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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-005

IN THE MATTER OF

DONALD JACKSON

AN ATTORNEY AT LAW

Decision

Argued: March 20, 1996

Decided: December 9, 1996

Cynthia A. Cappell appeared on behalf of the District IIB Ethics Committee.

John E. Seltser, III appeared on respondent's behalf.

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

This matter was before the Board based on a recommendation for discipline filed by the District IIB Ethics Committee ("DEC"). The four-count formal complaint charged respondent with misconduct arising out of a real estate transaction. Specifically, respondent was charged in the first count with violations of RPC 1.4 (failure to communicate) and RPC 1.7 (conflict of interest).[1] The second count charged respondent with participating in or condoning the

[1]Although the complaint used the language "deceit and misrepresentation," RPC 8.4(c) was not cited in this count.

alteration of a deed or contract or failing to disclose its creation or alteration, in violation of RPC 8.4 (no subsection cited). The presenter withdrew this count at the DEC hearing. The third count charged respondent with violation of RPC 1.15(a) and (b) (failure to safeguard client property and failure to maintain proper books and records), R.1:21-6(b)(2) (deficient recordkeeping) and negligent misuse of client trust funds, in violation of RPC 8.4 [presumably section (c)] and Advisory Committee on Professional Ethics Opinion 454, 105 N.J.L.J. 441 (1980). The fourth count charged respondent with lack of candor in his communication with the DEC, in violation of RPC 8.1 [presumably section (b)]. The fourth count was dismissed on respondent's motion.

Respondent was admitted to the New Jersey bar in 1981 and has been in private practice in Hackensack, Bergen County. He has no history of discipline.

There were significant discrepancies in the testimony of the three major witnesses, respondent, Jack Price and Phyllis O'Connor. Respondent's testimony and, for the most part, Price's, are set forth directly below. The testimony of O'Connor, which varied greatly, is set forth thereafter.

The Price to O'Connor Contract/Contract I

RESPONDENT AND PRICE'S VERSION

On or about October 1, 1989, Phyllis O'Connor, the grievant herein, saw an advertisement in "The Suburban News" for the sale of property located at 110 Pine Street, Ridgewood, New Jersey ("the property"), a single family residence. The advertisement contained the telephone number of Jack Price, who was engaged in buying and reselling real

estate simultaneously in two-part transactions, a practice commonly known in the real estate industry as "flips." O'Connor called Price to inquire about the property. Approximately two days later they went to see the property, accompanied by Angel, O'Connor's daughter. O'Connor was interested in buying the property. At that time, she and Price negotiated down a sale price of $195,000 from the advertised price of $199,000. According to Price, he and O'Connor discussed financing at that time. He advised her to get a mortgage broker and an attorney. With O'Connor's consent, Price drafted a contract of sale, which he and O'Connor signed on October 7, 1989 ("Contract I," Exhibit J-2).[2]

Price had an ongoing attorney-client relationship with respondent who had, since 1987, represented Price in approximately six real estate transactions. In the summer or fall of 1989, respondent was representing Price in two or three transactions, including Price's purchase of the property in question.

O'Connor told Price that she would like to meet a mortgage broker he had mentioned and that she still did not have an attorney. Accordingly, Price took her to respondent's office so that respondent could review the contract in Price's behalf as well as recommend an attorney to represent O'Connor. Before that meeting, which occurred on or about October 9, 1989, Price made it clear to O'Connor that respondent was representing him. 2T94[3]

On October 7, 1989, when O'Connor signed the sale contract, Price did not yet own the property, although he had a pending contract to purchase it from David and Janet Socha.

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[2]As co-purchaser of the property, Angel signed all of the documents signed by her mother as well. She did not testify before the DEC.

[3]1T represents the transcript of the hearing before the DEC on October 26, 1994. 2T represents the transcript of the hearing before the DEC on December 1, 1994.

O'Connor did not know that Price was not the owner of the property, a fact not mentioned in the contract. Furthermore, as seen below, on the day before, October 6, 1989, respondent had canceled the Socha to Price contract in Price's behalf, a development of which O'Connor was equally unaware. As of October 7, 1989, Price, through respondent, was attempting to keep the contract with the Sochas viable through an extended attorney-review period.

