SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-175
District Docket Nos. XIV-2005-0632E and VA-2008-0900E

IN THE MATTER OF

JOHN B. FROHLING

AN ATTORNEY AT LAW

Decision

Argued: July 22, 2010

Decided: October 14, 2010

John McGill, III appeared on behalf of the Office of Attorney Ethics.

S. M. Chris Franzblau appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline (censure), filed by the District VA Ethics Committee "("DEC"). On November 20, 2009, the Office of Attorney Ethics ("OAE") and respondent, represented by counsel, entered into a stipulation of facts. Respondent waived the filing of a formal amended complaint

and agreed that counts one, two, and three of the complaint were deemed amended to include the allegation that he failed to supervise his paralegal, Ruth Moench, by not ensuring that her conduct was compatible with his professional obligations, as required by RPC 5.3(b). The parties stipulated that they could offer "additional facts as evidence at the hearing to supplement the stipulation" and that "[a]ny objection to admission to such supplemental facts into evidence [would] be resolved by determination of the Hearing Panel Chair." The parties also stipulated that no evidence inconsistent with the essential facts contained in the stipulation could be offered.

The OAE agreed with the DEC that respondent's conduct deserves a censure. We concur with that form of discipline, but emphasize that this is a strong censure.

Respondent was admitted to the New Jersey bar in 1960. At the relevant times, he maintained an office for the practice of law in Newark, New Jersey, as a member of the law firm of Frohling and Hudak.

In 1998, respondent was reprimanded for using funds designed for payroll taxes owed to the government. Moreover, he presented his employees with W2s indicating that certain sums had been taken from their gross pay and either had been or would be paid to the government. In re Frohling, 152 N.J. 27 (1998).

Before addressing each count of the complaint, the

stipulation provided a background of respondent's professional relationship with Jay Thornton, "an entrepreneur and owner of Upscale Investment Corporation . . . [who] was involved in the property 'flips' recited in Counts One, Two and Three [of the complaint] and [who] conducted all aspects of the financial arrangements with the lenders."

Respondent was introduced to Thornton by a Mr. Lepis, an attorney from Jersey City who owned a title company. Prior to respondent's involvement in the three transactions that are the subject matter of the complaint, Thornton had been referring "flip" transactions to another attorney, Stephanie Hand, for a period prior to June 2005. In July 2005, following a disagreement between Thornton and Hand, respondent assumed responsibility for the three transactions, as settlement agent. Respondent's law firm represented the buyer in each of the "flip" transactions. Respondent signed and certified the HUD-1 forms ("the settlement statements"), which, as detailed below, were prepared by his paralegal, Moench.

This disciplinary matter stems from respondent's role in three real estate transactions: Carter-to-Arocho-to-Barclift, Brown/Tate-to-Arocho-to-Bey, and Cardwell-to-McLeod-to-Bey. Respondent's law firm was not involved in the preparation of the contracts of sale. Thornton prepared the contracts in all three transactions, before respondent's involvement in them. Later, Thornton provided

respondent with revised contracts to complete the flip transactions.

As respondent's paralegal, Moench was in charge of completing closing duties, as outlined in a checklist provided by respondent's law firm. Although Moench was a law school graduate, she was hired by respondent's law firm as a paralegal, in September 2004. Moench had not held that position before. For a period of six months, between March and September 2004, she had worked as a real estate salesperson, but had attended only one real estate closing. At the time of these transactions, however, she had worked on other closings for respondent's law firm.

Moench's duties included the computation of the figures that led to entries on the settlement statements; the preparation of the settlement statements, based on information from various sources, such as, the mortgage companies, the title companies, the parties to the transactions, Hand's office, and Thornton; and the preparation of all the disbursement checks, which were signed by respondent's law partner, John Hudak. Respondent reviewed some, but not all of the checks.

As respondent's assistant and at his direction, Moench set up the closings and worked with the mortgage companies. On the first flip transaction, Carter-to-Arocho-to-Barclift, Moench met with Hand's assistant, in respondent's office, to review the preliminary settlement statement and other closing documents

prepared by Hand's office. Moench made all subsequent changes on the settlement statements, as directed by the lenders and reviewed by respondent.

After the transactions in question became respondent's responsibility, Moench consulted with Pamela Smith, Leslie Boston, and Sheronda Oriol, employees of the lenders involved in these transactions. Smith and Boston were Thornton's sisters. Moench also consulted with employees of the lenders about any last-minute pre-closing requirements, approvals of the settlement statements, and confirmation of funding. Moench complied with their instructions.

According to the stipulation, Moench

> would testify that she understood Pamela Smith (Smith) to be a loan processing officer for Countrywide Home Loans (Countrywide) and Leslie Boston (Boston) to be a loan processing officer for FGC Commercial Mortgage Financing DBA Fremont Mortgage (Fremont Mortgage), and that both were sisters of Thornton, and that neither woman worked in the closing departments of those mortgage companies, and that Thornton discussed his sisters' involvement, as loan processors, with Moench of the Frohling & Hudak law firm's involvement in the closings of the flip transactions referenced in the Complaint.

[S¶7.][1]

In fact, Boston was not an employee of Freemont Mortgage, but

[1] "S" denotes the stipulation of facts.

a mortgage broker/loan officer with Sunset Mortgage Company. She signed the loan application for Bey, the borrower in count three of the complaint. Freemont Mortgage was the lender, but never did retail business. Through his direct dealings with his sisters, Thornton procured the mortgage commitments on behalf of the borrowers, without the involvement of either Hand or respondent. Thornton also arranged for the appraisals in connection with these transactions. Neither Hand nor respondent reviewed any of the appraisals. According to the stipulation, respondent would "testify that he was not independently knowledgeable on the real estate valuations and depended on the appraisers accepted by the lenders and never knew or met the appraisers."

The mortgage companies wired the closing proceeds directly to respondent's law firm. As the closing agent, respondent signed the mortgage closing packages and received the mortgage closing instructions. According to the stipulation, respondent reviewed the forms submitted by the lenders and

> relied on information provided to him by Hand, Thornton, Moench and others as to how the relevant items and figures should be listed on the [settlement statements] and the accuracy or truthfulness of the amounts or expenses quoted, including the payment and/or collection of deposit funds.

