SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-072
District Docket Nos. XIV-01-381E and
XIV-01-459E

IN THE MATTER OF :
:
BINCY ABRAHAM :
:
AN ATTORNEY AT LAW :

Decision

Argued: July 19, 2007

Decided: August 30, 2007

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

David Dugan appeared on behalf of respondent.

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

This matter came before us on a recommendation for discipline (one-year suspension), filed by the District V Ethics Committee (DEC). The grievance stemmed from respondent's simultaneous representation of a business entity and of the buyers of real estate. The purpose of the entity was to assist clients in purchasing single-family residences.

The complaint charged respondent with failing to safeguard clients' funds (RPC 1.15, presumably (a)), engaging in a conflict of interest (RPC 1.7), allowing the entity to direct or regulate her professional judgment in rendering legal services to the clients (RPC 5.4(c)), making misrepresentations (RPC 8.4(c)), and violating the recordkeeping rules (R. 1:21-6 and RPC 1.15(d)). In her answer, respondent admitted the latter violations.

The Office of Attorney Ethics (OAE) presenter recommends a "suspension of one year or less . . . for the multitude and magnitude of Respondent's ethical violations." We determine to impose a three-month suspension, with conditions.

Respondent was admitted to the New Jersey bar in 1998. She is also admitted to the Washington, DC, bar and to the United States Tax Court. She has no prior discipline.

At the relevant times, respondent worked as an independent contractor for Bustleton Legal Center, in Philadelphia.

At one point, respondent became acquainted with the principals of McClary Financial Group (MFG), through the brother of a good friend. Respondent very much trusted the friend, an attorney. According to respondent, the brother, Matthew McClary, "is a Duke M.B.A., very professional, and worked as a manager in a New Jersey corporation."

Sometime in 2001, McClary called respondent to relate that some individuals, including himself, were looking into starting a real estate consulting firm. McClary wanted to know if respondent was interested in performing services as a real estate attorney. She was. Later, she had a meeting with some of MFG principals, Ricardo Acosta, Shannon Ferguson, and Eric Callaghan. McClary and another principal, Earl Jackson, Jr., were not present at that meeting. Respondent testified that, in fact, McClary "was not there throughout most of this process." Apparently, McClary was not personally involved in MFG's improper events that later unfolded. As seen below, McClary testified that, although many documents purported to bear his signature, it had been forged by some of MFG principals.

At that initial meeting, respondent informed Acosta, Ferguson, and Callaghan that she was not an experienced real estate attorney. They assured her, however, that several attorneys were willing to serve as her "mentor," including Ferguson's wife, a commercial real estate attorney in New York. Respondent's understanding of her affiliation with MFG was that she would "negotiate the terms of the [real estate] contract, review it with [the buyers] during the attorney review period, draft riders if they disagreed, speak to the sellers' attorneys.

Basically represent [the buyers] on the terms of the contract itself."

Respondent agreed to perform the above legal services. At the time, she lived in Philadelphia and worked ten hours at Bustleton Legal Center. MFG offices were located in Bloomfield, New Jersey, where respondent was to maintain an office, free of charge.

Respondent's financial arrangement with MFG, which was not memorialized, called for her receipt of $1500 per closing plus expenses. According to the complaint, respondent's legal fee was to be paid from the initial sums given to MFG by the clients. In her answer, respondent so admitted. At the DEC hearing, however, she testified that the fee was "to come out of the closing," not out of the buyers' initial payment to MFG. Later, the $1500 was reduced to $750. Respondent testified, however, that, during the three or four months that she was associated with MFG, she received no fees because none of the four or five transactions in which she had been involved had reached the closing phase.

According to the complaint, MFG referred to respondent as "our attorney," when addressing its clients, an allegation that respondent admitted in her answer.

Part of respondent's affiliation with MFG entailed the opening of an escrow account in her name, in which the buyers' funds were to be deposited. MFG was to open its own account as well. According to respondent, she "knew very little about escrow accounts, business accounts and I honestly tried to read the rules, but did not understand [them] very much." She testified:

> I didn't understand the purpose of an escrow account per se. I tried to start an escrow account, and Fleet bank advised me that for purposes of following the IOLTA rules, that [sic] I had to have at least $10,000 in my account. There's some kind of regulation, $10,000 in my account for three months for it to qualify for it to be an actual escrow account. They opened my account calling it an escrow account. They said until they get authorization from IOLTA, it wouldn't necessarily be an IOLTA escrow account.
> At that point [MFG] said that they would open an escrow account. And in the meantime, Fleet was working on, you know, getting documentation. I believe I filled out an application.
>
> [1T151-19 to 1T152-9.][1]

Respondent never opened a New Jersey trust account. Instead, In May 2001, she opened what Fleet Bank designated as an "escrow account," which she used as her general law office account. She closed that account in August 2001, when she severed her ties with MFG. Respondent testified that she ended their relationship because she was ill and also because she

[1] 1T denotes the transcript of the DEC hearing of December 15, 2004.