As noted above, on or about October 9, 1989, respondent met with Price and O'Connor.[4] By this time, the Price to O'Connor contract had already been negotiated and signed. Respondent told Price and O'Connor that he could not represent both of them in the transaction. 2T135. Price asked respondent to recommend an attorney for O'Connor. According to respondent, O'Connor announced that she wanted an African-American attorney, a contention that O'Connor denied. Respondent claimed that he did not know any African-American attorneys experienced in real estate. Respondent contended that O'Connor then indicated that she wanted respondent, who is African-American, to represent her. Respondent testified that he once again informed O'Connor that he could not do so because it would be a conflict of interest, unless both O'Connor and Price agreed. Respondent added that, in that case, Price would have to find another attorney to represent him in the sale to O'Connor. 2T136.

At that juncture, Price stated that he would be willing to represent himself in the transaction. Respondent informed Price that that was not advisable because an attorney had to

[4]The first entry for the transaction on respondent's ledger card is the payment of O'Connor's $1000 deposit on October 7, 1989, the date the contract was signed. It may be that O'Connor's deposit check bore that date and, therefore, respondent entered it that way in his ledger. It is also possible that the first meeting in this matter was held on October 7, 1989, as O'Connor contended. See infra.

draft the documents. Respondent added that Price could consult with one of the attorneys to whom respondent rented office space. Price then left the room to allow respondent to review the contract and financing with O'Connor alone. Respondent testified that he also explained to O'Connor the ethical considerations involved in his representation of her interests in light of his prior representation of Price and continued representation in other matters. According to respondent, he told O'Connor that he had represented Price in the past and was then representing him in other matters, including the purchase of the subject property, which respondent deemed a separate transaction from the sale to O'Connor. Respondent told O'Connor that, if a dispute were to arise between her and Price, he could not represent either. Respondent was satisfied that O'Connor had understood him. Admittedly, respondent did not explain to Angel the terms of the contract or the ethics consequences of the representation, nor did he obtain her consent thereto.

Price's testimony differed here. Price's recollection was that respondent had stated that he could not represent O'Connor because of his representation of Price. Price was sure, thus, that respondent and O'Connor had not met alone that day. Price testified that it was not until he and O'Connor had left respondent's office that O'Connor had expressed her wish to be represented by respondent.

Respondent's wife, Deborah Jackson, who works in his office, testified that she recalled that Price, O'Connor and respondent had a meeting. After some time, Price had come out and respondent and O'Connor had met alone for fifteen or twenty minutes. During that time, Price had consulted with an attorney who rented office space from respondent, Ronald Martin Salzer, Esq. Jackson had not heard the conversation between Price and Salzer.

According to Price and respondent, they conferred later in the day on October 9, 1989. Price agreed that respondent would act as O'Connor's attorney only. In evidence is a letter dated October 9, 1989 from respondent to Price. Exhibit J-12. The letter explained the conflict of interest and asked Price to sign the letter if he were to consent to the "dual representation." Price signed a copy of the letter, evidencing his consent to respondent's representation of O'Connor. Although the letter indicated that a copy had been sent to O'Connor, she denied having received it. Respondent did not discuss the letter with O'Connor or ask her if she had received it. Respondent was asked about his failure to send a letter directed to O'Connor:

> Q. Did you separately send a similar or same letter to Mrs. O'Connor?
>
> A. No.
>
> Q. Why not?
>
> A. Well, for two reasons. Number one, because she hadn't raised the question after the fact that Jack Price had, and number two --
>
> Q. Raised what question after what fact?
>
> A. The question that generated this letter, and I think that was part of the telephone conversation that I had with him after they had left.[5] And the second reason was that when they came into my office I represented Jack Price, I did not know Mrs. O'Connor. She knew that I represented or [sic] Price. She elected to have me represent her. We had the conversation, the three of us, and then the two of us, Mrs. O'Connor and me, indicating that I was going to represent her, so I didn't see the possibility of a conflict with Mrs. O'Connor. She came in aware of the fact. He on the other hand, I had represented, and I just didn't want there to be any mistake as to what was going to take place.
>
> [2T142]

[5]It is unclear to what respondent was referring.

The Socha to Price Contract

As noted above, Price did not own the property when he entered into Contract I with O'Connor. Prior to that, on September 25, 1989, Price had signed a contract to purchase the property from David and Janet Socha for $170,000. Exhibit J-1. The contract designated the purchaser as "Jack P. Price and/or assigns." The contract was contingent on Price's ability to obtain a commitment for a conventional mortgage in the principal sum of $153,000. If Price failed to get the commitment within twenty-five days, the contract would be deemed null and void, unless the Sochas agreed to extend the period on the mortgage contingency clause or Price waived the contingency.

Exhibit C-5 is a series of somewhat disjointed letters involving respondent on the one side and Richard Orlando, Esq. and Bennett Wasserstrum, Esq. on the other. Orlando represented Mr. Socha and Wasserstrum represented Mrs. Socha. (The Sochas were in the midst of a divorce proceeding). The first letter of import is respondent's letter to Orlando and Wasserstrum of October 6, 1989, whereby respondent canceled the Socha to Price contract pursuant to the attorney-review clause. By letter dated October 12, 1989, Orlando confirmed a telephone conversation with respondent on an undisclosed date, wherein respondent advised Orlando that his October 6, 1989 letter canceling the contract should be disregarded and that the contract had been reinstated. As the DEC noted, "[o]bviously, the driving force behind the reinstatement of the Socha to Price Contract was the execution on October 7, 1989 of Contract I," the Price to O'Connor contract.

As noted earlier, although when Price entered into the contract with O'Connor he did not have a valid contract to buy the property, respondent did not convey this vital information to

O'Connor. Respondent explained that, when he met with O'Connor on October 9, 1989, he was certain that the contract with the Sochas would be reinstated. Accordingly, respondent testified, he saw no need to disclose to O'Connor the absence of a valid contract between Price and the Sochas. Respondent also maintained that the Price to O'Connor contract was still within the attorney-review period and that he, therefore, could cancel it, if necessary.

The O'Connor Mortgage Application

Seemingly, because O'Connor was unsophisticated in real estate transactions and because her job allowed her no free time, she gave relevant financial information to Price, who then sought a mortgage loan for her. O'Connor signed the necessary applications. Respondent denied any involvement in preparing O'Connor's mortgage application. Price anticipated that O'Connor would be able to get financing under a program whereby the lender would take back a second mortgage. Under the financing terms of Contract I, Price would take back a third mortgage. Prior to their meeting with respondent, Price had taken O'Connor to meet with a representative of the mortgage company, to apply for what O'Connor understood to be a government program. That program, however, was discontinued by the lender. By letter dated October 25, 1989, the lender notified Price that O'Connor's application had been denied. A copy of that letter was "faxed" to respondent.

There was some dispute in the record as to who had told O'Connor that her application had been denied. O'Connor claimed that Price had called her. Respondent, in turn, testified that he had called O'Connor and told her that, because her application had been turned down, she had the right to cancel the contract. Respondent contended that he had then informed Price

that he was canceling the contract in O'Connor's behalf. Respondent had no documentation directed to Price or O'Connor about the cancellation of Contract I. According to Price, he had also authorized respondent to cancel the Socha to Price contract, as Price's performance of his obligations under the contract with the Sochas was contingent on O'Connor's ability to close title.

According to Orlando's testimony, on October 27, 1989, respondent notified him by telephone that, because Price had been unable to get a mortgage commitment, he was canceling the contract. By letter dated October 27, 1989, Orlando confirmed respondent's representation that "buyers" (Price) had been denied a mortgage and that the contract was canceled. Orlando requested that respondent send him a copy of the letter denying the mortgage application. By letter dated October 31, 1989, Orlando told respondent that he had still not received a copy of the denial letter and was, therefore, reserving his client's remedies under the contract. Orlando reminded respondent that "[his] client had an obligation pursuant to the Contract of Sale to make a bona fide effort for obtaining a mortgage commitment." Exhibit C-5. At some point during this time, respondent forwarded to Orlando a copy of O'Connor's mortgage denial, presumably in an attempt to argue that the mortgage commitment provision applied to third-parties and not just to Price. Orlando was, therefore, aware by November 1989 that a third-party was involved in the transaction.

According to respondent, despite his efforts, Orlando did not accept the cancellation of the Socha to Price contract. Although the record is murky as to what ensued, it is clear that Orlando and Wasserstrum renegotiated that contract. The result was that the property was to

be purchased by Price, subject to a $200,000 appraisal, and the sale price was to be reduced from $170,000 to 160,000.

Respondent never told O'Connor about these developments in the Socha to Price transaction. According to O'Connor, respondent never apprised her that Contract I had been canceled.

In the interim, Price and O'Connor entered into a second contract, dated October 30, 1989 ("Contract II," Exhibit J-3), with different terms from those contained in Contract I.

The Price to O'Connor Contract/Contract II

Contract II, drafted by Price, called for a purchase price of $200,000 and payment by Price of "points" totaling $5,000. In effect, thus, the net price of the property was $195,000, the same purchase price listed in Contract I. Contract II also reflected a 160,000 mortgage, a $2,500 deposit and a $37,500 sum to be paid at closing. By a rider to Contract II, also drafted by Price, he agreed to take back a note in the amount of $32,500 for a term of five years from the date of closing. The note was secured by a second mortgage on the property. O'Connor signed the rider on October 30, 1989. Price testified that he had explained the rider to O'Connor. Price also testified that O'Connor was aware that he was buying the property from the Sochas for $160,000 and that she was buying it from him for $195,000. O'Connor, however, denied knowledge of the actual purchase price in Contract II. Furthermore, as seen below, she denied knowledge of the Socha to Price transaction.

In connection with Contract II, Price got O'Connor a mortgage commitment from Evergreen Mortgage Services Corporation ("Evergreen") for $160,000. Respondent had no involvement in obtaining that financing.

Both Price and respondent testified that respondent was not present when Contract II was signed. Respondent could not recall who had told him about Contract II: Price or O'Connor. Respondent maintained that he and O'Connor had reviewed the terms of Contract II and the rider and that she had understood them.

The Socha to Price and Price to O'Connor Closings

The Socha to Price and Price to O'Connor closings took place on December 28, 1989. The DEC expressed concern about the fact that the mortgage documents were dated December 27, 1989, one day before the closings. Respondent explained, however, that the documents bore that date because the closings had been originally scheduled for December 27, 1989. Respondent added that, when Angel O'Connor, who was in Trinidad, had been unable to travel to New Jersey until December 28, 1989, the closings were postponed for one day. Respondent allegedly notified the mortgage company ("Evergreen") of this fact and received its authorization to close title on December 28, 1989.

According to O'Connor, when she asked why the documents were dated December 27, 1989 respondent replied "[d]on't ask questions." 1T71.

Respondent had to close the Evergreen mortgage loan to O'Connor in order to have sufficient funds to satisfy Price's obligations to Socha. The Socha to Price closing, however, took place on the afternoon of December 28, 1989, prior to the Price to O'Connor closing.

Respondent testified that he told Orlando, who was now representing both Sochas at the closing, that they were closing in escrow because Angel O'Connor, who needed to sign the closing documents, would be arriving in New Jersey by the end of the day.

Orlando did not recall if respondent had asked him to hold the check for the proceeds until the next day. Orlando allowed that respondent may have so requested. 1T101. Orlando added that, in any event, when the closing ended, it was too late in the day to deposit the check. The Socha to Price documents were fully executed; a check drawn on respondent's trust account for the net closing proceeds was made out to Orlando's trust account and given to Orlando. As the following shows, as of the Socha to Price closing, Orlando was unaware that Price did not have sufficient funds to close title:

> Q. Did you know at the time that you closed in the afternoon that Angel O'Connor was not even in the country?
>
> A. No, I would have no knowledge of that.
>
> Q. If you had known that, would you have gone forward with the transaction that afternoon, knowing that your ability to collect on the proceeds was dependent on the transaction occurring later that day?
>
> A. I didn't know my ability to collect would have been dependent on the transaction later that day. I believe at the time I had knowledge of the transaction taking place, and in fact I have no problem with the transaction taking place, I just assumed that the funds are here and --
>
> Q. You assumed that the funds were in Mr. Jackson's trust account on behalf of Mr. Price. Is that correct?
>
> A. Yes.
>
> Q. And that he could write a check to you against Mr. Price's trust balance to satisfy the purchase price. Is that correct?

A. I don't recall any conversations contrary to that, no, so five years ago, I would say yes.

[1T106-107]

Orlando's testimony contradicted his admission that respondent "may have" asked him to withhold the deposit of the check until the next day.

The Price to O'Connor closing took place later that day. The deed and affidavit of title were prepared by Salzer, the attorney who shared office space with respondent and who was representing Price. Salzer was not present at the closing. The closing documents were first signed by O'Connor and Price and awaited Angel O'Connor's signature. O'Connor returned much later that night with Angel, who then signed the documents. The second mortgage taken back by Price was dated December 29, 1989. Respondent explained that it was probable that his secretary, seeing the late hour on December 28, 1989, thought they were not closing that day and dated the documents for December 29, 1989. Respondent explained that it may, in fact, have been after midnight when Angel signed the documents. Price, however, testified that he returned to respondent's office on December 29, 1989 to sign the second mortgage and note. Respondent disputed this testimony, stating that Price had signed the documents on December 28, 1989 and that Price may have returned merely to pick up a check.

The second mortgage, taken back by Price, was for $34,099.43, an amount greater than the $32,500 agreed to in Contract I. According to respondent, the amount was increased because O'Connor had insufficient funds to close. Respondent added that O'Connor had been informed of the change. Respondent testified that, after the closing, he gave the second mortgage documents to Price to record. For an undisclosed reason, the mortgage was not recorded until March 5, 1991, more than fourteen months later.

Respondent deposited the Evergreen to O'Connor mortgage check on December 29, 1989. He testified that he had informed Evergreen that he was holding the mortgage check until that date. Respondent claimed that, on December 29, 1989, he called Orlando and authorized him to deposit the check for the closing proceeds. Orlando deposited the check on December 29, 1989.[6]

Respondent did not believe that he had acted improperly in this matter. While he felt that he had protected O'Connor's interests, he conceded that he would not again undertake the representation of a client in this situation.

Of note is the fact that, after their initial meeting in October 1989 and continuing after the closing, respondent represented O'Connor in a number of additional matters, apparently to her satisfaction and without charge.

* * *

The third count of the complaint charged respondent with misconduct in connection with his handling of the closing proceeds and trust funds as well as with improper recordkeeping. Respondent used one ledger card to reflect both the transaction from Socha to Price and from Price to O'Connor. Exhibit J-6. Respondent stated that there was nothing to account for

[6]As noted above, the second count of the complaint, which was withdrawn, charged respondent with a violation of RPC 8.4(c), arising from an alteration to the deed from Socha to Price. The facts surrounding the alteration were discussed during the DEC hearing. By way of explanation, respondent claimed that, because the ultimate purchaser of the property, the O'Connors, had been included in the title work, a secretary in Orlando's office had mistakenly listed O'Connor as the purchaser on the Socha to Price deed. Respondent corrected the error with Orlando's authorization.

because Price had never given him any funds. He explained that O'Connor's mortgage funds were, in effect, paying the obligations in the Socha transaction.

Upon review of respondent's records from the transaction, including his ledger card, trust account checks and HUD-1 statements from both transactions, the DEC determined that all funds in respondent's trust account, including O'Connor's deposit money, were properly applied and accounted for and that Price and O'Connor had received that to which they were entitled. There was some controversy based on Price's testimony that he had given respondent a $4,000 deposit check from O'Connor. Respondent, who had no recollection of receiving the check, explained that, although O'Connor was obligated under Contract I to pay the $4,000, Price never asked for it and, therefore, respondent never asked O'Connor for it.

The fourth count of the complaint, failure to cooperate with the DEC, was dismissed on respondent's motion.

O'Connor's Version of the Events as to Contract I

O'Connor's testimony differed dramatically from respondent's in several key areas. According to O'Connor, she saw an advertisement for the property listing a sale price of $160,000.[7] Although O'Connor knew that Price was not the owner of the property, she thought that he was a realtor.

[7]In evidence is a microfilm copy of what, respondent contends, was the advertisement for the subject property. That advertisement listed the sale price of the property at $199,000. Exhibit R-6. O'Connor was not asked to identify the ad. It is possible that it could pertain to another property Price was selling at that time.

Price told O'Connor that the owners of the property wanted $170,000, not $160,000. Although O'Connor was interested in the property, she did not sign any documents at that time. The following day, Price took her to meet respondent. Prior to this meeting, Price told her that respondent represented him. Price assured her that respondent would "take care of everything." 1T25. O'Connor understood that respondent would find an attorney to represent her because he already represented Price.

Respondent met with O'Connor and Price, presumably on October 7, 1989. O'Connor had no recollection of a conversation with respondent on October 9, 1989. O'Connor testified that she signed Contract I during the initial meeting with respondent, the day after she saw the property.[8] O'Connor saw that the contract listed a purchase price of $195,000 on Contract I as well as a $156,000 sum. ($156,000 was the amount of the mortgage under Contract I). She stated that, when she asked Price about the $156,000 reference, he told her not to worry about it. 1T30-31.

Respondent told O'Connor during the meeting that he would refer her to another attorney who worked in his office to represent her in the transaction. Respondent never informed her that he represented Price. She never met with another attorney and it was her understanding that respondent represented both Price and her in the transaction. O'Connor was asked if she ever asked respondent where her attorney was. She replied that respondent assured her that he "[would] take care of that." 1T139. (It is unclear if O'Connor was referring to their first meeting or a subsequent occasion).

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[8]The DEC determined that the weight of the credible evidence was that Contract I was already signed when respondent first saw it.

O'Connor testified that respondent never explained the contract terms or the financing to her, never told her that he could not represent her and Price in the transaction and that neither respondent nor Price had told her that Price had to buy the property as a condition precedent to Contract I or that respondent was representing Price in that first transaction.

O'Connor's Version of the Events as to Contract II

The record does not reveal O'Connor's understanding of why she entered into Contract II or why the terms were different from those of Contract I. She testified that, after Price had told her that she had not obtained financing, she assumed that the deal was over. Price, however, had contacted her approximately two weeks later and told her that he and respondent would "get something working" and that she could "move in for Christmas." 1T54.

Although it is unclear from the record, it appears that O'Connor understood that the ultimate purchase price of the property was $160,000, the amount of the mortgage from Evergreen. She contended that she did not borrow any additional monies from Price.

O'Connor testified that Contract II was signed in respondent's office. She claimed that the rider to Contract II was not attached when she signed the contract. O'Connor testified that the rider had been placed in a pile of documents for her signature and that she had not read it. She maintained that respondent had not explained either Contract II or the rider to her. She claimed no understanding of the significance of the second mortgage or the note, which had not been explained to her. She contended that the first time she saw the rider and learned that Price held a mortgage on her house was in May 1993, during her bankruptcy proceeding, when her

attorney in that matter saw the note and brought it to her attention. According to O'Connor, it was the bankruptcy judge who suggested that she file an ethics grievance against respondent.

According to O'Connor, she never made any payments to Price on the second mortgage. Price, however, recalled receiving two payments from O'Connor. According to Price, the first mortgagee ultimately filed a foreclosure action and the second mortgage was also in default.

* * *

The DEC found that respondent had violated RPC 1.7(b) (conflict of interest). The DEC was concerned that the conflict inherent in this matter might not be subject to waiver. The DEC found that there was no informed consent to the representation. In the DEC's view, the key document was the October 9, 1989 letter asking that Price consent to the representation. The DEC deemed that letter "woefully inadequate." It was clear to the DEC that O'Connor did not understand that Price did not have title to the property or that his ability to get title was contingent on her compliance with Contract I or Contract II. The DEC envisioned a number of scenarios that could have arisen, causing respondent to have divided loyalty between his two clients. The DEC did not make a finding on the alleged violation of RPC 1.4. Similarly, the DEC found no clear and convincing evidence that respondent was guilty of recordkeeping improprieties or failure to safeguard trust funds.

As noted above, the second count of the complaint was withdrawn and the fourth count was dismissed.

* * *

Following a de novo review of the record, the Board is satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

The Socha to Price Closing

The record supports a finding that respondent was guilty of unethical conduct in connection with the Socha to Price closing. When respondent gave his trust account check to Orlando drawn against uncollected funds, he jeopardized other clients' funds. Respondent's alleged request to Orlando to withhold the deposit of the check until December 29, 1989, even if true, was insufficient action to protect funds belonging to his other clients. This situation went beyond a closing in escrow, where documents are signed but no money changes hands. Here, respondent gave Orlando a check drawn on his trust account, without any written instructions not to deposit the check. Even if, under normal circumstances, an attorney should be able to rely on the good faith of his fellow attorneys, there was always the possibility that the Price to O'Connor closing would not take place, particularly in light of the fact that Angel O'Connor was in Trinidad. One wonders for how long Orlando would have held respondent's check, particularly in the absence of written instructions in that regard. Had Orlando deposited the check, other client funds might have been invaded. By issuing a check from his trust account without corresponding funds on deposit, respondent exposed his clients' trust funds to an unauthorized risk of withdrawal, in violation of the mandate of RPC 1.15. See In re LaRosee, 122 N.J. 298 (1991). It is undeniable, thus, that respondent failed to safeguard client funds, in violation of RPC 1.15(a).

The Board agreed with the DEC's determination that respondent was not otherwise guilty of recordkeeping violations.

Respondent's Representation of O'Connor

Respondent's representation of O'Connor was fraught with improprieties from the start. There is no question that respondent had a longstanding professional relationship with Price. Respondent alleged that, when O'Connor needed representation, he gave up his representation of Price to represent O'Connor. It is difficult to accept, however, that respondent would favor O'Connor over Price, from whom he could expect additional business. The only logical conclusion is that he was trying to circumvent the rule prohibiting multiple representation absent certain safeguards. RPC 1.7. Indeed, the record allows the inference that respondent undertook the representation of O'Connor with Price's interests in mind, not hers. Respondent wanted to ensure a satisfactory conclusion of the Price to O'Connor transaction so that Price would benefit therefrom. In the process, respondent also had his own interests at heart, as Price had been a steady client and the potential for future business for respondent might have been enhanced by the successful completion of that transaction.

Of course, there is no absolute prohibition against representing both buyer and seller in the same transaction, as long as the terms of the contract have already been negotiated. See Advisory Committee on Professional Ethics Opinion 100, 89 N.J.L.J. 696 (1966). The problem arises where there is simultaneous representation of buyer and seller prior to the negotiation and execution of the contract of sale. Here, there is no clear and convincing evidence that respondent represented both Price and O'Connor prior to the signing of Contract I. As to

Contract II, it is possible that Price might have told respondent about the terms of a contract that had already been worked out between Price and O'Connor. In short, although there is a suspicion that respondent was involved in arranging the terms of both contracts, the evidence does not rise to the requisite clear and convincing standard to support a finding of misconduct in this context.

Therefore, assuming that respondent was not involved in the contract negotiations and that his representation of buyer and seller was not prohibited, he would have had to ensure compliance with the requirements of RPC 1.7. That rule reads in part:

> (a) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after a full disclosure of the circumstances and consultation with the client . . . . When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Respondent testified that he advised Price and O'Connor that he could not represent both of them in the transaction and that he explained to O'Connor the inherent difficulties in his representation of her interests, in light of his prior and ongoing representation of Price. O'Connor, in turn, denied that respondent discussed with her the conflict of interest situation. We need not, however, reach a conclusion as to credibility on this issue. For even if O'Connor had been apprised of the conflict situation through respondent's letter to Price asking Price's consent to O'Connor's representation (Exhibit J-12), it is unquestionable that respondent's attempt at disclosure and consent fell short of the requirements of RPC 1.7. That rule requires

full and detailed disclosure of the circumstances, including explanation of the implications of the common representation and the advantages and risks involved. It also requires consent from both parties, which respondent did not obtain. And even if respondent had demonstrated strict compliance with the dictates of RPC 1.7 (a) and (b), he would still have run afoul of RPC 1.7(c) because of the obvious appearance of impropriety created by the dual representation in these sensitive transactions.

Respondent also violated RPC 1.4 when he concededly did not disclose to O'Connor the price in the Socha to Price deal as well as his attempt to cancel the Socha to Price contract.

Moreover, respondent failed to disclose the secondary financing to Evergreen, despite Evergreen's written prohibition against secondary financing without written approval. Respondent contended that he did not see that provision in the mortgage commitment and that, at that time, that provision was not the norm in every commitment. Nevertheless, the provision in Evergreen's commitment was there for respondent to see; it could not have been missed. Even in the absence of an evil intent on respondent's part, a finding of failure to disclose secondary financing to the mortgage company is inevitable.

All in all, respondent was unable to comprehend the potential disasters that could have occurred in this transaction. The fact that both closings took place was fortuitous at best. Even when prodded by the DEC with various possible scenarios, respondent could not grasp the inherent dangers in his representation of buyer and seller. Respondent's argument that these were two separate transactions is specious. They were inherently linked together in terms of timing as well as the need to have the funds from O'Connor to complete the Socha to Price transaction.

Although the question of whether dual representation in "flip" transactions is absolutely prohibited should more properly be decided by the Supreme Court,[9] the bar should be forewarned that such representation without the strictest compliance with the mandates of the conflict-of-interest rules shall result in stern discipline. Only because of the lack of prior notice to the bar that this specific instance of misconduct will result in a suspension did the Board refrain from imposing that form of discipline. It is the Board's unanimous decision that respondent be reprimanded. Three members did not participate.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 12/9/96

LEE M. HYMERLING
Chair
Disciplinary Review Board

[9]The Court has prohibited dual representation in certain situations involving serious conflict of interest issues. See Baldasarre v. Butler, 132 N.J. 278 (1993).