[S¶35.]

Respondent received a legal fee for his handling of the closings. The settlement statements in the three transactions show the following fees paid by respondent's clients, the buyers: $1,500 in the Carter-to-Arocho transaction; $1,200 in the Arocho-to-Barclift transaction; $1,200 in the Brown/Tate-to-Arocho transaction; $1,200 in the Cardwell-to-McLeod transaction; and $1,500 in the McLeod-to-Bey transaction.[2]

According to the stipulation, the OAE's investigation of these matters revealed that Thornton is currently the subject of a federal complaint charging him with conspiracy to commit bank fraud in various property flip transactions, a violation of 18 U.S.C.A. §§ 1344 and 1349.

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[2] In the McLeod-to-Bey transaction, the settlement statement lists a $1,500 fee paid by the seller, McLeod. Nevertheless, only respondent's law firm is listed on the settlement statement as the recipient of legal fees. Presumably, thus, respondent collected a fee from both the buyer and the seller. Also, a $1,000 fee in the Arocho-to-Barclift was listed as having been paid from seller's funds (Arocho's). Yet, no attorney for the seller is listed on the settlement statement for that transaction. An inference could be drawn that here, too, respondent received a fee from the buyer and the seller. He testified that he received no other compensation for his role in these transactions.

1. Count One: Carter-to-Arocho-to-Barclift (67 Girard Avenue, East Orange, New Jersey)

On August 8, 2005, Urban Carter sold a house located in East Orange, New Jersey, to Delialah Arocho for $255,000. Respondent represented Arocho in that transaction. He received this file about one week before the closing. Hand had ordered the title searches.[3]

Also on August 8, 2005, Arocho sold the house to Lisa Barclift for $323,000, at a profit of $68,000 or about twenty-seven percent. This time, respondent represented Barclift. The stipulation does not indicate who represented Arocho in that sale, but the hearing panel report refers to Arocho as respondent's former client. In any event, a concurrent conflict of interest emerged when respondent represented a buyer (Arocho) in the purchase of the house and then represented another buyer (Barclift) in purchasing the same house from Arocho, now a former client. Moreover, although the two purchases took place on the same day, the new client paid $323,000 for a house that the former

[3] The OAE's investigation of Hand's role in these matters revealed no impropriety on her part.

client had bought for $255,000. Respondent admitted that his conduct violated RPC 1.7(a), RPC 1.7(b), and RPC 1.9(a).

In the first sale, Arocho did not have the funds necessary to close title. The settlement statement for the transaction indicated that, after some credits given to Arocho, she had to bring $250,994.31 in cash at the closing. According to the stipulation, respondent was unaware of this circumstance, having relied on information provided by Thornton and Hand's personnel, as well as on mortgage commitments contained in the file that he had received from Hand. The settlement statement, which Moench prepared and which respondent signed, as closing agent, does not list a mortgage loan.

The parties stipulated that, before respondent's involvement in this "flip" transaction, the Carter-to-Arocho contract had already been signed and all mortgage applications had been processed.

The funds to complete the Carter-to-Arocho transaction came from Countrywide Home Loans, Inc. ("Countrywide"), the mortgage company that provided the loan for Barclift to buy the house from Arocho. Indeed, on the closing date for both sales, August 8, 2005, Countrywide wired $281,047.11 to respondent's law firm. The firm then, under respondent's supervision, forwarded trust account checks in the amounts of $125,067.25 and $20,258.05 to Wells Fargo

and to Wachovia Bank, respectively, to pay off the first and the second mortgages listed on the Carter-to-Arocho settlement statement.

As closing agent for the Arocho-to-Barclift transaction, thus, respondent used the Barclift mortgage funds (second sale) to satisfy obligations due in connection with the first sale (Carter-to-Arocho). He did so without first obtaining Countrywide's written consent and contrary to the "Conditions to Close" section governing "No Other Sales," contained in Countrywide's closing instructions. Specifically, without the prior written consent of Countrywide's Chief Credit Officer, the loan could not be "closed or funded . . . in conjunction with, or simultaneously with, any other sale . . .", including a "flip sale."

According to the stipulation, although respondent did not obtain Countrywide's prior written consent,

> he would testify that he believed that Countrywide [had] both authorized the contemplated the "flip" [sic] nature of the transactions and was aware that its mortgage funds were going to be used to pay off the prior mortgages in both the first and second sales, based upon communications with its agent and Home Loan Consultant, Smith, who Respondent understood was aware of the contemplated transactions.

[S¶44.]

Moench, too, "would testify that Pamela Smith and Sheronda of Countrywide were aware of the flip transaction and gave oral approvals for the closing, and that she relied upon their apparent representative authority."

According to the stipulation, respondent "acknowledges that, without the intent to deceive, he certified in the first sale [Carter-to-Arocho] [settlement statement] that he had received funds from [Arocho] in connection with that transaction . . . " and also did not disclose, on the Arocho-to-Barclift settlement statement, that he had used Countrywide's funds to satisfy the original seller's (Carter) two mortgages in the first sale. The stipulation continued: "[w]hether this unintentional failure of disclosure rises to violations of *RPC* 1.1(a) (gross neglect), *RPC 1.3* (lack of diligence) *and RPC* 8.4(c) (misrepresentation) and the principles of *In re Silverberg,* 142 *N.J.* 428 (1995) and *In re Riedl,* 179 *N.J.* 461 (2004) is subject to consideration and decision by the hearing panel together with the determination of the appropriate discipline, if any."

According to the stipulation,

> [t]he OAE's investigation revealed from Countrywide's Mortgage Fraud Department's investigation concerning the conduct of their employee, Smith, that, although Countrywide's file contained no evidence that a "flip" transaction was contemplated, its Underwriting and Property Flip Sections failed to discover the following

discrepancies which appeared from documents in its possession regarding the Barclift from Arocho flip transaction:

a. Based upon public data, the property appeared to be valued at a high price;

b. Arocho was listed in the contract of sale, but title records showed another owner of record; and

c. Barclift's signature on the contract of sale and loan documents appears different.