> didn't think that they were giving me full information. And the place was so unorganized. There was [sic] all these people running around with little working equipment. I wasn't receiving documentation from them as they claim that they would obtain. So those things did bother me. In addition, the fact that, after three months, I did not obtain a senior attorney to work with me or to train me really bugged me.
>
> [1T213-18 to 1T214-2.]

We now turn to two of the transactions that are at the root of these disciplinary proceedings.[2]

1. <u>The Barber Matter</u>

Tamica Barber's mother and the mother of one of MFG principals, Earl Jackson, Jr., are friends. In June or July 2001, Barber met with two MFG's principals. Respondent was present at that meeting. The MFG principals told Barber that they would assist her in obtaining a mortgage loan and purchasing a house. Specifically, they told Barber that they "would be able to fill out the mortgage application, they would help me get a home, do the inspections, and ultimately purchase a home." By that time, Barber had already found a house that she

[2] Although the DEC limited the testimony to only two client matters, respondent's conduct encompassed approximately thirty-two transactions.

wished to buy. MFG, thus, was not involved in locating a house for her.

Barber was aware that MFG would charge her a fee for its services; she was unable to remember its amount. According to Barber, "[f]rom my understanding, it would be taken from the monies that I gave to put into an escrow account."

At their initial meeting, MFG told Barber that respondent was an attorney and that "she would be able to help, and she would write the contracts, review the contracts, and that if I choose to use her, that she would hold the monies in escrow for review of whatever McClary Financial needed to purchase a home." Barber testified that respondent, too, told her that she would prepare the contract. Respondent did not inform Barber that she had no experience in the real estate area. Barber testified about her understanding of respondent's role in her transaction:

> Q. Did she tell you that she had any kind of a relationship with McClary Financial?
>
> A. Just that she worked with them and their clients.
>
> . . . .
>
> Q. Did she advise you that you had the right to seek other counsel to handle your closing?
>
> A. Yes, she did.
>
> Q. And what did you say to that?

> A. I did at that time decide to use her as my attorney.
>
> Q. Did she indicate at any time that she would be working for McClary Financial at the same time that she'd be working for you?
>
> A. Well, it was my understanding that she would be working with me as my attorney, and she would supervise the work that McClary Financial would be doing on my behalf.
>
> [1T18-15 to 1T19-9.]

At her first meeting with MFG, Barber signed a document stating, among other things:

> (2) MFG helps place the client with different agencies for the purpose of purchasing real estate.
> (3) I give MFG authority to allocate funds from me to said agencies for costs associated with my real estate purchase.
>
> [Ex. 39.]

At that meeting, MFG and Barber scheduled an appointment for her to bring a $39,000 bank check that, Barber understood, would be placed in escrow. That amount was not set by MFG, but, according to Barber, was "the money that I identified that I wanted to use to purchase the home . . . . I was asked how much money I was looking to spend on purchasing the home, and that was the amount that I had available to me."

On July 7, 2001, Barber gave respondent a $39,000 bank check, which, pursuant to respondent's instructions, was made payable to her. According to Barber, respondent told her that she would keep the monies in escrow. Respondent signed a receipt stating that the monies were "to be disbursed for fees associated with closing of real estate purchase."

At the DEC hearing, Barber was questioned on her understanding of paragraph (3) of the first MFG document that she had signed, giving MFG authority to "allocate funds from me to said agencies for costs associated with my real estate purchase." Barber understood that language to mean, "when I need monies for an inspection or to write contracts, that those would be monies that would be authorized [sic] for them to obtain to do that on my behalf." According to Barber, respondent told her that respondent would "review . . . any requests for monies to be withdrawn, she would present those to me to keep me abreast of the situation, and I would either agree to it or she would explain to me why it was needed." It was Barber's expectation that respondent would not release the funds to MFG without her consent.

After Barber turned over the $39,000 check to respondent, both respondent and Ferguson told her that they would be in touch with her once they had contacted the seller's real estate agent.

The next contact Barber had with MFG was Ferguson's instruction for her to go to Coldwell Banker (presumably, the seller's broker) to sign the contract. She did so. She assumed that respondent had prepared the contract. In reviewing its terms, however, Barber noticed that the amount of the deposit did not reflect the parties' agreement. She, therefore, did not sign the contract.

