeguard funds. In addition, Thomas also had already received an admonition, followed by a one-year suspension for conduct remarkably similar to that for which he received the three-year suspension.

In determining to impose a lengthy suspension in Thomas II, we noted the serious harm to both buyer and seller, Thomas' disciplinary history, and the fact that he had participated in two fraudulent real estate schemes involving the same individual in "the mortgage business." In the Matter of Richard R. Thomas, II, DRB 04-303 (December 14, 2004) (slip op. at 42). We stated, "If [Thomas] were given the benefit of the doubt, perhaps his involvement in one improper transaction could be explained by monumentally poor judgment, lack of experience, or extreme naiveté. His participation in two such schemes, however,

demonstrates venality and is deserving of a lengthy suspension" Id. We imposed a two-year suspension. The Court, obviously troubled by Thomas' misconduct, imposed a three-year suspension, retroactive to the effective date of his one-year suspension.

This case is not Thomas II. As egregious as the fraud is in this case, it does not rise to the same level as that in the Thomas II case. Moreover, respondent has been only censured, a discipline imposed years after this misconduct. Thus, respondent is not an attorney who refused to learn from his mistakes. What we do have is an attorney who is not reluctant to violate his duties as a closing agent and who seemed to be moved by self-interest, if not greed.

Using respondent's prior censure as a starting point, the appropriate discipline for the sum of his current RPC violations, standing alone, would be a three-month suspension. But there are additional factors to consider: 1) the magnitude of the misrepresentations on the HUD-1;[20] 2) the enormity of the harm to McCutchen, a vulnerable, elderly woman; 3) the involvement of another attorney in his misdeeds, by placing the

[20] We recall that over $152,000 in disbursements did not appear on the HUD-1.

attorney's name on the HUD-1; and 4) his willingness to disregard his closing agent's obligations to pursue his self-interests. We, therefore, find that a one-year suspension is appropriate in this case.

Vice-Chair Frost would impose a three-month suspension. Member Baugh recused herself.

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, Jr.
Docket No. DRB 12-191

Argued: September 20, 2012

Decided: December 5, 2012

Disposition: One-year suspension

Members	**Disbar**	**One-year Suspension**	**3-month suspension**	**Reprimand**	**Admonition**	**Recused**
Pashman		X				
Frost			X			
Baugh						X
Clark		X				
Doremus		X				
Gallipoli		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		7	1			1

Julianne K. DeCore
Chief Counsel