[S¶44.]

In addition to the above improprieties, respondent did not collect a deposit in the Arocho-to-Barclift transaction, despite having been designated, on the contract of sale, as the escrow agent for the deposit, and despite having certified, on the settlement statement, that a $32,300 deposit had been paid. According to the stipulation, respondent relied on "statements of others, without taking adequate independent steps to clarify that the deposit monies . . . had, in fact, been paid." The parties left to the hearing panel's consideration whether such conduct violated RPC 8.4(c) (misrepresentation) and "the principles" of In re Agrait, 171 N.J. 1 (2002) (S¶49).

On August 9, 2005, the day after the two closings, respondent's law firm disbursed a check to Arocho for $19,401.61. Unbeknownst to respondent, the check was then deposited into Thornton's bank account for Upscale Investment

Corporation, thereby "reasonably inferring that Arocho was a 'strawman' for the benefit of Thornton in the property flip transactions."

Respondent acknowledged that, in these two sales, he relied on information supplied by Thornton and others, "without conducting adequate independent review of their accuracy or truthfulness." He also acknowledged that he failed to properly supervise Moench, by not making "reasonable efforts to ensure that her conduct was correct in handling the 'flip' transactions." Once again, the parties left to the hearing panel the determination of whether such conduct was incompatible with respondent's professional obligations, in violation of RPC 5.3(b) (failure to supervise nonlawyer employees).

2. Count Two: Brown/Tate-to-Arocho-to-Bey (60 Voorhees Street, Newark, New Jersey)

On August 22, 2005, Edwin Brown and Eleanor Tate sold a house located at 60 Voorhees Street, Newark, New Jersey, to Delialah Arocho for $166,000. On that same day, Arocho sold the house to Khayyam Bey for $220,000, an increase of $54,000 or about thirty-three percent. Respondent represented Arocho at the closing of her purchase from Brown/Tate and Bey at the closing of his purchase from Arocho. Respondent stipulated that such

representation was contrary to the conflict of interest rules, RPC 1.7(a), RPC 1.7(b), and RPC 1.9(a).

In this transaction, too, Arocho did not have the necessary funds to close title. The stipulation states that respondent was unaware of this circumstance, having relied on information given to him by Thornton, the lender, and "others," as well as information contained in the file.

The funds used to complete the first sale came from Countrywide, the lender that granted the mortgage loan for Bey's purchase from Arocho. According to the stipulation, respondent and Moench would testify that respondent "believed that Countrywide [had] authorized the use of its mortgage funds to complete these 'flip' transactions."

On August 22, 2005, Countrywide wired $172,296.34 to respondent's law firm. Thereafter, under respondent's supervision, the law firm used these proceeds to pay Brown/Tate $149,884.47 in connection with their sale to Arocho. Respondent did not have Countrywide's written consent to the use of the Bey mortgage funds for the first sale (Brown/Tate-to-Arocho), as required by Countrywide's "Conditions to Close" section governing "No Other Sales," contained in its closing instructions.

According to the stipulation, "Moench would testify that

Pamela Smith and Sheronda Oriol of Countrywide were aware of the flip transaction and gave oral approvals for the closing, and that she relied upon their apparent representative authority." Respondent acknowledged that he did not seek Countrywide's consent, but

> would testify that he believed that Countrywide both authorized the contemplated "flip" nature of the transactions and was aware that its mortgage funds were going to be used to pay off the prior mortgages in both the first and second sales, based upon communications with its agent and Home Loan Consultant, Smith, who respondent understood was aware of the contemplated transactions.
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> [S¶60.]

As with the transaction in Count One, the stipulation indicates that Countrywide's investigation of Smith's conduct revealed certain discrepancies in the documents pertaining to the Arocho-to-Bey sale. Specifically, "Arocho's signatures are suspected to be the same as in the Barclift matter;" "Bey's signatures on the contract of sale and loan documents are suspected to be different;" and "Arocho's signature on the affidavit of title does not match the signature on the sale contract." Respondent "would testify that he was unaware of these purported inconsistencies until after the filing of the ethics Complaint in this matter."

As in Count One, the stipulation sets forth respondent's

acknowledgement that, without the intent to deceive, he certified, on the first sale settlement statement (Brown/Tate-to-Arocho), that he had received funds from the borrower (Arocho), "without listing therein his use of the Countrywide mortgage proceeds loaned to the borrower in the second sale [Bey] to fund the settlement obligations required in the first sale." As to the settlement statement for the second sale, respondent "acknowledge[d] that, without the intent to deceive, he failed to disclose his use of Countrywide's mortgage funds to pay cash to the seller, Brown/Tate, in connection with the first sale [Brown/Tate-to-Arocho]."

Respondent "acknowledge[d] that [the above] conduct constitute[d] the negligent failure to correct the first sale [settlement statement] to reflect the exact terms of the transaction." Here, too, the parties submitted to the hearing panel's consideration the issue of whether such "unintentional failure to disclose" amounted to gross neglect, lack of diligence, and misrepresentation, as well as "the principles" of In re Silverberg, supra, 142 N.J. 428, and In re Riedl, supra, 179 N.J. 461.

As in the sale in Count One, respondent certified, on the settlement statement for the second sale (Arocho-to-Bey), that he had received a deposit ($22,000) from or on behalf of Bey,

when that was not the case. Respondent did not verify whether a deposit had, in fact, been tendered, having relied on statements of "others." Whether such conduct constituted a misrepresentation and a violation of "the principles" of In re Agrait, supra, 171 N.J. 1, was left to the hearing panel's consideration (S¶65).

On August 23, 2005, respondent's law firm drew a $24,627.44 trust account check payable to Arocho. Unbeknownst to respondent, the check was deposited in Thornton's account for Upscale Investment Corporation, "reasonably inferring that Arocho was a 'strawman' for the benefit of Thornton in the property flip transaction."

Ultimately, Bey defaulted on his mortgage loan obligations. On November 30, 2006, ownership of the property was transferred to Countrywide, through foreclosure proceedings.

Respondent "acknowledge[d] that, in connection with his representation in these real estate matters, he unreasonably relied on information obtained from Thornton and Hand's employees and others, including lender's employees, without conducting his own independent review of their accuracy or truthfulness." Respondent also "acknowledge[d] [his] failure to supervise his nonlawyer paralegal assistant, Moench, by failure to make reasonable efforts to ensure that her conduct was correct in handling the 'flip' transactions." Once again, the hearing panel

was given the task to decide whether such conduct was "incompatible with [respondent's] professional obligations . . . in violation of *RPC* 5.3 (b) . . . ."

3. Count Three: Cardwell-to-McLeod-to-Bey (722 Grove Street, Irvington, New Jersey)

On October 20, 2005, Anthony Cardwell sold a house located in Irvington, New Jersey, to Juanita McLeod for $210,000. On the same day, McLeod sold the house to Khayyam Bey for $300,000, at a profit of $90,000 or about forty-three percent. Respondent represented McLeod in the first sale (Cardwell-to-McLeod) and Bey in the second sale (McLeod-to-Bey).

McLeod did not have the funds to close title. In believing otherwise, respondent relied on information given to him by Thornton, the lender (Fremont Mortgage), and "others," as well as information contained in the file. Moench prepared the settlement statement and all the disbursements in connection with the first sale, based upon the pre-approval of the lender.

As in the transactions in Counts One and Two, the funds used to complete the first sale (Cardwell-to-McLeod) came from the mortgage proceeds intended for the second sale (McLeod-to-Bey). Although respondent did not obtain the written consent of Fremont Mortgage, contrary to its closing instructions, he

"would testify that he believed that Fremont Mortgage had authorized the use of its mortgage funds to complete these 'flip' transactions."[4]

On October 20, 2005, Fremont Mortgage wired $268,399.58 to respondent's law firm. Thereafter, under respondent's supervision, the law firm issued two trust account checks to pay off the first and the second mortgages on the property, in the amounts of $101,423.34 and $101,284.46, respectively. Those obligations were required to be satisfied at the time of the first sale (Cardwell-to-McLeod).

According to the stipulation,

> as closing agent, Respondent was unaware of these trust fund disbursements at the time, because he had delegated the satisfaction of all liens and encumbrances to, and relied on, Moench, Lender pre-approval and the statements of others with respect to the satisfaction of these obligations. Respondent would testify that he was unaware of any irregularity with the transaction at relevant times.
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> [S¶76.]

[4] Section G5 of Fremont Mortgage's closing instructions stated: "Do not close this loan or record any document without the prior written approval of the Lender, if you have knowledge of any contemporaneous transfer of title to the collateral property from or to anyone, except the parties who are shown as vested with title in the title commitment or preliminary report, or who are described in Section 1, Paragraph A2 of these Lender's Closing Instructions." The individual listed on Section 1, paragraph A2 was Khayyam Bey.

A representative of Prestige Title had informed Moench that property flips were "completely legal, unless the Bank had not given its pre-approval." Furthermore, Moench "would testify that she understood Leslie Boston [Thornton's sister] to be a representative of Fremont Mortgage who was aware of the flip transactions and who gave oral approval for the closings, and that Moench relied upon Boston's apparent representative authority." Respondent, too,

> would testify that he believed that that Fremont Mortgage both authorized the contemplated the [sic] nature of the 'flip' transactions and was aware that its mortgage funds were going to be used to pay off the prior mortgage in both the first and second sales, based upon communications with Boston, who Respondent understood was Fremont Mortgage's agent [and] who was aware of the contemplated transactions. Respondent would further testify that his law firm received written pre-approval closing documents from the Lender authorizing the closing.
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> [S¶78b.]

In fact, Boston was a mortgage broker/loan officer employed by Sunset Mortgage Company, not by Fremont Mortgage. Boston had signed the loan application for Bey, the borrower. She had also listed a $30,000 deposit on the application, when, in truth, no deposit had been tendered. Although the contract called for

respondent to hold in escrow a $30,000 deposit, he did not take adequate steps to verify that a deposit had been paid by or on behalf of Bey, relying on "statements of others."[5] Respondent certified on the settlement statement for the second sale (McLeod-to-Bey) that Bey had posted a $30,000 deposit.

Also, the settlement statement for the second sale (McLeod-to-Bey) falsely certified that the seller, McLeod, had been paid $251,948.21 when, in fact, respondent's law firm paid McLeod $38,109.21. In certifying that McLeod was to receive $251,948.21 from the sale, respondent relied on Moench, who prepared the settlement statement and all disbursements, based upon the pre-approval of the lender.

One day after the closing, respondent's law firm issued a trust account check to McLeod for $38,109.21. Unbeknownst to respondent, the check was subsequently deposited in Thornton's trust account for Upscale Investments Corporation, "reasonably inferring that McLeod was a 'strawman' for the benefit of Thornton in the property flip transactions."

According to the stipulation, respondent acknowledged (1) that he "failed to cure a concurrent conflict of interest by failing to obtain the written consent of either McLeod or Bey,

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[5] Fremont Mortgage's "Checklist for Closing Agent/Attorney" acknowledged as "received" a copy of a cancelled check for a $30,000 deposit.

with respect to Respondent's representation in the second sale"; (2) that, without the intent to deceive, he certified on the settlement statement for the first sale (Cardwell-to-McLeod) that he had received funds from McLeod, "without listing therein his use of the Fremont Mortgage proceeds loaned to [Bey] to fund the settlement obligations in the first sale;" (3) that, "without the intent to deceive, he did not disclose, on the settlement statement for the second sale (McLeod-to-Bey), his use of the Fremont Mortgage proceeds to satisfy the balance of the two mortgage loans owed by Cardwell; (4) that, "without the intent to deceive, he wrongfully stated, on the settlement statement for the second sale (McLeod-to-Bey), that McLeod had been paid $251,948.21, when, in fact, respondent's law firm paid McLeod $38,109.21 (a disbursement not reflected on the settlement statement); and (5) that, "without the intent to deceive, he certified on the settlement statement for the second sale (McLeod-to-Bey) that Bey had paid a $30,000 deposit.

The parties agreed to leave to the hearing panel's consideration the issue of whether the above conduct violated RPC 1.7(a), RPC 1.7(b), and RPC 1.9(a) (the conflict of interest rules); RPC 1.1(a) (gross neglect); RPC 1.3 (lack of diligence); RPC 5.3(b) (failure to supervise nonlawyer employee); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or

misrepresentation); and "the principles" of Silverberg, Riedl, and Agrait.

In his opening statement at the DEC hearing, the OAE presenter urged the panel to find that the stipulated facts clearly and convincingly established violations of RPC 1.1(a), RPC 1.7(a), RPC 1.7(b), RPC 1.9, and RPC 8.4(c).[6] Following respondent's counsel's opening statement, the presenter rested his case on the submissions before the panel. Respondent's counsel then elicited some testimony from respondent.

Respondent testified that he had no participation in the loan financing aspect of the three transactions at issue. The contracts, the title searches, and the mortgage applications were already in place at the time of his involvement. On cross-examination, he told the panel what he has learned from these incidents:

> What I learned from this episode is that I should have been more careful, in terms of accepting the statements that I received from people in this transaction, specifically Mr. Thornton and Ms. Hand; that I probably should have been more diligent in investigating the people I did [sic], when I was first introduced to this . . . and I was introduced to this by Mr. [Lepis], who is a lawyer in Jersey City that I knew

[6] Although the presenter did not cite RPC 5.3, respondent's counsel, in his opening statement, alluded to respondent's acknowledgement that he had not provide Moench with adequate supervision.

professionally, his daughter had told me that there was a gentleman in Essex County that had a program to assist people in acquiring properties, and that they needed a lawyer to represent the other side of the transaction. And I introduced myself to Mr. Thornton, and I quickly introduced myself and visited with Ms. Hand, a lawyer in Newark, New Jersey, and I was told that Mr. Thornton was a responsible person, that he had a program that he had initiated, that Ms. Hand had worked on with him . . . and I believe that I was told that they were responsible people, and I made a mistake, and I should have been more suspicious, and I think that, to that extent, I did not protect the people that were involved in these transactions, I did not do that. And as you look back on things, as I look back on my performance and/or my lack of performance as a lawyer, I consider myself to be a very dedicated lawyer, meaning that I spend a great deal of time trying to service a client, I was very active in the Newark community, we had done the bond counsel work for the City of Newark for a long time, and I felt that this was a good program, and one that I should get involved in to help. Unfortunately, I did not take the time, because of the circumstances, to either say no entirely or to investigate, and if I did, then I might have found out things which would have caused me to take a different approach.

[T19-18 to T21-4.]

Respondent acknowledged that he did not verify independently that the contents of the settlement statements were accurate. He claimed that he believed the statements to be correct, having relied on Moench's preparation of the closing

documents and on statements by Thornton, Hand, and, when necessary, by the clients. He explained: "[u]nfortunately, I was not a real estate lawyer, and I had a person that had done real estate closings for the office, [and] I had never been involved in a flip transaction."[7] Respondent did not place blame on Moench, though, explaining that she, too, did not know about the impropriety of "flip" transactions. He conceded, however, that he should have been more diligent in investigating "the facts" and in properly supervising Moench.

With respect to having certified, on the settlement statements, that deposits had been tendered, respondent testified:

> I did see the checks, I did inquire of the deposits, and I thought that the money -- I even spoke to the seller of the houses to acknowledge that they had received the deposits, and I relied on those statements, and I should not have done that, because as it turned out they were incorrect.
>
> [T25-2 to 7.]

Respondent claimed that he "had never been in this situation where [he'd] ever have people make statements to [him] that were not true" and that "these transactions came very quickly . . . this was all happening in a matter of weeks, and,

[7] Respondent testified that he had "done some house closings for [his] family before."

all of a sudden, we were asked to do the closing."

As indicated previously, except for his fees, respondent received no other compensation for his representation in these transactions.

Respondent submitted a "Statement in Mitigation", citing his many volunteer activities, including tutoring disadvantaged children; mentoring urban youths from St. Benedict's High School; counseling minority businesses and lending them funds; acting as Director of Youth at Risk; working with the homeless; serving as Director of Jersey City Charter School and as Director and Vice-President of the National County of Alcohol and Drug Dependency of Essex County; and volunteering in church groups and Bar Association activities, during his fifty years as an attorney.

Respondent explained that the reason for recounting the above activities was to show that his involvement with Thornton was grounded on humanitarian reasons. He became aware that Thornton had created a program to assist urban people in Essex County to purchase houses that they ordinarily would not be able to afford. He was told that with Thornton's experience and contacts with mortgage companies Thornton could help individuals to obtain financing and, through his company, even rehabilitate the properties.

Respondent added that the reason for his involvement with Thornton was "to assist what [he] thought was a very good cause, complete with a new creative way to achieve a very desirable result," that is, to add some revenue to his law firm. He explained that the firm had "suffered financially from the abrupt departure of [its] Managing Partner . . . " and that he wanted to help rebuild its practice.

Complicating the matter, though, was Hand's sudden withdrawal from the transactions, "leaving [them] to finish two closings with no real knowledge of how a flip transaction worked and with Clients eager to close on their transactions." Many of the relevant closing documents had been prepared by Hand. He stated "without reservation that he was unaware of the complexities of the flip transactions and of the motives of the persons, including the Mortgage representatives, who organized the transactions."

Respondent concluded by saying that he had no intention of "representing parties to real estate transactions or holding trust funds related to real estate matters in the future," has decided "not to engage in this specialty of practice in the future," intended to retire within the next few years, but "unfortunately due to the recent downturn in the economy and the recent departures of two partners and [his] personal family

responsibilities, he must continue to work." He requested that these "other aspects of [his] professional and personal life" be considered in the determination of the appropriate disposition of this matter.

The DEC accepted the parties' joint stipulation of facts as the "factual record in this matter" and considered respondent's Statement in Mitigation and his testimony, in reaching its conclusions. The DEC noted respondent's admission that, in three separate instances, he was involved in flip transactions, having acted as the attorney for the buyer in each aspect of the transactions. Specifically, in the first sale, respondent represented the buyer; in the second sale, he again represented the buyer, at which point the seller became respondent's former client.

Taking into consideration all of respondent's admissions and acknowledgements in the disciplinary stipulation, the DEC concluded that he had violated RPC 1.7(a), RPC 1.7(b), and RPC 1.9(a) by failing to cure a concurrent conflict of interest; RPC 1.1(a), RPC 1.3, and RPC 8.4(c) by "negligently failing to correct the [settlement statement] in the first [and second] sale of each of the three flip transactions to accurately reflect the true terms of the transactions;" RPC 8.4(c) by "failing to take adequate independent steps to clarify that the deposit monies listed on the second sale [settlement statements] for each of the

three flip transactions had in fact been paid;" and RPC 5.3(b) by "failing to adequately supervise his nonlawyer paralegal and failing to make reasonable efforts to ensure that her conduct was correct in handling the flip transactions."

In recommending a censure with conditions, the DEC noted its struggle with the quantum of discipline. The DEC remarked that, "while the conduct may have justified a suspension, the panel believed the minimum suspension of three months (R. 1:20-15A(a)(3)) to be too severe." The DEC believed that certain conditions were necessary to "emphasize the severity of Respondent's conduct." The DEC recommended that respondent

> (a) refrain from representing parties to real estate transactions, from holding trust funds related to real estate matters, and from engaging in the real estate practice;
>
> (b) take a course in small business management to "learn to better manage both his trust account and his employees;" and
>
> (c) comply with RPC 1.5(b) and provide his clients with written retainer agreements.[8]
>
> [HPR¶32a-HPR¶32c.][9]

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[8] This recommendation stemmed from a question posed by one of the panel members as to whether respondent had written fee agreements with the clients in the three transactions. When respondent answered that he had not, the panel member asked whether it was his practice to represent clients without written fee agreements. Respondent replied that his understanding was that his firm did not get "retainer letters" in real estate matters.

Following a review of the record, we agree that the DEC's conclusion that respondent conduct was unethical was fully supported by clear and convincing evidence. The stipulated facts amply support findings that respondent violated RPC 1.7(a), RPC 1.7(b), RPC 1.9(a), RPC 1.1(a), RPC 5.3(b), and RPC 8.4(c).

Admittedly, respondent violated the conflict of interest rules, when he represented the buyer in the first sale of each of the three transactions and later acted as the attorney for the buyer in all of the second sales, at which time his original clients became his former clients. Under RPC 1.7(a)(2), a concurrent conflict of interest exists if there is a significant risk that the representation of one client will be materially limited by the attorney's responsibilities to a former client. The representation is permissible only if the attorney complies with the safeguards of RPC 1.7(b), that is, informed consent, confirmed in writing, after full disclosure and consultation. Respondent did not do so.

In this case, compliance with those safeguards was even more critical because respondent's new client, the buyer in the second sale, was purchasing a property at a considerably higher

[9] "HPR" denotes the hearing panel report.

price than the former client had paid on the same day. Although it is possible that, in unique circumstances, a buyer receives a windfall by benefiting from a low purchase price and then re-selling the property for its actual, higher value, that was not the case here. The record allows the conclusion that the prices were artificially inflated so that higher mortgage loans could be obtained. In this fashion, not only would all the first sale obligations be satisfied, but there would be some funds left over to compensate Thornton, the mastermind of the scheme. Because the new client was purchasing property at an inflated price, respondent had a duty to ensure that the client's decision to go forward with the transaction was grounded on informed consent. By failing to cure the concurrent conflict of interest, respondent violated RPC 1.7(a) and RPC 1.7(b).

Respondent also violated RPC 1.9(a), which addresses an attorney's duty to former clients. It prohibits an attorney who has represented a client in a matter from representing another client in the same or in a substantially related matter in which the new and the former client's interests are adverse. The representation is only possible if the former client gives informed consent, in writing.

Here, respondent represented new clients (the buyers in the second sale) against his former clients (the buyers in the first

sale, now sellers in the second sale), in substantially related transactions -- they involved the same property. In addition, the relationship between seller and buyer of real estate is inherently adverse. Notwithstanding that all details of the transaction may have been ironed out during the contract negotiations, there is always the possibility that new problems may arise before the closing. Respondent was, thus, obligated to obtain the written, informed consent of the former client, before proceeding with the representation of the new client against the former client. He did not do so.

More seriously, however, respondent's role in these matters was marked not only by recklessness but also by misrepresentations.

Specifically, in the first phase of each of the three transactions, respondent certified, on the settlement statements, that he had received the necessary funds from the buyer. That was untrue. In all three instances, the first sale buyers did not have the funds necessary to close. Instead, funds obtained from the lenders in the second phase of the transactions were utilized to satisfy the first closings' obligations, without the consent of the lenders. That respondent might have relied on the lenders' purported permission to use the second sale funds for the first sale obligations might

excuse his unauthorized of such funds, but it does not serve to cure his misrepresentation, on the settlement statements, that he had collected the funds from the first sale buyers.

In addition, respondent falsely certified that all funds had been disbursed as represented on the settlement statements. In fact, there were no disbursements at all in the first phase of the transactions. The first sales were not funded until the second closings took place.

Yet another misrepresentation occurred when respondent certified, on the settlement statement for the second closing in Count Three (McLeod-to-Bey), that McLeod received $251,948.21 from the closing, when, in fact, McLeod was paid $38,109.21.

Respondent also certified, on the settlement statements, that he had received deposits in connection with the second sales. In reality, the buyers had not furnished a deposit at all. Respondent claimed, at the DEC hearing, that he had relied on the sellers' statements that they had received the deposits. Nevertheless, it was respondent's responsibility to collect the deposits and to hold them in escrow, as specified in the contracts of sale. Therefore, not only did respondent breach that duty, but he failed to ascertain that the deposits had been paid at all. He then certified that they had. At a minimum, his conduct smacked of recklessness.

Respondent's defenses/excuses were that he was inexperienced in real estate matters; that his motives were altruistic, that is, he believed that Thornton had put in place a program to assist urban individuals in Essex County to buy houses that they otherwise could not afford; that he had relied on file documents and statements from Hand, in addition to statements from Smith and Boston (Thornton's sisters) and other employees of the lenders, who had represented to him that the lenders had approved the flip nature of the transactions; that he had relied on Moench's preparation of the closing documents and that Moench, in turn, had relied on documents and statements from employees of the lenders; that he had confirmed with the sellers that they had received the deposits; that, in some instances, there had been pressure to hurry to close; and that he had no intent to deceive anyone.

The answers to these contentions are that respondent should not have ventured in uncharted waters unless he ensured that whatever mechanism that was implemented to properly carry out the activities unfamiliar to him was subject to his close supervision, rather than blind trust; that reliance on the representations of others is no substitute for personal and/or written verification; that accuracy and truthfulness can never be compromised for the sake of speed; that running alongside his

ostensibly humanitarian motives was the expected profit to his law practice; and that, notwithstanding his claims that he relied on others who lied to him, he made misrepresentations of his own, when he certified, on the settlement statements, that the closing funds had been received and disbursed exactly as posted on the statements, knowing that they had not.

Altogether, then, we find that respondent's conduct violated RPC 1.7(a), RPC 1.7(b), RPC 1.9(a), RPC 1.1(a), RPC 5.3 (b), and RPC 8.4(c).[10]

What discipline is then appropriate for this respondent? Misrepresentations in closing statements, unaccompanied by other forms of misconduct, generally lead to the imposition of a reprimand. See, e.g., In re Spector, 157 N.J. 530 (1999) (attorney concealed secondary financing from the lender through the use of dual settlement statements, "Fannie Mae" affidavits, and certifications); In re Sarsano, 153 N.J. 364 (1998) (attorney hid secondary financing from the primary lender and prepared two different settlement statements, thereby violating RPC 8.4(c)); and In re Blanch, 140 N.J. 519 (1995) (attorney failed to disclose secondary financing to a mortgage company,

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[10] Although the DEC also found a violation of RPC 1.3, there is no evidence that respondent lacked diligence in handling the closings. It is true that he should have been more diligent in supervising Moench and in complying with his own obligations, but such conduct more properly falls within the scope of RPC 5.3 and RPC 1.1(a) in this instance.

contrary to the company's written instructions).

At times, even when the misrepresentation to the lender appears in conjunction with other unethical acts, such as gross neglect or lack of diligence, a reprimand may still result. See, e.g., In re Agrait, 171 N.J. 1 (2002) (reprimand for attorney who failed to verify and collect a $16,000 down payment shown on the settlement statement, which he was obligated to escrow under the terms of the contract; the attorney breached his fiduciary duty to the lender by failing to collect the deposit; 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, thereby engaging in gross neglect and misrepresentation, and failed to communicate the basis of his fee in writing) and In re Silverberg, 142 N.J. 428 (1995) (reprimand for attorney who learned, after a real estate closing, that his clients had concealed secondary financing; the attorney then failed to correct the inaccuracy in the settlement statement; the attorney was also guilty of gross neglect and lack of diligence; strong mitigating factors considered, including a psychiatric disorder and a finding that the attorney was an innocent party in the scheme masterminded by the seller's attorney and the broker).

If the misrepresentation encompasses several matters, thus

evidencing a pattern of deception, more severe discipline is required. See, e.g., In re Alum, 162 N.J. 313 (2000) (one-year suspended suspension for attorney who participated in five real estate transactions involving "silent seconds" and "fictitious credits"; the attorney either failed to disclose to the primary lender the existence of secondary financing or prepared and signed false settlement 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 more serious situations, suspensions have been imposed. See, e.g., In re De La Carrera, 181 N.J. 296 (2004) (three-month suspension for attorney who, in one real estate matter, failed to disclose to the lender or on the settlement statement that the sellers had taken back a secondary mortgage from the buyers, a practice prohibited by the lender; in two other matters, the attorney also disbursed funds prior to receiving wire transfers, resulting in the negligent invasion of other clients' trust funds; the discipline was enhanced because the case proceeded on a default basis); 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 representing both the second mortgage holders and the buyers); 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 settlement statements, affidavits of title, and Fannie Mae affidavits and agreements, lied to prosecuting authorities, and failed to witness a power of attorney); In re Newton, 157 N.J. 526 (1999) (one-year suspension for preparing false and misleading settlement statements, taking a false jurat, and engaging in multiple conflicts of interest in real estate transactions; a major factor in the imposition of a one-year suspension was the attorney's participation in and knowledge of the scheme to defraud the lenders); and In re Frost, 156 N.J. 416 (1998) (two-year suspension for attorney who prepared misleading closing documents, including the note and the 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).

Respondent's conduct was akin to that of an attorney who received a reprimand. In re Gale, 195 N.J. 1 (2007). In that case, attorney Gale participated in five real estate transactions that involved fraudulent activities on the part of an individual named Salerno. After meeting Salerno, Gale agreed to represent two buyers (McAllister and Saroya) in five real estate deals engendered by Salerno. At the ethics hearing, one of the transactions (Saroya) was used to illustrate the improprieties that permeated the other four.

Specifically, Saljam, a company owned by Salerno, bought property from Paguiligan for $70,000. Saljam then sold it to Saroya on the same day for $115,000. Gale prepared the settlement statement according to Salerno's instructions, without verifying whether they were accurate or true.

As it turned out, the information provided by Salerno was not only erroneous, but downright fraudulent. For instance, although Gale listed a $23,000 deposit on the settlement statement, no deposit had been tendered. Gale testified that she had relied on Salerno's representation that a deposit had been paid.

In addition, the settlement statement showed Saljam as the mortgagee of a loan in the amount of $37,000. That was untrue.

Had Gale reviewed the title report, she would have known that there were no mortgages encumbering the property. Instead, she believed Salerno. At the closing, she disbursed funds to Saljam.

The settlement statements that Gale prepared for the four other transactions also contained misrepresentations. For example, Dominion Enterprises, another of Salerno's companies, was listed as a second mortgagee. After the closing, however, Gale issued a check to Saljam, allegedly at Salerno's instruction.

In the remaining transactions, Gale disbursed funds either to Salerno directly or to one of his companies, even though the recipient was different from the one listed on the settlement statement or had no entitlement to any funds. The common thread running throughout the transactions was that Salerno, either directly or indirectly, received sums to which he was not entitled.

Besides the above irregularities, Gale notarized McAllister's and Saroya's signatures on affidavits of title that misrepresented that they would occupy the premises. She also admitted to the OAE that she had not collected from the buyers the cash due at closing.

In her defense, Gale vehemently denied knowledge of any foul play on Salerno's part and any intent at deception. She

claimed that she had trusted Salerno.

We found that Gale's conduct was beyond grossly negligent -- it was reckless. It also constituted a pattern of neglect. We noted that, like this respondent, Gale conducted no independent verification of the legitimacy of Salerno's instructions to her. In the process, Gale not only prepared settlement statements with false entries that misled the lenders, but was also instrumental in allowing Salerno to pocket the fruits of his unlawful activities. We faulted Gale, an experienced real estate lawyer, for having taken directions from an individual whom she hardly knew and whose integrity she did not investigate.

Although Gale's, the OAE investigator's, and the special master's positions were that Gale's conduct was not aimed at deception, we found that she had to know that her entries on the settlement statements were not legitimate. In other words, she may not have been moved by a desire to deceive anyone, but, as an experienced real estate lawyer, who had evidence that what she was listing on the settlement statement was at variance with the title report, she had to know that the information contained on the settlement statements was contrary to reality. We, thus, found her guilty of misrepresentation.

Compelling mitigating circumstances justified the imposition of only a reprimand. At the time, Gale was unable to

clearly differentiate between good and evil because of depression and other serious ailments, in addition to her naiveté and trusting nature. The record conveyed a sense that she was basically a good person. Moreover, she derived no benefit from the transactions (she was an associate at a law firm), had an unblemished disciplinary and professional record, and gave no reason to believe that she would run afoul of the ethics rules again. We determined that a reprimand was sufficient discipline for Gale's infractions. The Court agreed.

Respondent's and Gale's conduct was similar in several respects: both allowed closings to proceed on inaccurate settlement statements, without ensuring their accuracy or truthfulness; both did not collect funds required for the closings; and both relied on statements or instructions of others whose integrity was questionable. In both instances, their conduct was marked by recklessness and misrepresentations.

In both cases, the mitigating factors were strong. No finding of deficiency of character was appropriate in either case; to the contrary, the evidence was that both were naïve and misguided, rather than venal. There was/is no need to protect the public from either attorney. Gale was beset with serious mental and physical problems. Respondent's volunteer activities are impressive and indicative of his willingness to help others.

One distinction between Gale's and respondent's conduct was that Gale's disciplinary record was stainless, whereas respondent has been reprimanded. Another distinction is that Gale also improperly notarized signatures on affidavits of title that contained misrepresentations. On the other hand, respondent also failed to supervise a nonlawyer employee and engaged in a conflict of interest. Those infractions should be included in the evaluation of the proper discipline in this case. See, e.g., In re Riedl, supra, 172 N.J. 646 (attorney reprimanded for failing to supervise his paralegal, allowing the paralegal to sign trust account checks' the attorney also displayed gross neglect in a real estate matter by failing to secure a discharge of mortgage for eighteen months after it was satisfied) and In re Neff, 202 N.J. 35 (2010) (attorney admonished for simultaneously representing buyer and seller of real estate; the attorney was moved by a desire to help the clients; prior private reprimand and censure).

On balance, a comparison of the violations in this case and in Gale suggests that respondent's conduct is deserving of discipline a degree higher than Gale's, that is, a censure, given that he has been reprimanded before. We emphasize, however, that this is a strong censure, inasmuch as his misrepresentations, recklessness, and abdication of his duties

as closing agent facilitated fraudulent transactions.

As mentioned previously, the DEC recommended three conditions: (1) that respondent be prohibited from engaging in real estate practice and from holding trust funds in connection with real estate cases; (2) that he take a course in small business management to learn how to manage his trust account and his employees; and (3) that he be required to comply with RPC 1.5(b) and provide his client with writings setting forth the rate or basis of his fee.

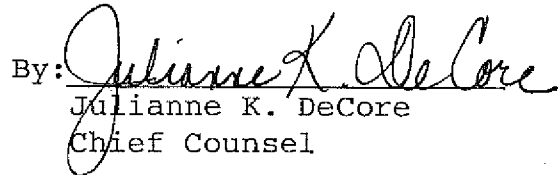
Of the above conditions, we agree with only one: that respondent be precluded from taking on real estate matters. In fact, respondent himself agreed to do so. In our view, the other conditions are unnecessary. First, respondent does not sign trust account checks and has not done so in years. Second, his failure-to-supervise impropriety was confined to a real estate paralegal and did not extend to non-real estate employees. Because he should be precluded from accepting real estate matters, there is no need for him to learn how to better supervise a real estate employee. Finally, the issue of whether he memorialized his fee in these matters was neither part of the stipulation nor fully explored at the DEC hearing. Rather, one of the panel members asked respondent, in passing, if he had a written fee agreement with the clients in these matters. He

replied that he had not. Nothing indicates that respondent does not provide his non-real estate clients with writings setting forth the basis or rate of his fee.

Member Clark did not participate.

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

Disciplinary Review Board
Louis Pashman, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

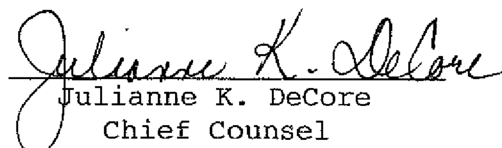
In the Matter of John B. Frohling
Docket No. DRB 10-175

Argued: July 22, 2010

Decided: October 14, 2010

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark						X
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			8			1



Julianne K. DeCore
Chief Counsel