When Barber contacted respondent about the problem, she learned that respondent had not prepared the contract and had not reviewed it. Respondent instructed Barber to discuss the matter with Ferguson. Barber did so. Ferguson then told her that he "participated in what he described as creative financing and that that would put me in a better position in the end after purchasing the home." At that juncture, Barber decided to consult with a lawyer of her own.

The new attorney attempted to contact MFG but, according to Barber, "they refused to speak with him." Barber then called respondent and asked for a refund of her monies. Respondent set an appointment for Barber to obtain a refund. When Barber called MFG to confirm the appointment, however, Ferguson informed her that respondent would not be able to meet with her because of illness. The appointment was rescheduled and then cancelled. Several subsequent appointments were cancelled as well. Eventually, Barber reached respondent at her Pennsylvania office, at which time she discovered that respondent was no longer associated with MFG.

Respondent advised Barber to contact MFG to get her refund. Barber assumed that respondent had turned over to MFG either respondent's account or Barber's funds. According to Barber, when she asked respondent why she had transmitted her funds to MFG, when she had assured Barber that they would be kept in escrow, respondent "didn't have an answer. She just kept directing me to McClary Financial." When Barber did so, she was told that another attorney, Francis Obi, was handling the real estate matters and that Obi was in possession of her funds. When Barber contacted Obi, however, he told her that "he didn't know who they [MFG] were and that he didn't have any monies on my behalf." Barber's future attempts to obtain her monies were met with MFG's insistence that she continue doing business with it.

At one point, MFG refunded Barber the sum of $10,000. She received nothing further from MFG. Subsequently, respondent's malpractice carrier reimbursed her for the balance of the $39,000. Barber received no reimbursement, however, for the $9000 fee that she had to pay her attorney to recover her funds.

To Barber's knowledge, MFG had not incurred any costs in connection with her transaction, with the possible exception of a credit check and the contract. She received no bills from MFG.

Barber ultimately purchased the house.

2. <u>The De Chavez Matter</u>

Maryann and Nestor De Chavez also sought MFG's assistance in buying a house. They had never purchased real estate before.

At their first meeting with MFG, Callaghan, Acosta, and respondent were present. According to Maryann De Chavez (De Chavez),[3] respondent told them that she was a lawyer, that she would be helping them with their purchase, that she would hold their down payment in escrow, and that she would review their contract. Although De Chavez knew that respondent worked for MFG and had an office at MFG's location, De Chavez understood that respondent would be their lawyer, not MFG's lawyer. Aside from informing the De Chavezes that they could retain their own lawyer for the transaction, respondent did not explain any possible conflicts of interests to them.

On June 22, 2001, the De Chavezes gave respondent a $1,000 check, payable to her. De Chavez thought that the $1,000 represented a portion of the down payment. Respondent signed a

[3] Nestor did not testify.

receipt stating that the monies were "to be disbursed for fees associated with closing of real estate purchase." The receipt also provided for an additional sum of $6,500, to be paid on June 28, 2001. De Chavez was aware of that obligation, which she fulfilled. Respondent gave the De Chavezes another receipt for those funds. Respondent assured them that the $7500 would be maintained in escrow.

Like Barber, the De Chavezes signed a document authorizing MFG to "allocate funds from me to said agencies for costs associated with my real estate purchase." Respondent was not present at the time. De Chavez testified that she did not know the meaning of the word "allocate." She stated that no one had told her that expenses such as title work, survey, and inspection would be paid out of the $7,500. She thought that the seller would be responsible for those costs. She knew, however, that MFG would "take a little piece [of her funds] if we find the house."

Instead of keeping the De Chavez funds in escrow (by that time, respondent had an escrow account), respondent cashed the checks and handed the funds over to the MFG principals who had accompanied her to the bank. She did not ask MFG for a receipt, allegedly because she trusted its principals. According to respondent, they had told her that MFG had an escrow account, but that turned out to be untrue.

Asked why she had released the monies to MFG, if she had assured the De Chavezes that she would keep them in escrow, respondent replied that she believed that De Chavezes had already found a house to purchase. Respondent explained that MFG's agreement with all the buyers contemplated the release of the funds to MFG as soon as a property to be purchased was identified. She admitted that her "biggest mistake is that I do not have any documentation stating that." Seemingly, respondent was referring to her failure to draft a document for the buyers' signature, authorizing her to distribute their funds to MFG when the buyers found a property that they wished to buy. She pointed out, however, that paragraph (3) of the buyers' agreement with MFG specifically provided for the transfer of the funds to MFG for "costs associated with [the] real estate purchase."

