SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-376
District Docket No. XIV-2009-0568E

IN THE MATTER OF

CHRISTOPHER L. YANNON

AN ATTORNEY AT LAW

Decision

Argued: June 20, 2012

Decided: July 16, 2013

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

K. Roger Plawker 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 disbarment filed by Special Master Leonard N. Arnold, J.A.D., ret. The three-count complaint charged respondent with having violated <u>RPC</u> 1.15(d) and <u>R.</u> 1:21-6 (recordkeeping violations), <u>RPC</u> 8.1(a) (knowingly making a false statement of material fact in connection with a disciplinary matter), <u>RPC</u> 8.4(b) (criminal conduct that reflects adversely on the lawyer's honesty,

trustworthiness or fitness as a lawyer), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation).

For the reasons expressed below, we determine that a one-year suspension is warranted.

Respondent was admitted to the New Jersey bar in 2002 and the New York bar in 2003. At the relevant time, he maintained a law practice in Sea Girt, New Jersey. He has no history of discipline.

The Office of Attorney Ethics seeks a two-year suspension for respondent's involvement in an illegal property flip.[1]

Although respondent invoked his fifth-amendment right against self-incrimination for each question posed during the first day of the ethics hearing, he admitted most of the allegations of the complaint in his verified answer. He waived appearance for the third day of hearing, purportedly because he was out of the country.

The facts are as follows:

In October 2008, Thomas Aiello retained respondent in connection with the purchase of investment property located at 1224 Monroe Avenue, Asbury Park, New Jersey. Previously, Aiello had been represented by Thomas Frey, Esq., when, on July 8,

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[1] Initially, the OAE sought respondent's disbarment. The successor OAE Deputy Ethics Counsel argued, however, that a two-year suspension is the appropriate discipline in this matter.

2008, he had entered into a real estate contract with Homesales Inc. (Homesales), a subsidiary of JPM Chase Home Finance, to purchase the property for $162,500.[2] On that same date, Aiello entered into a second contract with Homesales, which listed the sale price at $240,000. As discussed more fully below, this second contract was apparently an altered contract. Linda Schroeck, the listing agent for the property, claimed that the original contract had been altered to reflect the $240,000 sale price.

On July 14, 2008, Aiello applied for a mortgage with Lend-Mor Mortgage Bankers Corp. (Lend-Mor), using the second contract. The contract listed Aiello as the purchaser, Homesales as the seller, and a $240,000.00 purchase price.

Grievant Farhad Bokhour testified that, in 2008, he was the president of Lend-Mor, a company that provided residential mortgages and, to a very limited extent, commercial mortgages. Bokhour ran the company and took care of its day-to-day operations. He did not review loan applications. That was the underwriter's responsibility. Lend-Mor's loan officers or processors obtained financial information from their clients to ascertain whether they were creditworthy. Lend-Mor relied on,

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[2] Century 21 Solid Gold Realty was Aiello's real estate agency.

among other documents, contracts of sale, title commitments, HUD-1s, and appraisals.

On August 3, 2008, Vazirani Appraisal Services, LLC, conducted an appraisal that valued the property at $245,000. At the time of Aiello's application and closing, Bokhour was not aware of the other contract for $162,500. He stated that, had he been aware of it, the deal would have been cancelled.

Lend-Mor loaned eighty percent of the purchase price on investment properties. The buyer was required to provide the remaining twenty percent. Lend-Mor underwriter Harriet Moskowitz approved Aiello's application for a thirty-year fixed-rate $192,000 mortgage. Property Transfer Services, Inc. (PTS) issued an ALTA residential owner's title policy to Aiello for $240,000 and an ALTA loan policy to Lend-Mor for $192,000.

On September 17, 2008, Homesales, through its attorneys, Zucker, Goldberg & Ackerman (Zucker Goldberg), terminated the contract of sale for $162,500 because of Aiello's "failure to bring this matter to closing pursuant to the contract of sale."

In October 2008, Aiello retained respondent to consummate the closing under the second contract of sale for $240,000. On October 17, 2008, respondent sent a $6,000 deposit to Zucker Goldberg. On November 3, 2008, in anticipation of the closing, Lend-Mor wire-transferred $192,000 to respondent's Aiello sub-account. As explained more fully below, the closing did not

occur on the scheduled date. Respondent then wired the funds back to Lend-Mor.

Lend-Mor's general closing instructions, which had been sent to respondent on at least two occasions, stated "Do not close or fund this loan if you have any knowledge of a concurrent or subsequent transaction which would transfer the subject property." The instructions stated further:

> The instructions can only be modified with our advance written approval. You shall be deemed to have accepted and to be bound by these closing instructions if you fail to notify us in writing to the contrary within 48 hours of your receipt hereof or if you disburse any funds to or for the account of the Borrower(s).
>
> [Ex.63.]

Bokhour explained that an intervening transaction would alter the purchase price. In that type of situation, Lend-Mor would not approve the loan. He added that Fannie Mae and FHA guidelines prohibit more than one transaction on the same day.

On November 10, 2008, respondent closed two transactions on the same Monroe Avenue, Asbury Park property: from Homesales to David Wagshul (Aiello's brother-in-law) for $162,500 and from Wagshul to Aiello for $240,000.

Bokhour testified that he knew nothing about the Homesales-to-Wagshul transaction and that Moskowitz would not have issued a commitment, had she known about the intervening transaction to

Wagshul. The HUD-1 that respondent had sent to Lend-Mor was consistent with the information in Aiello's loan application. If it had not been, there would not have been a closing. Neither the closing package sent by respondent's office, under cover-letter dated November 11, 2008, nor the "underwriter's" closing documents, sent under cover-letter dated November 17, 2008, notified Lend-Mor of another closing.

In his answer, respondent asserted that Lend-Mor was aware of the "concurrent/intervening Wagshul transaction, which was expressly approved by Lend-Mor's branch manager," Robert Cusic.[3] Exhibit 32, respondent's October 23, 2008 letter to Aiello and Lend-Mor, stated:

> By acknowledging this letter below please confirm that you are aware, in the sale of the above referenced property, that title will be transferred from Homesales, Inc. to David Wagshul for the sum of $162,500 and then contemporaneously transferred to Thomas M. Aiello for the sum of $240,000.00. A successor's endorsement will be added to the title insurance policy.
>
> Please contact me if there is any question. Otherwise, simply acknowledge the foregoing

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[3] Cusic and Frey, Aiello's prior attorney, were indicted, along with an "uncharged" co-conspirator, in late 2010 or early 2011. According to respondent's counsel's letter-brief, dated April 14, 2012, Frey was charged with seven counts of criminal conduct. At oral argument before us, respondent's successor counsel added that Cusic entered a guilty plea and that the charges had nothing to do with this transaction.

by signing below and return this letter via fax.

Cusic acknowledged the letter on behalf of Lend-Mor. Nevertheless, on November 10, 2008, Lend-Mor sent another letter to respondent with general closing instructions, again prohibiting a closing, if respondent had knowledge of a concurrent or subsequent transaction.

Bokhour testified that, at the time of the transaction, he was not aware that Cusic had acknowledged respondent's October 23, 2008 letter. According to Bokhour, Cusic was a loan officer, not an officer of Lend-Mor, did not have a role in the company's operations or management, and did not have the authority to approve a loan. His job was to assemble the required documentation for submission to the underwriter. Bokhour acknowledged, however, that Cusic held himself out to be a branch manager of Lend-Mor and might have signed off on preliminary documents, such as pre-commitment letters or pre-approval letters.

Respondent used the Lend-Mor wire transfer to fund Wagshul's purchase and to fund the subsequent flip to Aiello.[4] In

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[4] Respondent was not charged with a conflict of interest for representing both alleged buyer and seller in the sale from Wagshul to Aiello and even claimed that he did not represent Wagshul. He did, however, maintain an attorney trust subaccount for Wagshul.

his answer, respondent admitted that the monies were intended for Aiello to purchase the property from Homesales, denied that no other use of the funds was authorized, and asserted that Lend-Mor funded Aiello's purchase knowing that the loan proceeds would "first be applied to the intervening purchase by Wagshul" and that Lend-Mor's branch manager (Cusic) had approved that use of the loan, prior to the closing. Bokhour, in turn, testified that Cusic was not authorized to permit Wagshul to use Aiello's funds and that Wagshul never applied for a mortgage. Bokhour claimed that no one other than Cusic was aware of the sale to Wagshul and that Lend-Mor did not approve or know of Wagshul's use of Lend-Mor's funds. He added that operations manager Mary Ann Russo and Moskowitz would never have approved the transaction.