Respondent was also asked, at the DEC hearing, why she had "played middleman" if the funds had ultimately ended in MFG's hands. Her reply was, "I ask myself that every day."

In the interim, the De Chavezes had set out to locate a house. They found a house in Clifton, for sale by owner. The owner instructed them to return the next day to sign the contract and pay a $1,000 "binder."

On July 12, 2001, respondent signed the following statement:

> To Whom It May Concern:
> My law firm has received $7,500 on behalf of Nestor and Mary Ann De Chavez for purchase of the real estate property located at 107 East 8th Street, Clifton, New Jersey 07011.
>
> [Ex.18.]

By that time, respondent had already released the funds to MFG. The statement, however, reassured the De Chavezes that the funds remained in escrow with respondent.

On July 25, 2001, the De Chavezes signed the contract of sale. They gave the contract to respondent on that same day. Respondent told them that she would review the contract and contact the seller's attorney. De Chavez testified that respondent did not explain the terms of the contract to them. She further testified that respondent had not called her thereafter.

On July 30, 2001, the seller's attorney wrote a letter to respondent, cancelling the contract for failure to pay the $1,000. On July 31, 2001, respondent replied to the letter, informing the seller's attorney that the De Chavezes were "obtaining a mortgage for 97% of the purchase price" and that they "have agreed to waive the mortgage contingency clause and wish to hold the down payment of 3% in my escrow account." As stated above, respondent no longer had the De Chavez funds in her possession. Respondent requested the seller's attorney to draft a new contract with the new provisions and send it to her attention.

On August 1, 2001, however, the seller's attorney sent respondent the following letter: "This letter is in response to your letter of July 31, 2001. As previously advised, we have declared the contract is [sic] null and void. Your clients [sic] terms for a new contract are not acceptable."

Thereafter, the De Chavezes asked MFG for the return of their monies. They signed a document titled Request for Refund, to no avail. MFG did not comply with their request. De Chavez testified that she "went back and forth" to MFG's offices, but it had moved to another location. When De Chavez finally located MFG, she was told that respondent had their monies, but she was unable to find respondent.

On August 17, 2001, respondent wrote a letter to the De Chavezes, informing them that she was "closing [her] New Jersey practice" because of health problems, that MFG had retained attorney Francis Obi, that all documents and funds held on their behalf were to be transferred to Obi or held by MFG. The letter went on to say:

> In the interim, however, I continue to pursue all correspondence on your behalf with seller's attorneys and representatives, and other service providers involved with your property purchase. I will continue to keep copies of your documents, unless you voice your objection to me doing so.
> I will be periodically contacting McClary Financial. If you have any questions for me individually, please feel free to call (973) 414-0125 and leave a message with an assistant or representative specifically stating it is for me and I will return your call. As you are aware, McClary Financial is now located at 32 Scotland Road, Orange, New Jersey 07050.
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> [Ex.25.]

Although De Chavez first testified that she had no further contact with respondent after that letter, she later admitted that she had called respondent several times at home and asked for the return of her funds.

De Chavez' calls to Obi, too, produced no results. Obi informed her that he did not have her monies. The De Chavezes then hired an attorney, Thomas DeVita, who wrote a letter to MFG, respondent, and Obi, on August 28, 2001, demanding the immediate return of the $7,500. After receiving that letter, Ferguson informed DeVita that there had been expenses incurred with the transaction, such as appraisal and insurance, and that the funds would not be refunded. De Chavez never saw an appraisal report, insurance receipt, or title work. As she pointed out, they did not even have a valid contract.

After MFG refused to return their monies, the De Chavezes contacted the Department of Banking, as suggested by DeVita. That department's action was limited to contacting the Office of Attorney Ethics.

On February 28, 2002, the De Chavezes received a letter from respondent, enclosing a copy of a complaint that she intended to file against MFG. Respondent was the plaintiff. The defendants were MFG and its principals. The complaint alleged that MFG had caused respondent to "sustain great and irreparable injury and irreversible harm to her character and loss of clients because she was not able obtain the refund of the funds on behalf of her clients." The complaint demanded judgment for "[m]andatory injunction enjoining [defendants] from refusing to refund clients' funds." On April 28, 2003, the court signed a Consent Order for Indemnification, entering judgment for indemnification in favor of respondent and against MFG.

Eventually, respondent's malpractice insurance company paid $9,500 to the De Chavezes.

Respondent's explanation as to why the $1000 deposit had not been timely forwarded to the seller's attorney was that, if the De Chavezes had paid the $1,000, they would have been expected to come forward with an additional $16,500, the balance of the deposit, within three days of the attorney review period. Respondent contended that, because the De Chavezes did not have the additional sum, they had agreed that the payment of the $1,000 should be held off. She added that, because the De Chavezes had been led to believe that the deposit would be $7,500, instead of $16,500, she had sought to extend the negotiations as much as possible. Respondent stated that she would rather have voided the contract than to give the seller a $1,000 that would have been forfeited. Presumably, she was referring to the seller's attorney letter stating that, if the De Chavezes breached the contract, the seller would be entitled to the deposit monies as liquidated damages.

Respondent admitted that she did not have the $1,000, which she had transferred to MFG. She explained, however, that, after the seller's attorney had requested the payment of $1,000, she had told MFG that the money would have to go back to her account. She understood that MFG was willing to turn it over to her immediately.

At one point in the DEC hearing, the panel chair pointed out to respondent that, although she no longer had the $1,000 in her possession, she had represented, in a July 31, 2001 letter to the seller, that the De Chavezes wanted the down payment escrowed with her. Respondent replied:

> There is always the expectation that that money would be returned at any time if it needed to be given to the seller, if it was supposed to be used for down payment.
>
> [1T185.]
>
> And then I did advise McClary that we would be -- they would have to give me back the 3 percent to put in my escrow account, and they were more than willing to do so.
>
> [1T199-25 to 1T200-3.]

According to respondent, the monies were never returned to her because the contract was declared null and void.

3. **The Butler Matter**

While respondent was affiliated with MFG, she also represented an individual named Andre Butler.

On July 27, 2001, in a letter addressed "To Whom It May Concern," respondent acknowledged receiving $100,000 on Butler's behalf. She also represented that Butler had "sufficient funds to close on the specified date." At that time, respondent had not yet deposited the $100,000 in her account. She explained that she had not done so because Butler had informed her that he had written checks against that amount.

On August 9, 2001, respondent wrote a letter to the seller's attorney stating, among other things, that Butler "does not feel comfortable leaving monies in [the seller's attorney's] trust account" and that Butler "has learned from [the seller] that he may be willing to waive this clause and agree to allow Mr. Butler's funds to <u>remain</u> in my trust account" (emphasis added). Again, respondent did not have the funds in her account at the time. Yet, she never disclosed that circumstance to the seller's attorney.

The transaction was never completed. Respondent testified:

> Mr. Butler stopped contacting me. I do remember that. I continuously contacted him. I had a valid check made out to me. I had to keep it in my files and then in my wallet for a while, and then he just stopped contacting me. The last I remember was his objections to whatever the attorney had written back, but beyond that, I don't remember him ever contacting me again, and my specific messages were I have your check made out to me, you know, and I need you to contact me back, but no contact whatsoever.
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> [2T10-18 to 2T11-2.][4]

Respondent testified that she still has the check. She never negotiated it and never returned it to Butler because she does not know his whereabouts.

[4] 2T denotes the transcript of the DEC hearing of September 19, 2006.

The last witness to testify below was Matthew McClary. He claimed that he never met the De Chavezes and, in fact, never met with any clients or customers. He maintained that Ferguson, Callaghan, and Acosta had "stolen his identity," presumably referring to the forgery of his signature on certain documents. He testified that Callaghan, in particular, was so adept at forging that he even counterfeited money. According to McClary, all three principals had bought penthouses in New York and then disappeared. He heard that they had been arrested.

The fifth count of the complaint alleged that respondent did not maintain a trust receipts and trust disbursements book, did not keep a running balance in her trust account checkbook, did not maintain either a separate ledger car detailing attorney funds held for bank charges or a separate ledger sheet for each client, did not prepare a schedule of clients' ledger accounts and reconcile it quarterly to the trust account bank statement, and did not maintain a business account, all in violation of R. 1:21-6 and RPC 1.15(d). Respondent admitted those violations.

Respondent's counsel urged the imposition of a reprimand, with the following conditions: continuing legal education, a proctorship, and the submission of quarterly reconciliations of her attorney records to the OAE.

The DEC found that, by immediately turning over to MFG funds that she was obligated to maintain in escrow, respondent failed to safeguard clients' funds and allowed MFG to direct or control her professional judgment, violations of RPC 1.15(a) and RPC 5.4(c). The DEC further found that respondent "perpetuated the false impression that these funds were being held by her . . . and thereby engaged in misrepresentation," a violation of RPC 8.4(c). Finally, the DEC concluded that respondent violated RPC 1.7 by allowing her responsibilities to her clients to conflict with her responsibilities to MFG. The DEC noted that respondent's failure to uphold her fiduciary duties and remain independent of MFG, with whom she had a business relationship, permitted MFG to abscond with her clients' funds. The DEC found that respondent's "defenses for not properly exercising her professional responsibility, namely ignorance, inexperience and a sense of remorse, cannot excuse her from discipline for violating these rules."