Respondent admitted that he filed a deed in Monmouth County, representing that the property was transferred from Homesales to Wagshul for $162,000, but denied that the deed, prepared by the seller's attorney, was fraudulent. Respondent also admitted that he filed another deed, showing a transfer from Wagshul to Aiello for $240,000, and that he failed to file a notice of real estate settlement for that transfer.

Bokhour learned about the Aiello loan after the closing. He tried repeatedly to contact respondent's office to obtain information about the closing documents and to obtain important

documentation, including a copy of the deposit check, to determine whether Aiello had used his own funds to purchase the property. Bokhour needed the information to sell the loan to investors. Respondent never returned his calls.

When Bokhour turned to the title company of record, PTS, he was informed that, a few days before the closing, respondent had cancelled the title insurance. When Bokhour inquired of the company why respondent had done so, he was informed that respondent wanted PTS to do things that PTS was not willing to do.

In his answer, respondent admitted that he paid PTS for a title policy that did not name Wagshul and that he later engaged a different title company, whose report showed Wagshul in the chain of title.

Bokhour's suspicions led him to contact the county clerk's office. He discovered that two deeds had been filed: one from Homesales to Wagshul and the other from Wagshul to Aiello. He then realized that a fraud had occurred.

Lend-Mor was unable to sell the Aiello loan because of the intervening transaction and had to service the loan. Bokhour brought a foreclosure action against Aiello and others, when the checks to pay the mortgage were returned for insufficient funds.

PTS Title Officer Patricia Charles testified (by telephone) that her company had issued a title commitment for the property,

listing Aiello as the proposed buyer and Homesales as the seller, for a $240,000 purchase price. She became aware of a second title commitment with the identical policy number, but it was not prepared by her office. Charles received a copy of it from the seller's attorneys, Zucker Goldberg. Schedule A listed Wagshul's name as the purchaser and a purchase price of $162,500. When Charles saw it, she inquired of respondent's office whether the sale was a "flip," but was told that it was not.

Charles also received a copy of respondent's October 23, 2008 letter, requesting that Lend-Mor and Aiello acknowledge the intervening sale from Homesales to Wagshul. Charles testified that she could not accept Cusic's authorization on the letter because the acknowledgement had to come from an officer of the company. She added that there had to be a "nominal deed" for the transfer, which was not provided. Therefore, the acknowledgment letter was not acceptable. She then once again inquired whether the transaction was a flip, but respondent assured her that it was not. When Charles emailed respondent asking him to call her office, his reply was that she should stop working on the file. Charles had planned to contact Zucker Goldberg about the transaction, but respondent directed her not to call them. He told her not to speak to anyone because her "alliance was to him."

By letter dated November 5, 2008, PTS revoked any title insurance issued by its company.

Andrew Liput, Esq., testified that, in early or mid-April 2009, Lend-Mor retained him to investigate the Asbury Park transactions. Lend-Mor was concerned because it had not received the title insurance policy for the transaction. As a matter of "due diligence," Lend-Mor had checked the public records and discovered the intervening transaction. According to Liput, Lend-Mor believed that there was either a "straw buyer" or fraud, because the mortgage funds were used to fund two mortgage transactions.

By letter dated April 20, 2009, Liput asked respondent for an explanation about the intervening transaction and for a copy of respondent's entire closing file, including copies of all checks disbursing the funds.

On May 14, 2009, respondent replied that another attorney had been involved in negotiating the transaction (Frey) and that he had been involved only in the closing. The letter added that Lend-Mor was aware that the property would be transferred from Wagshul to Aiello and, therefore, of the intervening transaction. Respondent forwarded to Liput schedule B of a title report that listed both transfers. The title report in Lend-Mor's files, however, was issued by a different title insurer

and it did not contain a Schedule B listing the intervening transaction.

In a letter dated May 29, 2009, Liput requested, among other things, respondent's explanation for the undisclosed intervening transaction and for his failure to distribute the closing funds in accordance with the lender's closing instructions. He also inquired why respondent had changed title companies. Liput received no reply to that letter. Liput testified that Aiello's loan proceeds had been used for Wagshul's purchase. Liput noted that it appeared that the difference in the purchase price from both sales was to go to the seller, but that the seller had not received the funds. Liput could not determine how the funds had been distributed, because respondent never gave him copies of checks, ledgers, or other documents and also failed to return his calls.

By letter dated June 26, 2009, respondent informed Liput that Counsellors Title Agency had issued a policy that had been sent directly to Lend-Mor, which confirmed that there had been an intervening transaction.

On Lend-Mor's behalf, Liput filed a claim with Old Republic Title Company, under a closing protection letter, for respondent's failure to follow closing instructions. He also filed a lawsuit for fraud and negligence. Liput offered to withdraw the lawsuit without prejudice, if respondent submitted

documentation to prove that no fraud had been involved. Respondent, however, did not send such information.

Liput also determined that Wagshul had been making the mortgage payments and that some of his checks had been returned for insufficient funds. Liput, therefore, also filed a foreclosure action against Aiello, Wagshul, and unknown tenants.

Respondent, in turn, filed a lawsuit against Lend-Mor, Liput, and Liput's firm. Liput withdrew from Lend-Mor's representation to avoid a conflict of interest situation.

OAE Disciplinary Auditor Arthur Garibaldi testified that, during the course of his investigation, he subpoenaed respondent's bank records. Respondent also provided him with documents and, later, corrected documents.

Garibaldi's investigation revealed that the initial sale between Aiello and Homesales did not take place. Instead, there was an intervening transaction, where Wagshul purchased the property from Homesales for $162,500 and, on the same day, resold it to Aiello for $240,000. Aiello did not pay Wagshul. Lend-Mor's funds were used to fund the intervening Wagshul transaction, as well as the subsequent transaction from Wagshul to Aiello. This occurred even though respondent acknowledged, on Lend-Mor's general closing instructions of November 10, 2008, that such a transaction was prohibited.

During his testimony, Garibaldi used Exhibits 129A and 129B. He explained that those documents were part of his report, "an illustration of the running balances for the Respondent's attorney trust account . . . for [Aiello's subaccount] and an illustration of the running balance for this particular date for his master trust account . . . and a running balance for [Wagshul's subaccount].

Garibaldi also described Exhibit 129B as "an illustration, again, of those client ledger cards for [Aiello's subaccount, respondent's master trust account and Wagshul's subaccount] and it gives a running balance per item as opposed to end-of-date balance."

Garibaldi described the path of the Lend-Mor funds as follows:

On November 3, 2008, Lend-Mor wire-transferred $192,000 to respondent's Aiello subaccount (#8084), which funds respondent returned, on November 5, 2008, because the closing did not take place as scheduled. On November 10, 2008, Lend-Mor re-wired the funds to the Aiello subaccount. Also on November 10, 2008, respondent transferred $64,785.63, intended for the Aiello purchase, into subaccount 9484, respondent's master trust account. Using his master account, respondent then purchased an "official check" (number 813-17574) for the same amount, $64,785.63. The balance of the Lend-Mor mortgage funds was

reduced accordingly to $127,214.37. Also on November 10, 2008, respondent re-deposited $64,785.63 into the Aiello subaccount, bringing the balance back up to the original amount of the Lend-Mor loan, $192,000. On November 12, 2008, respondent transferred $175,671.81 from the Aiello subaccount into the Wagshul subaccount (#8087).