The DEC recommended that respondent receive a one-year suspension, "complete [before reinstatement] extensive courses that deal with the violations outlined," practice under the supervision of a proctor for at least one year, and submit to the OAE semi-annual audits of her attorney records for at least two years, following reinstatement."

The DEC remarked that, although respondent was an inexperienced attorney at the time and did not personally benefit from her improper acts, "protecting the public from acts that compromise the integrity of the profession cannot be tolerated and hence, her alleged lack of knowledge was viewed as a mitigating factor, but one that cannot outweigh her serious violations of the Rules of Professional Conduct."

Following a de novo review of the record, we find that the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence.

That respondent simultaneously represented MFG and its clients is unquestionable. She admitted that she viewed herself as MFG's attorney. Although the testimony at the DEC hearing did not specifically focus on the nature of respondent's association with MFG, she admitted in her answer that MFG referred to her as "our attorney" in the presence of MFG's clients. Nothing in the record indicates that respondent ever disputed that description of their relationship.

Undoubtedly, respondent also represented MFG's clients. She testified that her arrangement with MFG included the negotiation of the terms of each transaction and the review of the contract of sale. With no objection from respondent, the clients testified that she had advised them that she was a lawyer, that she would be assisting them with their purchase, and that she would hold their monies in her trust account. Throughout these proceedings, not once did respondent allege that there was no attorney/client relationship between her and MFG's clients.

Despite this dual representation, respondent never disclosed to the two clients who testified below, Tamica Barber and Maryann De Chavez, that MFG was also her client and that, if their respective interests ever collided, she would be placed in a conflict of interest situation because of her duty to represent them with the same degree of fidelity. Understandably, MFG's clients were led to believe that, as their attorney, respondent would faithfully represent their interests in the transaction, and never envisioned the possibility that respondent might place MFG's interest above theirs. In this regard, thus, respondent violated RPC 1.7(a) and (b) because she represented clients with interests directly adverse to each other and because her representation of MFG's clients was materially limited by her responsibilities to MFG. Indeed, the buyers' interests were to complete the transaction on the most favorable and affordable terms to them, while MFG's goal was the receipt of its fee, which, according to its agreement with the buyers, would be paid even if the buyers opted out of the deal. Under RPC 1.7, respondent had a duty to fully disclose the circumstances to Barber and to the De Chavezes and to obtain their consent to the concurrent representation.

More seriously, respondent allowed MFG to direct and regulate her professional judgment in rendering legal services to the buyers. Although she represented to the buyers that their deposit monies would be safeguarded in her attorney trust account, she immediately released them to MFG, at its request, with no notice to the buyers. Barber and the De Chavezes relied on respondent's assurances to them that their funds would be held untouched in her trust account, believing that respondent's status as a lawyer and, more importantly, her status as <u>their</u> lawyer, would make those assurances worthy of their trust. Yet, with an obvious lack of concern for the safety of the buyers' monies and for her promise to them, respondent had no qualms about relinquishing custody of the funds to individuals she hardly knew. Free of any compunction, respondent allowed MFG principals to exercise control over her clients' funds, all the while leading the clients to believe that their monies remained inviolate in her trust account. Her conduct in this regard violated <u>RPC</u> 1.15(a) and <u>RPC</u> 5.4(c).

Respondent's argument that she had an ethical duty to promptly deliver the funds to MFG, under <u>RPC</u> 1.15(b), is devoid of merit. She assured the buyers that their monies would be safeguarded with her. She had an obligation to keep that promise. Her failure to do so caused economic harm to at least one client, Barber. Although, ultimately, Barber and the DeChavezes received what they had entrusted to respondent, Barber was not fully compensated for her losses. She testified that she never recovered the $9,000 legal fee paid to her new attorney.

Another serious impropriety was respondent's representation to the sellers' attorneys in the De Chavez and Butler transactions that the deposit monies were being held in her trust account. When respondent made that statement, she had already disbursed the funds to MFG. Her explanation that she believed that MFG would return the funds to her custody, if asked, merits no consideration whatsoever. That MFG might have been willing to return the funds does not excuse her misrepresentation to the attorneys. She lied to them that she had the funds in her possession at _that_ time. Furthermore, nothing in the record allows the inference that respondent knew MFG principals to be trustworthy. Like the DEC, thus, we find that respondent violated _RPC_ 8.4(c) by making misrepresentations to the sellers' attorneys and also to her clients. De Chavez testified that, when she received a copy of respondent's letter, she was reassured that her monies were being held intact in respondent's trust account.

Finally, respondent was guilty of several recordkeeping deficiencies, which she admitted. Her conduct in this regard violated R. 1:21-6 and RPC 1.15(d).

Respondent's conduct was not without mitigation, however. She was a new and inexperienced attorney at the time of her transgressions. Nothing in the record suggests that she was moved by venality. Although it is obvious (and understandable) that the reason for respondent's association with MFG was the prospect of legal fees, the amount that she charged, $750, was not unreasonable. In fact, respondent herself suggested that the initial amount, $1,500, be reduced to $750 because of her lack of experience. Moreover, she ended up deriving no personal gain from the transactions. She testified that none of the closings had taken place before she disassociated herself from MFG. Also, she acknowledged her wrongdoing, expressed remorse for her actions, is viewed by her friends as too trusting, and has a clean disciplinary record.

More importantly, nothing in the record suggests that respondent abandoned her clients, when she severed her relationship with MFG. De Chavez acknowledged receiving a letter from her stating that she no longer had an office at MFG's location, and that she would continue to correspond with the seller's attorney and representatives, as well as other providers involved in the property purchase. Respondent also gave the De Chavezes a number where she could be reached. Respondent testified, and De Chavez acknowledged, that she had several communications with De Chavez after the date of that letter. Respondent's inability to recover the buyers' funds from MFG should not be viewed as abandonment of their interests. Rather, it was the direct consequence of her recklessness in turning over the funds to MFG. Finally, that respondent filed a complaint against MFG to attempt to recoup the funds and that all clients either partially or entirely recovered their funds should also be viewed as factors mitigating respondent's conduct.

It is well-settled that a reprimand is the appropriate level of discipline for conflict of interest, absent egregious circumstances or serious economic injury to the clients. In re Guidone, 139 N.J. 272, 277 (1994), and In re Berkowitz, 136 N.J. 134, 148 (1994). At times, a reprimand may still result if, in addition to conflict of interest situations, the attorney displays other forms of unethical behavior that are not considered serious enough to merit a suspension. See In re Kennedy, 174 N.J. 374 (2002) (reprimand for attorney found guilty of conflict of interest for representing buyers of real property in two transactions also involving his wife as the real estate broker or agent; in one of the matters, the attorney was also found guilty of RPC 8.4(c) (misrepresentation by silence), when he closed title without sufficient funds from the buyers, failed to inform the sellers' attorney of this circumstance, and gave the sellers' attorney an inaccurate RESPA statements reflecting sufficient settlement funds at hand to close title; aggravating factors were the attorney's refusal to acknowledge any wrongdoing and the personal benefit he derived through his wife's receipt of real estate commissions; in mitigation, it was considered that, prior to these incidents, the attorney's career of thirty-seven years had been unblemished); In re Kraft, 167 N.J. 615 (2001) (reprimand for attorney guilty of misconduct in four matters; in one matter, he engaged in a conflict of interest by failing to explain to the client the advantages or disadvantages of pursuing her case jointly or independently of the client's co-worker, who was also represented by the attorney; in another matter, the attorney violated RPC 1.4(b) by failing to clearly explain to the client his legal strategy, thereby precluding her from making an informed decision about the course of the representation and the pursuit of her claims; in all four matters, the attorney exhibited lack of diligence;

and in one of the matters, he failed to prepare a written fee agreement with the client); and In re Castiglia, 158 N.J. 145 (1999) (on a motion for discipline by consent, the Court agreed that a reprimand was the appropriate discipline for an attorney who engaged in a conflict of interest by simultaneously representing various parties with adverse interests, repeatedly failed to communicate to his clients, in writing, the basis or rate of his legal fee, and witnessed the signature on a deed and affidavit of title, even though the documents had been signed outside of his presence).

An attorney who, among other serious improprieties, allowed his professional judgment as a lawyer to be controlled by a corporation with which he was associated received a one-year suspension. In re Moeller, 177 N.J. 511 (2003). There, the attorney had been retained by the corporation as a "referral attorney" to review living trusts documents of the corporation's clients. The purpose of the corporation was to market and sell living trusts to senior citizens. The attorney filed a certification of incorporation for the corporation, became its registered agent, allowed the corporation to use his law firm's address, and became its New Jersey office manager. In the course of their association, the attorney and the corporation implemented a direct-mail marketing program that contained numerous misleading statements. In fact, two county surrogates testified that elderly citizens, usually widows, had called their offices because they "were being scared out of their wits, they were being told that it would cost 18 to $24,000 for their next of kin or children . . . to admit a will [to] probate. And, of course, we know that's not true." In re Moeller, DRB 02-463 (June 19, 2003) (slip op. at 11). The attorney also allowed the corporation to control his professional independence as a lawyer, engaged in a conflict of interest situation by allowing his responsibilities to the corporation to materially limit his representation of his clients, did not explain the living trusts to the clients or discuss other estate planning options more suitable to their needs, assisted the corporation in the unauthorized practice of law, shared legal fees with the corporation, misrepresented to the clients the amount of his fee, charged an excessive fee, and misrepresented to disciplinary authorities the nature of his relationship with the corporation.