On November 12, 2008, respondent wired $147,564.98 from the Wagshul subaccount directly to the seller's attorneys, Zucker Goldberg. On November 14, 2008, respondent wired $18,130.62 from the Wagshul subaccount to Wagshul's Capital One account. From November 14, 2008 to February 17, 2009, there were ten additional disbursements from the Wagshul subaccount for expenses such as realty commissions, title policy charges, and sewer and tax charges. There were three disbursements to respondent: on November 21, 2008 for $290, February 12, 2009 for $1,030, and February 17, 2009 for $300. Other disbursements were for expenses relating to the sale. The $1,020.29 check to Asbury Park for sewer and taxes contained a notation on the check "Aeillo from Homesales." It did not reference the Wagshul transaction. After that disbursement, the balance in the Wagshul subaccount was $603.86. Wagshul contributed $1,000 towards the transaction. His check, dated June 23, 2008, payable to Century 21 Solid Gold, had the notation "1224 Monroe Ave. For Thomas

Aiello." On February 17, 2009, the balance in the Wagshul subaccount was $230.

Exhibit 129A shows that, after $175,671.81 was transferred from the Aiello subaccount to the Wagshul subaccount, a balance of $16,328.19 remained. A November 13, 2008 receipt of $1,000, listed as "Century 21 – Aiello from Chase," brought Aiello's subaccount up to $17,328.19. A $9,564.59 check to Lend-Mor reduced the balance to $7,763.60.

A $1,000 disbursement from Aiello's subaccount, on November 19, 2008, brought the Aiello subaccount balance down to $6,763.60 (it was listed on Ex.129A under payee/payor as "Thomas Aiello-Deposit.") A November 21, 2008 $3,900 check to respondent brought the subaccount balance down to $2,863.60. Checks to Counsellors Title Agency and the Monmouth County Clerk, on December 4, 2008 and January 23, 2009, respectively, brought the Aiello subaccount balance down to $0.60.

By letter dated May 11, 2010, respondent forwarded various documents to Garibaldi, including financial records, bank statements, photocopies of trust checks, a handwritten ledger, and information relating to litigation between Aiello and Lend-Mor. Included was the Aiello-Wagshul HUD-1, which reflected the $240,000 purchase price and showed, at line 303 (cash from borrower), that Aiello was to bring $64,785.63 to the closing. Garibaldi noted that this was the amount taken from Aiello's

subaccount to purchase a bank check, which was then re-deposited into Aiello's subaccount.

Garibaldi testified that respondent transferred $175,000 from Aiello's subaccount into Wagshul's subaccount and that the funds were used for the Wagshul-to-Aiello transaction. Aiello did not bring any funds to the closing. The funds came directly from Lend-Mor. Those funds and the $1,000 from Wagshul were the only funds earmarked as closing funds.

According to Garibaldi, Zucker Goldberg was not aware of the intervening transaction. As to the October 17, 2008 $6,000 "official check" to the Zucker Goldberg firm, Garibaldi was unable to trace it back to either the Aiello or Wagshul subaccount. Even though respondent's office had sent the check to Zucker Goldberg, it did not go through his trust account.

Linda Schroeck, of Linda Schroeck Realty Group (the listing agent), testified that her agency had received several offers for the Asbury Park property, before accepting Aiello's offer. She explained that, with bank-owned properties, as in this case, the selling price is calculated by using three comparable sales for comparison and making "adjustments," because the valuations must be within ten percent of each other. In addition, she stated that appraisals are ordered.

Here, Schroeck pointed out that Aiello had originally offered to buy the property for $160,000, but had eventually

accepted the seller's counter-offer of $162,500. Schroeck was provided with a copy of the original mortgage commitment, for $154,375, an amount that she determined was consistent with the purchase price.

Schroeck became suspicious about the "illegal flip," when she was inadvertently provided with other documents showing the $240,000 sale price, including an altered contract of sale that contained her forged signature.

She immediately brought the altered contract to the attention of Zucker Goldberg and the asset manager at the bank, Kathryn Milo. The new contract contained an inflated sale price of $240,000. Schroeck faxed the new contract to Milo, with the following message handwritten on the coversheet:

> Please see attached contract there is some kind of fraud going on here. This is not the contract signed by the seller – someone changed our figures to inflate purchase price, etc. Also, they signed the mold addendum & wrote my name on it. This does not match what we sent out to them. I don't know what to do. Buyer's atty sent to me in error I am sure I was never supposed to see this. How do we handle this. I spoke to selling agent she does not know who did it or why & was unaware.
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> [Ex.19.]

According to Schroeck, the contract with the $240,000 sale price was the initial contract that she had prepared, but someone had whited-out the original purchase price ($162,500),

changed it to $240,000, signed her name to it, and added the seller's initials on an addendum to the contract. Schroeck alerted her client that something was wrong. She also contacted respondent and alerted him that she thought something was "going on;" that it was not the correct contract. According to Schroeck, respondent did not want to discuss it, "he didn't want to know anything about it." In fact, Schroeck communicated mostly with respondent's assistant, "Betty," because respondent would not take her calls. "[A]t some point in time," Betty emailed Schroeck with the instruction that she was not to speak to the title company anymore "or anyone on that end of the deal."

The commission for the sale was based on the $162,500 sale price. According to Schroeck, respondent never informed her that there would be an intervening transaction. She testified that the seller was left in the dark and did not know what was going on.

Count one of the complaint charged that respondent's use of Lend-Mor's funds to transfer the property to Wagshul and his filing of a fraudulent deed representing that the property was transferred from Homesales to Wagshul for $162,500 violated RPC 8.4(b) and (c).

Count two alleged that respondent submitted false documents and information to the OAE, during the course of its

investigation, thereby violating RPC 8.1(a). Respondent admitted the allegations.

Garibaldi compared the documents that respondent had sent to him with the subpoenaed bank records and determined that the transaction could not have occurred as respondent had claimed. The bank records did not support a purchase by Wagshul from Homesales, Wagshul did not contribute any money to purchase the property, and Aiello did not contribute $64,000 (cash from borrower, line 303) to purchase the property. Garibaldi determined, and respondent later admitted, that his records had been fabricated.

Respondent's revelations about his records began when Garibaldi spoke to him, on July 30, 2010. At that time, respondent stated that he wanted to meet with Garibaldi that very day to "clarify and correct some of the documents that he previously submitted to the OAE." He was "very evasive," however, when Garibaldi asked him about any details.

In an August 10, 2010 letter to Garibaldi, respondent stated that some of the information that he had provided, "particularly" his trust accounting, was inaccurate. Respondent explained further that "Wagshul utilized moneys that he received from the sale of the property to Aiello in order to complete his purchase of the property. This being a simultaneous transaction,

it closed without me thinking enough about it at the time."
Respondent added:

> Long after the transaction closed title, Mr. Youngman, Esq. as the new attorney for Lend Mor convinced me that the way I closed the transaction was problematic. Because of Mr. Youngman's unyielding pressure and that Mr. Aiello wanted the case settled, I agreed to the terms of the settlement. I also changed the way information was provided to you in order to save myself embarrassment over the way I may have thoughtlessly handled the transaction a year before.
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> [Ex.116-2.]

Garibaldi described a number of the fabricated documents, as follows:

Respondent submitted to Garibaldi what purported to be a bank statement from respondent's TD Bank subaccount number 8084, the Aiello subaccount, dated November 20, 2008. The document showed a deposit of $64,785.63, with a handwritten notation "Cash From Client." However, Garibaldi's analysis of the bank records showed that respondent received no cash from Aiello. The same document also showed a $256,785.63 balance in Aiello's subaccount. Aiello's subaccount never contained that amount. According to Garibaldi, respondent created the records to make it appear as if Aiello had contributed sufficient funds to the transaction.

Respondent also provided Garibaldi with a deposit slip that showed that $64,785.63 had been deposited into Aiello's

subaccount. The bottom of the deposit slip stated "Deposit slip cash from client." Garibaldi's review of the records revealed that this document, too, had been fabricated. The cash had come directly from the mortgage funds that Lend-Mor had wired. The money was transferred from the Aiello subaccount into respondent's master account and subsequently used to purchase a bank check. The bank check, not cash, was then deposited directly back into Aiello's subaccount number 8084.

Respondent's records included a cover fax sheet, purportedly from TD Bank, about a wire-transfer of $240,457.44 from Aiello's subaccount to Wagshul's Capital One account. Respondents subpoenaed bank records showed no evidence of such a wire-transfer. The HUD-1 that respondent supplied to Garibaldi documented a non-existent transaction between Wagshul, as the seller, and Aiello, as the buyer.

Respondent had prepared a handwritten ledger that showed the deposit of the Lend-Mor loan proceeds of $192,000 and a $64,785.03 deposit, totaling $256,785.03, nearly the amount due on line 120 of the HUD-1, the gross amount due from the borrower. However, the $64,785 reflected the amount taken from the mortgage proceeds and then re-deposited. Neither Wagshul nor Aiello had a balance of $256,000 in their subaccounts. Respondent's ledger also showed a $240,457.44 wire-transfer that never occurred.

Respondent submitted additional documentation to Garibaldi, under cover letter dated May 24, 2010. His cover letter stated that, while reviewing his file, he had discovered a series of draft HUD-1s, with notes to his secretary to make corrections. Following Garibaldi's review of the documents, he tried to telephone respondent to discuss the investigation and wrote to him, on July 22, 2010, but received no reply.

Garibaldi reviewed the series of draft HUD-1 statements that he found during the course of his investigation, including: Aiello as buyer, Wagshul as seller, contract price of $240,000 (Aiello never paid Wagshul the $240,000); Aiello as buyer, Homesales as seller, contract price of $162,500 (Homesales never transferred the property to Aiello; the sale was to Wagshul); and Wagshul as buyer, Homesales as seller, contract price of $162,500 (Wagshul did not supply the funds for the transaction; the Lend-Mor mortgage funds to Aiello were used to fund the purchase). Another HUD-1 contained a handwritten notation, "This HUD-1 by Zucker" and Aiello's name listed as borrower was crossed out, with Wagshul's name handwritten in, with a question mark. Lines 201, deposit of earnest money, and 220, total paid by borrower, reflected a $6,000 amount. Garibaldi found no proof that Wagshul had provided these funds. The contract sale price listed on the HUD-1 was $162,500 and Fortune Title Agency was listed at line 1102. No title work was ever submitted by that

agency. A handwritten note at the bottom of the page stated "Fax the update title binder, the old one is wrong." The next page indicated a wire fee to Cumberland Title Agency, but Garibaldi's investigation did not uncover any information relating to that agency. Garibaldi determined that the HUD-1 was not the document that was used in the Homesales-to-Wagshul transaction.

During the OAE audit, respondent insisted that Wagshul had purchased the property from Homesales for cash and then resold the property to Aiello, but he could not produce any evidence to support that claim. Although respondent submitted to the OAE Wagshul's signed statement that respondent was not his attorney, Garibaldi noted that respondent maintained a subaccount for Wagshul.

According to Garibaldi, the deed between Wagshul and Aiello was recorded on January 20, 2009. Zucker Goldberg's November 10, 2008 client ledger summary, however, listed Aiello as the buyer and Homesales as the seller. It showed deposits totaling $153,564.98: $147,564.98 from respondent, as well as the $6,000 earnest money deposit.

As to the HUD-1 that listed Aiello as the buyer and Wagshul as the seller, there was no proof that Wagshul ever received the amount due to seller, $240,457.44. The subpoenaed bank records established that the cash from borrower, $64,785.63, actually came from the lender's funds. It was the amount transferred to

purchase the initial check that was deposited into Aiello's subaccount.

With respect to the balance of the mortgage funds, the following exchange took place between the special master and Garibaldi:

> HON. ARNOLD: Okay. Your thesis is that some of that money went for a purpose other than purchasing the property, correct, or don't you know?
>
> THE WITNESS: No, no, other than the purchasing the property for Aiello.
>
> HON. ARNOLD: Yeah.
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> THE WITNESS: It funded the intervening transaction.
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> HON. ARNOLD: Okay. What happened to the difference?
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> THE WITNESS: Some of the difference as I testified to earlier, went to -- directly to a creditor of Mr. Wagshul's, I believe it was a sum of $18,000 and change to pay off a Capital One debt. . . . I'd have to refer to my reconstructed client ledger to give you a full recount of where the balance of the monies went.
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> HON. ARNOLD: Well, okay, I'm going to leave it at that. I don't think it's proper for me to conduct an investigation.
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> [3T30-12 to 31-9.][5]

[5] 3T refers to the transcript of the DEC hearing dated June 11, 2012.

With regard to the charged recordkeeping infractions, respondent admitted that he was guilty of the recordkeeping violations set forth at paragraph 46 of the complaint and that he, thereby, violated R. 1:21-6 and RPC 1.15(d).

Specifically, the OAE's September 9, 2010 demand audit for the audit period October 1, 2008 through October 31, 2009 revealed that respondent's records were seriously deficient. His books and records were not maintained in accordance with R. 1:21-6.

In his answer, respondent admitted that 1) he did not maintain trust or business account receipts or disbursements journals; 2) he did not maintain ledger cards identifying attorney funds for bank charges; 3) he did not maintain individual ledger cards for each client; 4) he did not conduct monthly trust account reconciliations with client ledgers, journals and checkbooks; and 5) his deposit slips lacked sufficient details.

In mitigation, respondent offered the testimony of his friend Jeffrey Perron, Esq. Perron stated that he had known respondent since their first day of law school, in 1999, and that respondent was knowledgeable with regard to real estate matters. He described respondent as being a great friend and very caring. When Perron was going through personal problems, respondent helped him out by giving him work. They were both

going through marital issues at the same time. Fixing his relationship was paramount to respondent.

Respondent also submitted an unsigned certification setting forth the following, as mitigating factors:

Respondent has no disciplinary history. He was having personal problems that "overshadowed" his professional life. His fiancée had broken off their engagement and moved out-of-state, in late summer/early fall 2008. He was "extremely" depressed and sought professional assistance. His emotional and physical state affected his work. His attention was focused on repairing his relationship with his fiancée, rather than on the details required for his practice.

Respondent added that, during the time of the transactions at issue, he began to wind down his practice. The reduction in his staff, coupled with his emotional and physical state, affected his work. He delegated certain important matters to others, who did not have the requisite experience.

At the time that the OAE contacted him about the transactions, he had repaired the relationship with his fiancée, but it was still fragile, and he was concerned that she would leave again, because of questions arising from his work.

Respondent admitted that, as a result, he

> foolishly provided inaccurate information to the OAE in an attempt to reconstruct how the transactions at issue should have been

> executed in light of the mistakes made during the time. I was embarrassed about the condition of the files and my accounting and by doing this, I hoped the matter would be resolved without much further being required of me.
>
> [Ex.C2¶8.]

After reconsidering his actions, respondent contacted the OAE and admitted providing it with inaccurate records. He took full responsibility for his actions and regretted that he was not forthcoming from the outset.

Respondent stated that the "practice of law, along with its stresses and oftentimes heavy workload, is no longer suited for me. Accordingly, I do not intend to practice law in the State of New Jersey or in any other jurisdiction in the future."

Citing the Federal Bureau of Investigations' 2010 Fraud Report, the OAE noted, in its pre-hearing brief to the special master, that property flipping is a prevalent fraudulent scheme. It is a "complex fraud that involves the purchase and subsequent resale of property at greatly inflated prices." A fraudulent appraisal artificially inflates the property value to enable the purchaser to obtain a greater loan than would otherwise be possible.

Citing In the Matter of Lattimore, 604 S.E.2d 369, 373 (S.C. 2004), the OAE stated further:

> In an illegal flip, a straw buyer or co-conspirator (Buyer A) will enter into a

> contract to purchase property for its actual value from the seller. Buyer A will not obtain financing but will, instead, enter into a contract to sell the property to a co-conspirator (Buyer B) at an inflated price. Buyer B will then use an appraisal for the inflated price to obtain a loan. Closings on the sale from Seller to Buyer A and from Buyer A to Buyer B are done at the same time. Buyer A will pay the contract price to Seller from the loan proceeds and will then often split the difference with Buyer B. The actual transaction is contrary to the information contained on the HUD-1 forms, which misrepresents the sales prices and the source of the funding for the purchases and often falsely indicates that the buyers are contributing significant down payments in cash.
>
> [OAEb2.][6]

According to the OAE, after Homesales terminated the first contract, respondent took over and "successfully continued and completed the illegal flip initiated by Frey, Cusic, Aiello and Wagshul." The OAE pointed out that, if it had been a true sale between Wagshul and Aiello, respondent would have had no reason to send Aiello's deposit funds ($6,000) to Zucker Goldberg, Homesales' attorneys. The deposit should have gone directly to Wagshul.

The OAE urged the special master to find that respondent engaged in a "legal fraud," which consists of "a material

[6] OAEb refers to the OAE's pre-hearing brief to the special master, dated April 17, 2012.

representation of a presently existing or past fact with knowledge or belief of its falsity made with an intent that it be relied upon." The OAE added further that respondent's use of Lend-Mor's mortgage funds for Wagshul's purchase of property was not only unethical, but criminal.

The OAE cited cases in other states where illegal flips resulted in disbarment, as well as the New Jersey case of <u>In re Harris</u>, 186 <u>N.J.</u> 44 (2006). Harris, who engaged in flipping properties, was also convicted of first degree conspiracy to commit theft by deception, second degree theft by deception, and second degree misapplication of entrusted property.

The OAE noted that respondent's conduct did not involve only a single act but "planning, multiple acts of deceit, altering documents, shifting of entrusted funds, and conspiracy." Moreover, respondent's deceit continued with his altering of documents submitted to the OAE. The OAE, thus, argued that respondent's "lack of character and willingness to defraud" rendered him unfit to practice law.

By letter-brief dated July 31, 2012, the OAE submitted its closing argument to the special master. The OAE took the position that respondent falsified documents to facilitate the flip to Aiello. The scheme involved leading Lend-Mor to believe that Aiello was buying the property from Homesales for $240,000, in order to obtain a $192,000 mortgage that was sufficient to

fully fund Wagshul's purchase of the property from Homesales for $162,500. Aiello and Wagshul made only minimal contributions towards the purchase.

The OAE stated, in its brief to the special master:

> The realtor, seller, mortgage and title companies were all deceived about the true transactions planned -- a $162,500 purchase by [Wagshul], using Lend-Mor's loan to Aiello, followed by a "flip" to Aiello for $240,000, using a false HUD-1 and other phony documentation to make it look as though Aiello put in sufficient funds to close, when in fact he put in nothing.
>
> [OCA2.][7]

The OAE underscored respondent's knowledge of the wrongdoing, demonstrated by his alteration of documents submitted to the OAE to cover up his role in the fraud. Respondent prepared and signed three false HUD-1s to complete two real estate transactions for which neither Wagshul nor Aiello had sufficient funds. Respondent helped Aiello purchase the property by falsifying a HUD-1 to portray a phony picture to Lend-Mor, falsified another HUD-1 to fool the seller and the realtor, and falsified a third HUD-1 for the flip, by listing on it funds that were never received. The OAE pointed out that the HUD-1s contain a warning that "It is a crime to knowingly make

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[7] OCA refers to the OAE's letter-brief to the special master, dated July 31, 2012.

false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment." Respondent signed the statement on the HUD-1 that "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." Subsequently, respondent tried to conceal the true facts by creating and submitting even more false documents to the OAE.

According to the OAE, respondent's was not a single act of fraud, "but a well-concocted plan that required a false mortgage commitment, a false title policy, false HUD-1s, phony bank records, phony contracts of sale, bogus representations and multiple acts to coordinate the deception among the players." Although the scheme was started by another attorney, it was carried out and completed by respondent.

In his pre-hearing letter-brief to the special master, respondent's counsel cited a number of cases in which reprimands were imposed on attorneys who made misrepresentations in closing documents: In re Agrait, 171 N.J. 1 (2002); In re Spector, 157 N.J. 530 (1999); In re Sarsano, 153 N.J. 364 (1998); In re Silverberg, 142 N.J. 428 (1995); and In re Blanch, 140 N.J. 519 (1995).

Counsel argued further that <u>In re Harris</u>, <u>supra,</u> 186 <u>N.J.</u> 44, was inapposite, foremost because the attorney there had been convicted of first degree conspiracy, first degree money laundering, second degree conspiracy to commit theft by deception, and second degree misapplication of entrusted property. In addition, she was sentenced to eighteen years' imprisonment.

In his closing argument to the special master, respondent's counsel denied that respondent had violated <u>RPC</u> 8.4(b) and (c). He claimed that Lend-Mor was fully aware of the transactions at issue. Moreover, 1) the $240,000 purchase price was established before respondent was retained; 2) Homesales received the price for which it had bargained; 3) the realtors received their commissions based upon the sale; 4) the appropriate fees and costs were paid for the transactions; 5) respondent did not receive funds to which he was not entitled; and 6) respondent had secured a title policy that referenced the intervening transaction.

According to counsel, the OAE did not establish that respondent engaged in an "illegal flip" without Lend-Mor's knowledge or authorization. To the contrary, the evidence demonstrated that Lend-Mor allowed the closing instructions to be modified with advance written approval. Respondent obtained that approval from Lend-Mor's branch manager, Robert Cusic.

Counsel contended that it was reasonable for respondent to believe that Cusic had the authority to approve the transactions at issue. Citing Hollingsworth v. Lederer, 125 N.J.Eq. 193, 206 (E.&A. 1936), counsel argued that the OAE cannot escape the well-settled doctrine that knowledge of corporate officers and agents acting in the course of their employment is imputed to the corporation, whether or not the officer or agent communicates his knowledge to the corporation. Thus, counsel reasoned that Cusic's and others' knowledge must be imputed to Lend-Mor.

Counsel asserted also that the OAE failed to establish that 1) respondent committed fraud, because he had not set the sale price and the loan application and commitment letters had pre-dated his involvement in the transactions and 2) the deed to Wagshul was fraudulent or that respondent prepared it or had knowledge that it was fraudulent; he merely filed the deed as he was required to do.

Finally, counsel argued that the violations in counts two and three require only a reprimand or, at most, a censure.

The special master drew no adverse inference from respondent's assertion of his Fifth Amendment privilege. The special master found that respondent and others used Lend-Mor's money to transfer title from Homesales to Wagshul for $162,500 and then from Wagshul to Aiello. Aiello paid nothing for the

transfer. As a result, $62,000 was left available, with the exception of $18,000 that was paid to one of Wagshul's creditors. These transactions were completed in violation of Lend-Mor's repeated closing instructions, to not close or fund the loan if respondent had knowledge of a concurrent or subsequent transaction to transfer title to the property. The special master concluded that respondent "deliberately engaged in fraud." The special master noted specifically that, after respondent received an October 23, 2008 "acknowledgment letter" from Cusic, approving of the dual transactions, respondent received yet another notice from Lend-Mor, "forbidding" a closing if there was a subsequent or concurrent transaction.

The special master underscored Garibaldi's testimony that Aiello was to pay $64,873.65 at the closing, but did not do so, and that that amount was not accounted for, except for the $18,000 that went to Wagshul's creditor. The special master found that the use of the Lend-Mor's funds was not permissible. Thus, he concluded, respondent violated RPC 8.4(a) and (b) by using Lend-Mor's "mortgage money to concurrently close these transactions."

The special master found, however, that the OAE failed to prove, clearly and convincingly, that the deed transferring the property from Homesales to Wagshul was fraudulent. The special

master found further that Homesales was paid in full, as were the broker's commissions.

On the other hand, the special master found clear and convincing evidence that respondent knowingly made a false statement of material fact to the OAE (RPC 8.1(a)) and also violated the recordkeeping rules (RPC 1.15(d)).

The special master noted that respondent's use of Lend-Mor's mortgage funds to fund Wagshul's purchase of the subject property was "unethical and possibly a violation of N.J.S.A. 2C:21-15." He concluded that respondent must be disbarred. He cited In re Wigenton, 210 N.J. 95 (2012) (censure) (attorney negligently misappropriated escrow and client trust funds, violated recordkeeping rules, and engaged in a conflict of interest by representing the seller while serving as a real estate broker in the same real estate transaction). The special master noted that Wigenton's misappropriation of client and escrow funds had been caused by negligence, whereas, here, respondent's conduct was much more serious. "[R]espondent knowingly engaged in fraud by using Lend-Mor's funds intended for Aiello for the Wagshul purchase and made misrepresentations to the OAE."

The special master also found that respondent's "actions are more sever[e] than those in In re Frohling," 205 N.J. 6 (2011) (censure for gross neglect, conflict of interest, failure

to supervise a non-lawyer and misrepresentation), where the attorney "believed that the intervening transaction had been approved by the lender."

In his brief to us, respondent's successor counsel argued, among other things, that "[w]hile any failure to have utilized [the] financing strictly in connection with the first sale may have resulted in an inaccurate – albeit fully reconciled – HUD settlement form, the material elements of the transaction were achieved." In addition, the use of some of the mortgage proceeds to fund the deposit did not prejudice the transaction. Title was successfully transferred at the agreed upon price and the lender received its bargained-for security. Counsel also argued that there was no "illegal flip," because there is no evidence of a false appraisal; the lender received the secured collateral for which it bargained. In mitigation, counsel pointed to the fact that no client was harmed. Counsel added that, although respondent's cooperation with the OAE got off to a "poor start" and he made "some serious errors in judgment," he "redeemed" those errors by providing the OAE with the records it requested and assumed responsibility for those mistakes. Counsel, therefore, urged us to impose discipline no greater than a reprimand. Prior counsel had urged a reprimand or, at most, a censure.

In its letter-brief to us, the OAE conceded that the record did not support the special master's recommendation for disbarment. Instead, the OAE recommended a two-year suspension. The OAE noted that, while respondent's participation in the fraudulent flip may not have initially warranted a suspension, "his submission of falsified financial documents and falsified 'draft' HUD-1 forms to the OAE in order to subvert the disciplinary investigation should result in greater discipline." The OAE relied on cases where two-year suspensions were imposed: In re Geary, 189 N.J. 194 (2007); In re Katsios, 185 N.J. 424 (2006); and In re Silberberg, 144 N.J. 215 (1996).

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

Although respondent was not the mastermind behind the scheme, after Homesales cancelled the $162,500 contract, he completed two closings on the same day for the same property. The scheme could not have been carried out without the assistance of one or more of Lend-Mor's employees, the appraiser, the attorney(s) (in this case both Frey and respondent), and the straw purchaser. Lend-Mor was led to believe that Aiello was buying the property from Homesales for $240,000 so that Aiello could obtain a $192,000 mortgage, an

amount sufficient to fully fund Wagshul's purchase of the property from Homesales for $162,500.

Respondent falsified documents as part of an elaborate ploy to facilitate the flip from Wagshul to Aiello and to hide the truth from the OAE. The crux of the ploy involved misleading the lender about the value of the property and concealing the actual transactions.

Although respondent did not negotiate the contract or apply for the mortgage, he created false documentation and held the title company and realtor's inquiries at bay, once they became suspicious about the transaction. On November 12, 2008, respondent transferred $175,671.81 from the Aiello subaccount (Lend-Mor funds) to Wagshul's account to complete the Homesales-to-Wagshul purchase and then, on the same day, closed the sale from Wagshul to Aiello for $240,000. Respondent completed the HUD-1s, ledger cards and even obtained a title policy referencing the intervening transaction to facilitate the illegal transaction. Respondent participated in this deception, even though the lender's closing instructions specifically prohibited the dual transactions, unless respondent obtained Lend-Mor's advance written approval. Respondent sidestepped this restriction by obtaining Cusic's signature on a letter referencing the dual transactions. Later, Cusic was indicted for crimes not fully disclosed during the proceedings.

In furtherance of the scheme, respondent transferred $64,785.63 of Lend-Mor mortgage proceeds into his master account to purchase a bank check, which he then re-deposited into Aiello's subaccount to make it appear as if Aiello had contributed funds to purchase the property.

As the OAE correctly pointed out:

> The realtor, seller, mortgage and title companies were all deceived about the true transactions planned -- a $162,500 purchase by [Wagshul], using Lend-Mor's loan to Aiello, followed by a "flip" to Aiello for $240,000, using a false HUD-1 and other phony documentation to make it look as though Aiello put in sufficient funds to close, when in fact he put in nothing.
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> [OCA2.]

Respondent prepared three false HUD-1s to complete the two real estate transactions. He attested to the accuracy of the HUD-1s' contents, despite the warning on the documents that "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." The fraudulent HUD-1 for the flip transaction to Aiello listed funds that were never received.

Furthermore, once the OAE began investigating the transactions, respondent tried to conceal what had transpired by creating and submitting false documents and bank records to the OAE.

Count one of the complaint charged that respondent's "use of the Lend-Mor funds to transfer the Property to Wagshul, and his filing of a fraudulent Deed constituted fraud, misrepresentation, dishonesty and conversion, in violation of RPC 8.4(b) and RPC 8.4(c)." The proofs clearly and convincingly establish that respondent engaged in fraud and misrepresentation when he furthered the property flip, thereby violating RPC 8.4(c). There were insufficient proofs presented, however, to find that respondent filed a fraudulent deed.

As to the complaint's charge of "conversion," Black's Law Dictionary defines it as "[a]n unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another . . . to the exclusion of the owner's rights," or "[a]ny unauthorized act which deprives an owner of his property permanently or for an indefinite time." In a sense, respondent could be deemed to have "converted" Lend-Mor's funds for an unauthorized use, when he used the funds for the Wagshul purchase. The, OAE, however, did not charge respondent with knowing misappropriation of client or escrow funds. Neither does the record establish a conversion by respondent or his knowing misappropriation of escrow funds. Based on Garibaldi's description of his reconstructed records being only an "illustration" of respondent's running balance for a particular date, on his reference to only the $18,130.62 to

Capital One as funds used "for a purpose other than purchasing the property,"[8] on the lack of testimony about the remaining funds in Wagshul's subaccount, and on the fact that the disbursements to respondent were not questioned, we find no reason to remand this matter for a possible charge of knowing misuse of escrow funds.

As to the issue of discipline, although the special master recommended respondent's disbarment, precedent does not support such discipline for respondent's fraud in the real estate transaction.

Generally, the discipline imposed for misrepresentations on closing documents has ranged from a reprimand to a term of suspension, depending on the seriousness of the conduct, the presence of other ethics violations, the harm to the clients or third parties, the attorney's disciplinary history, and other mitigating or aggravating factors. See, e.g., In re Barrett, 207 N.J. 34 (2011) (attorney reprimanded for misrepresenting

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[8] Improper release of escrow funds, without more, has generally resulted in discipline ranging from an admonition to a reprimand. See, e.g., In re Spizz, 140 N.J. 38 (1995) (admonition for attorney who, against a court order, released to the client funds escrowed for a former attorney's fees and misrepresented to the court and to the former attorney that the funds remained in escrow; the attorney relied on a legal theory to argue that the former attorney had either waived or forfeited her claim for the fee) and In re Milstead, 162 N.J. 96 (1999) (attorney reprimanded for disbursing escrow funds to his client, in violation of a consent order).

that a RESPA statement that he signed was a complete and accurate account of the funds received and disbursed as part of the transaction; the RESPA reflected the payment of nearly $61,000 to the sellers, whereas the attorney disbursed only $8700 to them; the RESPA also listed a $29,000 payment by the buyer, who paid nothing; finally, two disbursements totaling more than $24,000 were not listed on the RESPA; the attorney had no record of discipline); In re Mulder, 205 N.J. 71 (2011) (reprimand for attorney who certified that the RESPA that he prepared was a "true and accurate account of the funds disbursed or to be disbursed as part of the settlement of this transaction;" specifically, the attorney certified that a $41,000 sum listed on the RESPA was to satisfy a second mortgage; in fact, there was no second mortgage encumbering the property; the attorney's recklessness in either making or not detecting other inaccuracies on the RESPA, on the deed, and on the affidavit of title was viewed as an aggravating factor; mitigating circumstances justified only a reprimand); In re Agrait, 171 N.J. 1 (2002) (reprimand; 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); In re Gahwyler, 208 N.J. 353 (2011) (censure for attorney who made multiple misrepresentations on a HUD-1, including the amount of cash provided and received at closing; the attorney also represented the putative buyers and sellers in the transaction, a violation of RPC 1.7(a)(1) and (b); mitigating factors included his unblemished disciplinary record of more than twenty years, his civic involvement, and the lack of personal gain); In re Soriano, 206 N.J. 138 (2011) (censure for attorney who assisted a client in a fraudulent real estate transaction by preparing and signing a RESPA statement that misrepresented key terms of the transaction; also, the attorney engaged in a conflict of interest by representing both the sellers and the buyers and failed to memorialize the basis or rate of his fee; 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, supra, 205 N.J. 6 (censure for attorney who in three real estate flip transactions was found guilty of making misrepresentations in RESPA statements, claiming that he relied on information submitted by the lenders; the attorney also grossly

neglected the matters, engaged in conflicts of interest, and failed to supervise a non-lawyer assistant; the prices of the properties had been artificially inflated to obtain large mortgages to fund the purchases; mortgage funds from the second sales were used for the first sales' obligations; the attorney had a prior reprimand; compelling mitigating factors considered); In re Khorozian, 205 N.J. 5 (2011) (censure for attorney who represented the buyer in a fraudulent transaction in which a "straw buyer" bought the seller's property in name only, with the understanding that the seller would continue to reside there and would buy back the property after one year; the seller was obligated to pay a portion of the monthly carrying charges; the attorney prepared four distinct HUD-1 forms, two of which contained misrepresentations of some sort, such as concealing secondary financing or misstating the amount of funds that the buyer had contributed to the acquisition of the property; aggravating factors included the fact that the attorney changed the entries on the forms after the parties had signed them and that he either allowed his paralegal to control an improper transaction or he knowingly participated in a fraud and then feigned problems with recall of the important events and the representation); In re Scott, 192 N.J. 442 (2007) (censure for attorney who failed to review 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); In re De La Carrera, 181 N.J. 296 (2004) (three-month suspension in a default case in which the attorney, in one real estate matter, failed to disclose to the lender or on the RESPA the existence of a secondary mortgage taken by the sellers from the buyers, a practice prohibited by the lender; in two other matters, the attorney disbursed funds prior to receiving wire transfers, resulting in the negligent invasion of clients' trust funds); In re Nowak, 159 N.J. 520 (1999) (three-month suspension for attorney who prepared two settlement statements that failed to disclose secondary financing and misrepresented the sale price and other information; the attorney

also engaged in a conflict of interest by arranging for a loan from one client to another and representing both the lender (holder of a second mortgage) and the buyers/borrowers); In re Swidler, 205 N.J. 260 (2011) (six-month suspension imposed in a default matter; in a real estate transaction in which the attorney represented both parties without curing a conflict of interest, the attorney acted dishonestly in a subsequent transfer of title to property; specifically, in the first transaction, the buyer, Rai, gave a mortgage to Storcella, the seller; the attorney, who represented both parties, did not record the mortgage; later, the attorney represented Rai in the transfer of title to Rai's father, a transaction of which Storcella was unaware; the attorney did not disclose to the title company that there was an open mortgage of record; the attorney was also guilty of grossly neglecting Storcella's interests, depositing a check for the transaction in his business account, rather than his trust account, and failing to cooperate with disciplinary authorities; prior reprimand and three-month suspension); In re Fink, 141 N.J. 231 (1995) (six-month suspension for attorney who failed to disclose the existence of secondary financing in five residential real estate transactions, prepared and took the acknowledgment on false RESPA statements, affidavits of title, and Fannie Mae affidavits and agreements, and failed to witness a power of attorney); In re Alum, 162 N.J. 313 (2000) (one-year

suspended suspension for attorney who participated in a series of real estate transactions involving "silent seconds" and "fictitious credits"; the attorney either failed to disclose to the primary lender the existence of secondary financing or prepared and signed false RESPA statements showing repair credits allegedly due to the buyers; in this fashion, the clients were able to obtain one hundred percent financing from the lender; because the attorney's transgressions had occurred eleven years before and, in the intervening years, his record had remained unblemished, the one-year suspension was suspended and he was placed on probation); In re Newton, 159 N.J. 526 (1999) (one-year suspension for attorney who participated in a scheme to defraud lenders by drafting lease/buyback agreements that were created to avoid secondary financing and to allow the sellers, not the investors, to remain on the premises; attorney prepared false and misleading RESPA statements in nine matters, took a false jurat, and engaged in multiple conflicts of interest in real estate transactions); In re Serrano, 193 N.J. 24 (2007) (eighteen-month retroactive suspension for attorney who pleaded guilty to a federal information charging her with making a false statement to a federal agency; the attorney profited from a scheme to fraudulently induce FHA to insure certain mortgage loans by acting as the closing agent for residential mortgages and preparing fraudulent HUD-1 settlement statements to "qualify

unqualified borrowers" for HUD-insured mortgages, knowing HUD would rely of the forms to determine whether to insure the mortgages; the attorney was involved in approximately twenty-five closings, five of which ended in foreclosure; she profited $20,000 to $40,000 from the scheme); In re Mederos, 191 N.J. 85 (2007) (eighteen-month suspension for attorney who played a minor role in a mortgage fraud scheme by submitting false loan documents in three transactions; in particular, the attorney, prepared settlement statements that contained materially false information about the financial status of the borrowers; the attorney was paid $900 per closing; after pleading guilty to mail-fraud conspiracy, the attorney was sentenced to three-years probation and fined $2,000; in sentencing the attorney, the court considered his extensive cooperation with the government); In re Jimenez, 187 N.J. 86 (2006) (eighteen-month retroactive suspension for attorney who played a minor role in a major mortgage fraud scheme; the attorney was convicted of mail fraud and conspiracy to commit mail fraud for preparing false documents, including tax returns, W-2s, pay stubs, and bank statements; the attorney also wrote false information on verification of employment forms and forged employers' signatures, even resorting to the use of a "light box" to lend authenticity of the forgeries; the attorney was a law student at the time of his criminal offenses); and In re Frost, 156 N.J. 416

(1998)(two-year suspension for an attorney who prepared misleading closing documents, including the note and mortgage, the Fannie Mae affidavit, the affidavit of title, and the settlement statement; the attorney also breached an escrow agreement and failed to honor closing instructions; the attorney's ethics history included two private reprimands, a three-month suspension, and a six-month suspension).

We find respondent's conduct more serious than Frohling's (censure for misconduct in three flip transactions), in that Frohling claimed that he had relied on the information submitted by the lenders, when he certified that the information on the settlement statements was true. Respondent, in turn, was solely responsible for false entries on the settlement statements and went to great lengths to make the transactions look legitimate by wire-transferring funds between the accounts and trying to make it appear as if his client had contributed funds for the closing by using Lend-Mor's funds to purchase a bank check. Moreover, when the first title company became suspicious about the transaction, respondent forbade one of its officers to contact the seller's attorney, then fired the title company and retained another one. Respondent was not an innocent, trusting soul, but a willing, active participant in the fraud.

More seriously, unlike Frohling, who admitted his wrongdoing by entering into a stipulation of facts with the OAE,

respondent went to great lengths to cover up his misdeeds by creating false bank statements and other documents, thereby violating RPC 8.1(a). He eventually admitted that he had supplied the OAE with what he termed to be "inaccurate" documentation. In reality, the documents were not merely inaccurate, but flat out fabrications to conceal the true nature of the transactions and respondent's egregious improprieties.

Finally, Frohling proffered more compelling mitigation. Respondent's mitigation consisted of his romantic tribulations and lack of an ethics history (Frohling had a prior reprimand).

Respondent's conduct was also more serious than that in Nowak (three-month suspension). There, in one transaction, the attorney represented clients with adverse interests -- the second mortgagees and the buyers of the property. Nowak also prepared two statements containing misrepresentations. The statements failed to disclose secondary financing and misrepresented the sale price and the amount of cash to the seller from the borrowers. Respondent's misconduct here was worse, given the lengths he went to to disguise the true nature of the transaction. Moreover, his actions were exacerbated by his misrepresentations to the OAE.

Misrepresentations to ethics authorities are generally met with discipline ranging from a reprimand to a term of suspension, depending on the gravity of the offense, the presence of other

unethical conduct, and aggravating or mitigating factors. See, e.g., In re DeSeno, 205 N.J. 91 (2011) (attorney reprimanded for misrepresenting to the district ethics committee the filing date on a complaint on the client's behalf; the attorney also failed to adequately communicate with the client and failed to cooperate with the investigation of the grievance; prior reprimand); In re Sunberg, 156 N.J. 396 (1998) (reprimand for attorney who created a phony arbitration award to mislead his partner and then lied to the OAE about the arbitration award; mitigating factors included the passage of ten years since the occurrence, the attorney's unblemished disciplinary record, his numerous professional achievements, and his pro bono contributions); In re Falzone, Jr., 209 N.J. 420 (2012) (attorney censured for failing to supervise his secretary-wife and to comply with the recordkeeping rules, thereby enabling the wife to steal $279,000 from the account, and for lying to the OAE during its investigation); In re Homan, 195 N.J. 185 (2008) (censure for attorney who fabricated a promissory note reflecting a loan to him from a client, forged the signature of the client's attorney-in-fact, and gave the note to the OAE during the investigation of a grievance against him; the attorney told the OAE that the note was genuine and that it had been executed contemporaneously with its creation; ultimately, the attorney admitted his impropriety to the OAE; extremely compelling

mitigating factors considered, including the attorney's impeccable forty-year professional record, the legitimacy of the loan transaction listed on the note, and the fact that the attorney's fabrication of the note was prompted by his panic at being contacted by the OAE and his embarrassment over his failure to prepare the note contemporaneously with the loan); In re Kaplan, 208 N.J. 487 (attorney suspended for three months for failing to finalize the equitable distribution of a pension in a divorce matter for four years, failing to return the client's twenty phone calls, and making misrepresentations to the district ethics committee); In re Bar-Nadav, 174 N.J. 537 (2002) (three-month suspension for attorney who submitted two fictitious letters to the district ethics committee in an attempt to justify his failure to file a divorce complaint on behalf of a client; the attorney also filed a motion on behalf of another client after his representation had ended and failed to communicate with both clients); In re Rinaldi, 149 N.J. 22 (1997) (three-month suspension for attorney who did not diligently pursue a matter, made misrepresentations to the client about the status of the matter, and submitted three fictitious letters to the ethics committee in an attempt to show that he had worked on the matter); In re Katsios, supra, 185 N.J. 424 (two-year suspension for attorney who improperly released escrow funds from a real estate transaction to the

seller, a relative, in violation of an escrow agreement and then submitted altered bank statements and false reconciliations to the OAE during its investigation); and In re Silberberg, supra, 144 N.J. 215 (attorney suspended for two years for allowing a buyer to sign the name of the co-borrower, who was deceased at the time of the closing; the attorney then witnessed and notarized the signature; after the grievance was filed, he falsely stated that the co-borrower had attended the closing and sent a false seven-page certification to the ethics committee to cover up his improprieties).

Respondent's misconduct was exacerbated by recordkeeping deficiencies, an ethics offense that is ordinarily met with an admonition, as long as they have not caused a negligent misappropriation of client funds. See, e.g., In the Matter of Jeff E. Thakker, DRB 04-258 (October 7, 2004) (attorney failed to maintain a trust account in a New Jersey banking institution); In the Matter of Arthur G. D'Alessandro, DRB 01-247 (June 17, 2002) (numerous recordkeeping deficiencies); In the Matter of Marc D'Arienzo, DRB 00-101 (June 29, 2001) (failure to use trust account and to maintain required receipts and disbursements journals, as well as client ledger cards); and In the Matter of Christopher J. O'Rourke, DRB 00-069 (December 7, 2000) (attorney did not keep receipts and disbursements

journals, as well as a separate ledger book for all trust account transactions).

We now address the question of the proper discipline for this respondent.

Among other things, respondent's counsel argued that respondent's reliance on Cusic's knowledge and authorization to go forward with the intervening transaction was reasonable and that it should be imputed to Lend-Mor. Moreover, he asserted that respondent had no knowledge that the documents that Cusic and Frey had supplied him were fraudulent and that, therefore, the first count of the complaint should be dismissed. We find this argument to be disingenuous, given respondent's efforts to disguise the true nature and funding of the transactions.

We agree, however, with counsel's point that, In re Harris, 186 N.J. 44 (2006), a case that led to the attorney's disbarment, is more serious than this case. Harris' conviction stemmed from her involvement in real estate closings in which she represented a real estate developer who engaged in the practice of "flipping" properties. Harris was convicted of first-degree conspiracy to commit financial facilitation (money laundering), first-degree money laundering, second-degree conspiracy to commit theft by deception, second-degree theft by deception, and also second-degree misapplication of entrusted property, which the Court equated to the knowing

misappropriation of escrow funds. Here, respondent was not charged with knowing misappropriation of funds and was not convicted of any crimes. Therefore, disbarment is not warranted here.

We note that the special master commented that respondent's use of Lend-Mor's mortgage funds to fund Wagshul's purchase was possibly a violation of N.J.S.A. 2C:21-15. This statute relates to the misapplication of entrusted property:

> A person commits a crime if he applies or disposes of property that has been entrusted to him as a fiduciary, or property belonging to or required to be withheld for the benefit of . . . a financial institution in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted . . . .

The Court has equated the misapplication of entrusted funds with knowing misappropriation. In re Iulo, 115 N.J. 498 (1989). Although the complaint charged respondent with "conversion," in violation of RPC 8.4(b), there were no proofs at the hearing to clearly and convincingly establish that respondent engaged in criminal conduct that rose to the level of misapplication/misappropriation of entrusted funds, mandating his disbarment. We, therefore, dismiss this charged violation of RPC 8.4(b).

We find that respondent's conduct in creating false HUD-1s, transferring funds from one account to the next, firing the title company when it caught wind of his misconduct, and restricting its contact with Homesales to prevent Homesales from learning about the flip, and creating and submitting false documentation to the OAE to disguise his fraudulent conduct, coupled with his recordkeeping improprieties, and his lack of compelling mitigation, require significant discipline. The question is how much.

The two-year suspension cases cited by the OAE were significantly more serious. For example, Geary involved an attorney's extensive and large scale misrepresentations to his firm and its clients. He was responsible for preparing regulatory filings for the firm's insurance clients. As he fell further behind in his work, he misrepresented to the clients that he had prepared and filed rate filing applications with various departments of insurance. In some cases, rather than preparing the applications, he created paperwork to submit to the clients to mislead them that their cases were progressing. He even provided clients with paperwork bearing "approved stamps" to make it appear as if approvals had been obtained by various departments of insurance. Some insurers unwittingly marketed the products without obtaining valid approvals.

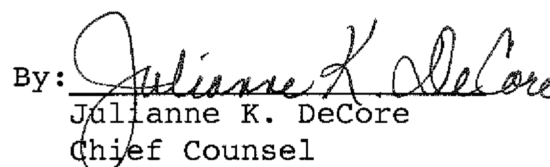
While respondent's scheme to cover-up his wrongdoing was elaborate, it was not as elaborate or on the scale of Geary's cover-up. Nor were the consequences here as dire as in Geary. For these reasons, we find that a two-year suspension is too severe.

Based on the totality of respondent's ethics violations and the lack of compelling mitigating factors, we find that a one-year suspension is the appropriate sanction in this case.

Member Doremus did not participate.

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

Disciplinary Review Board
Bonnie Frost, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

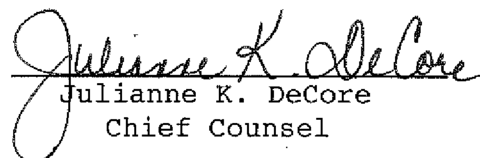
In the Matter of Christopher L. Yannon
Docket No. DRB 12-376

Argued: June 20, 2013

Decided: July 16, 2013

Disposition: One-year suspension

Members	Disbar	One-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh		X				
Clark		X				
Doremus						X
Gallipoli		X				
Yamner		X				
Zmirich		X				
Total:		6				1



Julianne K. DeCore
Chief Counsel