Improper release of escrow funds, without more, has generally resulted in discipline ranging from an admonition to a reprimand. See In the Matter of Joel Albert, DRB 97-092 (February 23, 1998) (admonition for the release of a portion of escrow funds to pay college tuition costs of a daughter of a party to the escrow agreement, without first obtaining the consent of the other party; the attorney had a reasonable belief that consent had been given); 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); In re Milstead, 162 N.J. 96 (1999) (attorney reprimanded for disbursing escrow funds to his client, in violation of a consent order); In re Margolis, 161 N.J. 139 (1999) (reprimand for attorney who breached an escrow agreement requiring him to hold settlement funds in escrow until the completion of the settlement documents; the attorney used part of the funds for his fees, with his client's consent); In re Flayer, 130 N.J. 21 (1992) (reprimand for attorney who made unauthorized disbursements against escrow funds; the attorney represented himself in the purchase of real estate). But see In re Moore, 175 N.J. 100 (2003) (one-year suspension for attorney who prematurely released escrow funds to his client, albeit with a reasonable belief that he could do so; the attorney also made numerous misrepresentations about the status of the escrow in pleadings to a court, and in correspondence to two attorneys, a surety, and the OAE; the attorney also failed to cooperate with the OAE by not producing records for an audit and did not comply with the Court's order for the production of the documents; thereafter, the attorney failed to appear on the return date of the Court's order to show cause; the attorney also practiced law while ineligible).

Knowingly making a false statement of material fact to a third person ordinarily requires a reprimand. See In re Lowenstein, 190 N.J. 58 (2007), (reprimand for attorney who failed to notify an insurance company of the existence of a lien that had to be satisfied out of settlement proceeds; the attorney's intent was to avoid the satisfaction of the lien). Misrepresentation to clients, too, requires the imposition of a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). "Truthfulness and professionalism are paramount in an attorney's relationship with the client." Ibid.

Finally, recordkeeping violations, without negligent misappropriation, result in an admonition. See In the Matter of Jeff E. Thakker, DRB 04-258 (October 7, 2004) (admonition for failure to maintain an attorney trust account in a New Jersey banking institution); In the Matter of Arthur G. D'Alessandro, DRB 01-247 (June 17, 2002) (admonition for numerous recordkeeping deficiencies); In the Matter of Marc D'Arienzo, DRB 00-101 (June 29, 2001) (admonition for failure to use trust account and to maintain required receipts and disbursements journals, as well as client ledger cards); In the Matter of Christopher J. O'Rourke, DRB 00-069 (December 7, 2000) (admonition imposed on attorney who did not keep receipts and disbursements journals, as well as a separate ledger book for all trust account transactions); and In the Matter of Arthur N. Field, DRB 99-142 (July 19, 1999) (admonition for attorney who did not maintain an attorney trust account in a New Jersey banking institution).

The somewhat difficult issue here is the level of discipline for this respondent. Clearly, her conduct was serious. Her release of the funds to MFG was particularly egregious. Nevertheless, the record strongly suggests that naiveté, inexperience, and total lack of understanding of an escrow agent’s responsibilities played a great role in respondent's actions. Certainly, her conduct was not as serious and extensive as Moeller's and Moore's, who received one-year suspensions. She did not make misrepresentations to disciplinary authorities or in pleadings filed with a court; did not fail to cooperate with the ethics system, violate a Supreme Court's order, or fail to appear on the return date of the Court's order to show cause; did not charge an excessive fee, misrepresent the amount of the fee to clients, share legal fees with a non-lawyer, or assist a non-lawyer in the unauthorized practice of law; and did not mail deceptive materials to potential clients.

In our view, a three-month suspension adequately addresses the serious nature of respondent's misdeeds, as counterbalanced by the mitigating circumstances present in this case. Upon reinstatement, respondent should be supervised for two years by a proctor approved by the OAE, should submit to the OAE quarterly reconciliations of her attorney records, and should furnish proof of satisfactory completion of the Skills and Methods courses, as well as law-office management courses approved by the OAE.

Vice-Chair Pashman and Member Boylan 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
William J. O'Shaughnessy, Esq.

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel