SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-212
District Docket Nos. XIV-2007-0005E and IIA-2009-0901E

IN THE MATTER OF	:
WILLIAM H. MULDER	:
AN ATTORNEY AT LAW	:

Decision

Argued: July 22, 2010

Decided: November 1, 2010

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Raymond F. Flood 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 an admonition filed by the District IIA Ethics Committee ("DEC"), which we determined to treat as a recommendation for greater discipline, pursuant to R. 1:20-15(f)(4). The complaint charged that respondent prepared a false RESPA statement, allowed his

client to sign closing documents containing false information, and engaged in a conflict of interest, all in violation of RPC 4.1(a)(1) (misrepresentation of material fact to a third person), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), RPC 1.7(a)(2) and (b) (conflict of interest), and RPC 1.8(e) (providing financial assistance to client).

At the conclusion of the DEC hearings, the Office of Attorney Ethics (OAE) presenter told the hearing panel that respondent's conduct was deserving of either an admonition or a reprimand, opining that respondent's testimony about the events was "reasonable." The presenter did not take exception to the DEC's recommendation for an admonition. We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1996. He has no history of discipline.

The conduct that gave rise to this disciplinary matter was as follows:

In 2001, Jennifer Carney, the grievant in this case, retained respondent in connection with the refinance of a mortgage loan on her house and the addition of another person's name, James Frechione, to the deed. Thomas Marinaro, a mortgage broker, referred Carney to respondent. Marinaro was known to

both Carney and respondent. Marinaro and Chuck Danys, Carney's then boyfriend (now husband) grew up together. Marinaro and respondent met at a closing for a mutual client. Later, respondent did legal work for Marinaro's company, The Mortgage Corner, LLC.

In 2004, Carney again hired respondent, this time to represent her in the purchase of a house located in Little Egg Harbor Township, New Jersey, owned by Claude Mitchell. Mitchell and Danys worked together. At the time, Mitchell was experiencing serious financial troubles, including a foreclosure of his mortgage loan. According to Carney, she and Danys were trying to help Mitchell. Carney told respondent that she was helping out a "very close friend of the family" who was in "financial trouble" and whose house was "pretty well close to being foreclosed on."

The transaction was a sale/lease-back: Carney would purchase the property from Mitchell, who, in turn, would remain as a tenant and pay Carney $500 a week in rent, an amount sufficient to pay Carney's mortgage and other expenses in connection with the property. As Carney testified, "nothing would come out of [her] pocket." Once Mitchell's credit was restored, he would buy the property back from Carney for "whatever was left on the mortgage . . . no money down."

Carney gave Mitchell one year to "get back on his feet." Other than a contract of sale, only an oral agreement confirmed their arrangement.

The RESPA statement for that transaction, which respondent prepared, listed Mitchell's debts at the time as roughly $150,000: $113,942.90 to Countrywide Mortgage, $25,416.20 to the Monmouth County Board of Social Services, $10,865.94 to Primus Automotive Financial Services, and $1,582 to the New Jersey Department of Labor.[1] The RESPA also contained a seller's concession in the amount of $7,800.

The purchase price was to be $164,000. According to Carney, the transaction was supposed to be a "no money down deal." She was not required to bring any sums to the closing. As the RESPA statement for the transaction shows, Carney obtained a $164,000 mortgage loan from FGC Commercial Mortgage Finance, d/b/a Fremont Mortgage (Fremont).

Although the initial purchase price was to be $164,000, it was later changed to $205,000, a difference of $41,000. Carney

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[1] There are several references in the record to Exhibit C-14, a RESPA statement, which was not admitted into evidence. In a letter to Office of Board Counsel, the panel chair clarified that Exhibit C-14 is identical to the RESPA statement marked as Exhibit C-49.

and Mitchell signed a contract providing for the increased price and for a mortgage in the amount of $164,000, the original purchase price.

In his answer to the formal ethics complaint, respondent explained that "[t]he contract price was changed at the request of The Mortgage Corner, LLC, a mortgage company/banker. This was done after the subject property was appraised at $205,000 and after a $41,000 gift from the Home Buyer Gift Foundation was approved."[2] At the DEC hearing, too, respondent explained the price change to the hearing panel:

> Well, the mortgage broker, Tom [Marinaro], called me and said that he couldn't get it approved the way they had structured their loan, originally, and that the house appraised for $205, so they were able to do this Gift Foundation program, that they have got to get the transaction to go through, and show the amount of down payment that he needed to show for the transaction.
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> [3T77-19 to 25.]

Carney was unable to explain the reason for the increased price. She testified that "[t]hat's the way [Marinaro] said it had to be done in order for me to get approved" and for

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[2] As seen below, the $41,000 represented the amount of the deposit for the transaction.

the house "[to be] put in an equity position." More specifically, Marinaro told her that, "in order for me to get approved they had to change the sale price to show equity . . . ." As detailed below, a program known as the Home Downpayment Gift Foundation (the Gift Foundation) supplied the deposit for Carney's purchase of the property.

Marinaro testified at the DEC hearing. According to Marinaro, he did not put this deal together. Although he owned a mortgage company at the time, The Mortgage Corner, he acted as a mortgage broker, not as a banker. Fremont was the underwriter.

Marinaro testified that Carney came to him asking for help with the mortgage. She told him that she had no money for a down payment. One of Marinaro's employees, a loan officer, also worked for the Gift Foundation. Marinaro then referred Carney to the Gift Foundation. Marinaro explained that

> [a]t that time, the Gift Foundation was an allowable source for a homeowner to get a down payment, as long as there was equity in the property, they can have a charitable gift foundation give it to the buyer of the house. The way the program worked, the gift foundation would give the down payment to the buyer, and the seller would reimburse the money back to the gift foundation, and it was actually a win/win for the parties, the home buyers benefited, because they got to use a portion of that equity for the down payment, and the seller benefited because

they got a charitable donation, so there was an IRS benefit, as well.

[2T46-20 to 2T47-7.][3]

The following exchange took place between the hearing panel chair and Marinaro:

Q. So let me get this straight. If a house sold for $200,000, and just [to] make it easy numbers, they received $40,000, they were able to get up to $40,000 from the gift foundation as the down payment?

A. Correct, as long as the appraisal justified the increased amount, correct.

Q. The house is appraised for $200,000, they take out a mortgage for $160,000, so they needed $40,000?

A. Correct.

Q. The Home Gift Foundation would give to the buyer $40,000 to be used as the cash, the cash balance for the closing?

A. Correct.

Q. At the end of the closing, the seller then paid back the $40,000?

A. Correct.

Q. So the seller really didn't sell the house for $200,000, the seller really sold

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[3] "2T" denotes the transcript of the November 2, 2009 DEC hearing.

the house for $160,000?

A. No, the transaction was $200,000, at that point. It's where the down payment was coming from, it didn't affect the pricing of the home sale. In other words, I buy a house for $200,000, I'm putting down $100,000, I only have $60, the other $40, the Gift Foundation gives it to me, I put it down as my down payment, but then the seller reimburses the Gift Foundation.

Q. So you have to inflate the price for the seller to return the money?

A. Well, you call it "inflating price". Your price is your price, it's where the down payment money is coming from.

Q. Is this an analogy to a seller's concession?

A. Well, yes and no. Let me read you an actual definition.

. . . .

A. "Charitable organizations that offer down payment of system programs have been under heat, in general, for the loophole risks and other issues outlined by HUD, the IRS, and real estate professionals. Typically, these charity organizations offer around a 3 percent charitable organization down payment, through assistance, through a contribution from the seller, while simultaneously giving the buyer a gift to be used as assistance for purchasing a home. Opposers found out that legal loophole of getting around an FHA violation, defenders have a half full perspective, pointing out numerous success stories of minority and low income home buyers realizing their American dream." There's a list here of all the pro's

of the foundation, and all the con's of the foundation.

Q. It sounds like the max is 3 percent?

A. No, that's typical, it says it could grow from 3, it could be 100, it depends what the lender allows.

. . . .

Q. So the seller has to agree to repay the money?

A. Correct.

Q. And if the seller refuses?

A. Well, yeah, then - - obviously, then, if the seller refuses, then I believe this company will not give the down payment to the buyer. So in other words, the Home Gift Foundation has to have a signed form from the seller, saying they agree to it. If not, they wouldn't wire the money over.

[2T47-8 to 2T51-10.]

A panel member asked Marinaro if, as a mortgage broker, he would have to notify a lender that a buyer did not have sufficient funds for a down payment. Marinaro replied:

It depends on the lender, and, again, that's probably one of the issues that there was [sic] so many mortgage problems, over the last couple of years, most of the sub-prime lenders, and I believe, Fremont was one of them, didn't care about assets, where the money came from, Fannie Mae and FHA loans do, they require me to verify every nickel, where it came from, I even have to source

> the asset, I have to show bank statements. Fremont didn't care.
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> [2T55-23 to 2T56-7.]

Asked if he had advised respondent that Fremont had to be notified of the Gift Foundation funds, Marinaro answered, "No, probably not, I don't recall, but I would say 'no,' because it wasn't required."

On March 22, 2004, the closing date, the Gift Foundation issued instructions to respondent about the $41,000 "gift" to Carney:

> In connection with this transaction, the Seller and the Purchaser have agreed to participate in the Charitable Gift Program ("Program"). Under the terms of this Program, the Foundation agrees to provide a cash gift to the Purchaser and the Seller agrees to make a donation to the Foundation.
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> . . . .
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> 1. The amount of Gift Funds to be credited to the purchaser from the Foundation is $41,000.00 (This is typically shown on line 206 of the HUD-1).
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> 2. The donation amount to be debited from the Seller and allocated to the Home Downpayment Gift Foundation is $41,795.00.[4]

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[4] According to OAE disciplinary auditor Arthur Garibaldi, $795 represented an administrative fee to the Gift Foundation.

3. The Foundation will wire the Gift Funds to you either the day before or the day of the settlement. You shall hold the Gift Funds in escrow for the benefit of the Purchaser.

4. At the closing, the Gift Funds shall be applied toward the downpayment, closing costs, pre-paid or other areas allowed by the Lender.

5. At the closing, the donation will be paid by the Seller or the designee. Payment of the donation shall be shown as a debit to the Seller on the Closing Statement (typically line 506).

. . . .

- Please ensure that you collect the Home Downpayment Gift Foundation's donation at Closing. You are to hold these funds in trust and escrow for the benefit of the Foundation, as Escrowee, until such time as you forward the funds to the Foundation.

. . . .

6. By no later than 5:00 pm on the first business day following the Closing, you are to wire the donation to the Home Downpayment Gift Foundation . . . .

[Ex.C-23;Ex.C-51.]

Respondent signed the second page of the Gift Foundation's instructions, in his capacity as settlement agent.

Garibaldi, who performs complex financial investigations for the OAE, testified that, "[a]s illegitimate as it sounds, [the Gift Foundation] is a legitimate enterprise." He noted, however, that "the amount received on this particular transaction, the $41,000, far exceeds the normal acceptable limit, which is anywhere from 3 to 5 percent as an acceptable gift of the contract price."

Carney testified that she did not quite understand how the Gift Foundation operated because no one clearly explained it to her. She first heard about it from Marinaro. She did not think, however, that the Gift Foundation was giving her $41,000. She thought that "the mortgage broker was raising the sale price . . . more like a paper transaction."

Respondent, too, testified that he knew nothing about the Gift Foundation program before this transaction. According to respondent, "the way it was explained to [him] was that this was equity from the house the seller is getting to the buyer, to use as their down payment, and the money than [sic] had to be returned, with a fee, at the closing."

Respondent prepared the RESPA statement for the closing. Among other figures, the RESPA listed a purchase price of $205,000 (line 101); a $20,500 deposit paid by Carney (line

201); a $164,000 mortgage loan (line 202); and a "seller concession" of $7,800 (lines 213 and 513). The $41,000 down payment and the $795 administrative fee charged by the Gift Foundation were listed as "payoff of second mortgage loan" (line 505). As mentioned above, the Gift Foundation instructions indicated that, typically, the "cash gift" (the deposit) was listed on line 206 of the RESPA (a blank line) and the "donation" by the seller on line 506 (also a blank line).

The complaint charged that, by characterizing the $41,795 on the RESPA as a second mortgage, respondent made a misrepresentation. Respondent's explanation was that, because he knew that the funds would have to be returned to the Gift Foundation, he viewed it as a lien and, therefore, it seemed "pretty logical" to label it as a second mortgage.

The closing of title occurred on March 22, 2004. Only respondent and Carney were present at respondent's office. According to respondent, Mitchell was represented by Kathleen Policastro, an attorney with offices in a building where respondent's office was formerly located, 15 Main Street, Hackensack.

Respondent was the individual who suggested Policastro's involvement in the transaction. According to respondent, he told Carney that Mitchell needed separate counsel. Carney then gave

him the name of an attorney, who, when contacted by respondent, said that he had represented Mitchell in a bankruptcy matter, but was not representing him in this deal. When Carney asked respondent for an attorney recommendation, he suggested Policastro. According to respondent, Policastro later called his office to thank him for the referral and to inform him that she had agreed to act as Mitchell's attorney.

One day after the closing, March 23, 2004, the Gift Foundation wired the $41,000 into respondent's trust account. The record does not explain why the funds were not available on the closing date. Two days later, March 25, 2004, respondent issued a $25,308.87 trust account check to Fleet Bank for the purchase of a bank check in an equivalent amount.[5] The bank check was made payable to Carney, who deposited it in her personal account on the same day and then purchased a Commerce Bank check for the same amount, payable to respondent's trust account. Respondent deposited that check in his trust account on March 26, 2004.

Garibaldi opined that the above check transactions were intended to "appear as funds were being deposited [in respondent's trust account]. According to Garibaldi, respondent had told him,

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[5] From that amount, $20,500 represented the deposit that respondent listed on the RESPA statement as having been paid by Carney. In fact, Carney paid no deposit at all.

during the OAE investigation, that the lender did not require an "aged" deposit, that is, the lender did not ask for "proof as to where the funds were held, and for how long. Sometimes, an institution wants to know that those funds were on deposit for 60 days or 90 days or 180 days. It was – it was my understanding that [the lender] did not require that . . . ." Garibaldi explained that "[s]ome institutions will require the funds to be in the . . . [to] show that you just didn't receive it from your mom or dad the next the morning [sic], before the transaction." [6]

Respondent confirmed that Fremont did not require "aged funds" and offered the following explanation for the check transactions: "The lender needed to see, you know, those funds, and we wound up writing a check from those funds to Carney, because the lender wanted to see the money coming from Carney's account . . . ."

According to Garibaldi, the source of the deposit (the Foundation gift) was not disclosed to the lender. Whether such disclosure was necessary is not entirely clear. Marinaro

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[6] As seen below, respondent split the $41,000 Foundation gift on the RESPA statement between a $20,500 deposit purportedly paid by Carney and the amount of cash due from her at the closing, $22,350.31 (line 303), for a total of $42,850.31. The $1,850.31 difference consisted of net closing costs ($9,591.54 (closing costs) plus $58.77 (taxes) minus $7,800 (seller's concession) equals $1,850.31).

testified that it was not required.

Asked by the hearing panel about the source of the $20,500, Garibaldi replied, "[T]here was no specific amount, there was no matching amount to that deposit . . . [but] the deposit came from respondent's trust account via [the $41,000] funds received from the Home Downpayment Gift Foundation."

Respondent offered the following explanation:

> Well, there was a deposit of – I guess the total deposit was $41,000, which came from the Gift Foundation, you know, numbers on that HUD, you know, probably change every time you send it to the bank, they wanted something different, so, you know, you would make changes, send it back, and, you know, those are the numbers we wound up with, but, you know, the total deposit I think I split between what would be considered an initial deposit, and then what she had to bring at the closing, so that's how I split up the $41,000 on her side [of the RESPA statement].
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> [3T79-19 to 3T80-4.][7]
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> [T]he way we did it was by splitting up [the 41,000], between the amount that [Carney] brought back from Commerce [Bank] and the balance that was already in my trust account, from the Gift Foundation.
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> [3T110-4 to 7.]

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[7] "3T" denotes the transcript of the December 4, 2009 DEC hearing.

As indicated above, the closing took place on March 22, 2004. According to respondent, he and Carney were at his office; Mitchell signed the closing documents, including the deed, at Policastro's office. It is undisputed that respondent explained the closing fees and costs to Carney.

At the closing, Carney signed an affidavit of title prepared by respondent's office and a second home rider prepared by the lender. Both documents contained false statements. Paragraph 3 of the affidavit of title stated:

> **Ownership and Possession.** We are the only owners of property located at 56 Spinnaker Drive, Mystic Island, New Jersey, called this property. We now mortgage this property to FGC Commercial Mortgage Finance, d/b/a Fremont Mortgage, its successors and assigns as their interests may appear. The date of the mortgage is the same as this affidavit. This mortgage is given to secure a loan of 164,000.00. We are in sole possession of this property. There are no tenants or other occupants of this property. We have owned the property since October 21, 1999. Since then no one has questioned our ownership or right to possession. We have never owned any property which is next to this property. [Emphasis supplied].
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> [Ex.C-47.]

In truth, Carney did not have sole possession of the property; had no intention of occupying the property, which was

to be rented to Mitchell; and had not owned it since 1999. Carney claimed that she had not read the affidavit before signing it because she trusted her lawyer.

At the DEC hearing, respondent was asked whether the affidavit of title indicated that the property was to be a second home or whether it listed it as a primary residence. Respondent gave the following explanation:

> It indicates it's her own residence. But I know what most likely happened with that, we had a program that we used, where you would type in the information, and it would send it all over to the various documents, and my secretary probably typed in "56 Spinnaker Drive", and that should have been changed, that should have been [Carney's] current address, because this was a second, a second home.
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> [3T91-20 to 3T92-1.]

The second home rider, too, contained false information:

> 6. Occupancy. Borrower shall occupy, and shall only use, the Property as Borrower's second home. Borrower shall keep the property available for Borrower's exclusive use and enjoyment at all times, and shall not subject the Property to any timesharing or other shared ownership arrangement or any rental pool or agreement that requires Borrower either to rent the property or give a management firm or any other person any control over the occupancy or use of the Property.
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> [Ex.C-48.]

Carney acknowledged that she signed the rider with no intention of using the property as a second home. Once again, however, she contended that she had not read the rider prior to signing it. Although the lender, not respondent, had prepared the rider, respondent testified that Carney had signed it in his office. He asserted, however, that he had no knowledge of the tenancy arrangement between Carney and Mitchell:

> I wasn't aware of the circumstances. I know that [Mitchell] was supposed to buy it back from Carney, but I wasn't privy to what their arrangements were . . . . I learned, later on, that he was supposed to sell [sic] it back, and Carney was supposed to make $10,000 from the transaction.
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> [3T81-3 to 11.]

Respondent testified that, in either June or July 2004, he learned that Mitchell was living in the house. Carney had called his office to say that Mitchell had stopped paying the rent, that she had found a buyer for the house, and that Mitchell had to be evicted from it. As seen below, respondent filed an eviction proceeding against Mitchell.

At the DEC hearing, considerable time was spent on whether Mitchell had been represented by counsel at the closing of March 22, 2004. As indicated previously, respondent testified that

Kathleen Policastro, an attorney with an office in the building where his former office was located, had represented Mitchell, at respondent's recommendation. Policastro had called him to thank him for the referral.

Policastro, however, denied having represented Mitchell whom, she contended, she had not even met until months after the closing. She acknowledged that respondent would often send her the other party to a real estate transaction for representation and that Mitchell had called her office before the closing, telling her that respondent had recommended her. According to Policastro, she had instructed Mitchell to bring the contract for her review and to sign a fee agreement. Although Mitchell had called her once again and she had reiterated her requests, he had not complied with them and she had never heard from him again. She assumed that Mitchell had hired someone else. She did not discuss the transaction with respondent.

The RESPA for the transaction, however, shows that Policastro received a $750 fee from the closing (line 1107 – "paid from seller's funds at settlement"). In evidence is check no. 4264 from respondent's trust account, in the amount of $750, payable to Policastro. Policastro negotiated that check. The back of the check bears the words "for deposit only."

At the DEC hearing, Policastro acknowledged the receipt and deposit of the check, but professed to have no knowledge of its existence:

> I see the legal fees part [on the RESPA], yes, I did, and yes, I did receive a check. But the situation was, at my office, see, I wasn't here, or else I would have signed off [on the RESPA]. The situation was that [respondent], he sent me a check, but I didn't do any of the work, I didn't do anything. So when it was called to my attention, I didn't even realize I had gotten a check on this. The situation was, I was doing a tremendous amount of court work, and my children were helping me out, and their instructions were not to leave checks laying [sic] around the office, and if I weren't there, they stamped the back, and they went right in the bank to be reconciled later. I didn't even realize I had gotten a check on this transaction until, I believe, Mr. Pompliano [her attorney] told me, and then advised me to send it back, which I did . . . . You know, I wasn't looking for a check on this transaction, I didn't do anything on this transaction, and the first time I met [Mitchell] was when his attorney in Little Egg Harbor, whose name escapes me, sent me this subpoena, and I asked him to send Mr. Mitchell up to my office, because I wanted to see who this was, if I have even seen this guy. When he came up, neither he nor I have never [sic] seen each other before.
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> [2T6-2 to 2T7-1.]
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> I didn't see the check. The back of the check was stamped, because when my sons were in my office, when I wasn't there, and the checks came in . . . they stamped the

checks, and they were deposited in my business account.

[2T9-20 to 25.]

Policastro claimed no recollection of having seen the check, when she reconciled her attorney records. She testified that, during the OAE investigation of the grievance, she received a letter from the OAE, asking her to identify the check. She went through her records and found the deposit slip for the $750. She then retained counsel [Pompliano], who advised her to send the check back to respondent. She did so on September 5, 2007.

The deed from Mitchell to Carney, dated March 22, 2004, shows Policastro as its preparer. Policastro denied having prepared the deed and denied that the signature under the notation "Prepared by Kathleen Policastro" was hers. She testified that she saw the deed for the first time when an attorney for Mitchell sent her a letter, in August 2004, asking for her real estate file.

The deed listed Mitchell's address as 52 Stokes Avenue, Budd Lake, New Jersey, and Carney's as 56 Spinnaker Drive, Mystic Island, New Jersey. Neither address was accurate. Mitchell resided at 56 South Spinnaker Drive and Carney resided

at 2517 Hiering Road, Toms River, New Jersey.

According to Policastro, the deed was notarized by Shelly Parker, an employee of Hackensack Title Company, with offices across the hall from hers. She denied having authorized Parker to notarize the deed. Policastro's assumption was that Parker saw her name on the deed and notarized it, as a "courtesy" to her. She recalled Parker's mention that she had notarized a deed for her, but added that she and Parker "didn't go into it" because she was not "expecting it."

Victor Sellarole, an attorney for the Hackensack Title Company, witnessed Mitchell's signature on the deed.

When the OAE presenter asked Policastro about her reaction on seeing her name and signature on the deed, she replied that she had been "a little surprised:"

> I was a little surprised to see a deed with my name on it, but to be very honest with you, there was -- I thought there was a spirit of some kind of camaraderie in the building, that someone might prepare - - I was a little surprised my name was signed on it, but it was a spirit to make a closing go through, if one attorney was busy and somebody else could prepare a deed, they would do that, but I was a little surprised that they would sign my name. I reviewed it more as, look, I was in court all the time, you know, the guy had called, I don't know what he told Bill [respondent]; I don't know if he told Bill this is going through, I'm already [sic] to close, I don't know what he

told Bill, I didn't have a chance to discuss anything with Bill, and I figured that maybe -- I mean, I didn't see anybody prepare the deed, I didn't see anybody sign my name on the deed, I have no idea who did it, but I thought it was in the spirit of camaraderie in the office, like we got to get this closing moving, you're in court all the time, when are we going to get the deed done, so somebody - - somebody prepared the deed from the title work and signed my name; I didn't particularly like it, but it wasn't in a spirit of alarm, like, Oh, my God, we got a forgery here, it wasn't in that spirit that I took it, because that was not the atmosphere of the building, and everybody tried to work together, and so I reviewed it as a deed was prepared, and then I - - when I saw my name there, and then I looked at the back page, and then I saw Shelly, and that matched her notarizing a deed, and then, everything seemed to fall in place.

[2T21-25 to 2T23-5.]

I did not confront anyone . . . . Victor Sellarole witnessed it, his staff person notarized it, he was with the title company . . . . I mean, I wasn't crazy about it, I would have liked to have authorized this or anything like that, but I had no reason to believe that there was anything wrong with the transaction. Apparently, Victor Sellarole had looked at it, Shelly had notarized it, and they're the title company, they seemed to think that everything was okay . . . .

[2T36-8 to 22.]

Asked if she had talked to respondent about the deed, when

she had first discovered it, Policastro replied that she had not because she

> wasn't doing an investigation of [respondent]. I just – I just wanted to know what the story was with this guy, Claude Mitchell. I had no reason to – I mean, I didn't see [respondent] sign my name on the deed, I don't know how my name got on the deed, I have no reason to think he was doing anything wrong . . . .
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> [2T30-21 to 2T31-1.]

The OAE presenter asked Policastro if it was a common practice for others to sign deeds or other documents for her, in order to facilitate closings. She answered:

> No, no, but – no, but it was – I think it was a courtesy, at this [sic]. I think it was, at this point, I think that somebody prepared the deed thinking they were doing a good thing. Apparently, apparently, I gathered that the seller couldn't make the closing, I don't really know what went on, all – all I could tell you, was it a common thing, no, it wasn't; as a matter of fact, this is probably the only time that I can ever think that ever happened, but I think that there was a spirit of cooperation among all of us . . . .
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> [2T26-19 to 2T27-4.]

The presenter then asked Policastro what action she had taken about this alleged one-time occurrence. She replied:

> Well, I usually act in the interest of the client, and it seemed, since Victor reviewed it, and he's the attorney with the title company, and they took the guy's signature, and the guy wasn't calling me saying something's wrong . . . I didn't want to file an ethics complaint against somebody, if the transaction seemed okay and everybody seemed happy. I wasn't crazy about it, but, no, I didn't confront anybody. Times were busy, life got in the way . . . . and the client and everything seemed okay, so I let it go.
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> [2T37-7 to 18.]

For his part, respondent maintained that Policastro had represented Mitchell in the transaction. In fact, he stated, he had not deposited the $750 that Policastro had returned to him because otherwise he would have been agreeing with her contention that she had not represented Mitchell. According to respondent, his secretaries had prepared the closing documents (the record does not clarify which precise documents) and had sent them to Policastro's office. They had been returned signed.

At the hearing below, respondent was asked about his "best recollection . . . with respect to the deed." He answered:

> Well, it was pretty common – we would help [Policastro] with a lot of her real estate, if she had real estate, we would help her with RESPAS or what have you. I'm certain that my – one of my secretaries probably prepared the closing documents and sent them

> to [Policastro], for her to use for the closing.
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> . . . .
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> My recollection is that Claude Mitchell went to 15 Main Street, for that closing, and that's where those documents were signed, the deed, the HUD, the Affidavit of Title.
>
> [3T80-12 to 24.]

Mitchell's recollection was that he had not been represented by a lawyer at the closing. He acknowledged that he had signed the contract and the RESPA statement, but testified that he had not been present at the closing, had not gone to Policastro's office on the closing date to sign the deed, and, in fact, had not gone to anyone's office to sign papers. As to the contract, he stated that it had been left in Danys' mailbox for him to sign and return to the mailbox. He could not recall if the RESPA statement had been left in the mailbox, but surmised that it had: "I can't recall [if it was in the mailbox], but I signed it, so it had to be in the mailbox." He "figured" that he had signed documents "a couple of times."

Mitchell testified that he had not met Policastro until long after the closing. He recalled that, after the closing, he had gone to her office, in Hackensack, and that she had said, "I

have nothing to do with this [transaction]." He added that "[i]t was like a 10-minute thing."

Theodore Quarg, an attorney who has known respondent since 1987 and who testified on respondent's behalf, asserted that Policastro had represented Mitchell. First, however, he testified about his and respondent's longstanding professional relationship. He explained that, while respondent was attending law school, respondent had worked as an intern in his office. After respondent had passed the bar exam, respondent had worked for him for three years. Thereafter, he and respondent had shared office space, an arrangement that continues to date.

Quarg testified about respondent's good character:

> Q. What can you tell the panel about Mr. Mulder's reputation for honesty and integrity?
>
> A. Certainly for me to say that I would share office space with Mr. Mulder, that's one thing that shows what his integrity is. I can tell you that I made this decision based on three years of watching Bill learn, grow, come to work every day, care about his cases, care about the clients, try to get the correct resolution. He has continued to do that under his own practice, and I certainly would have to say that I find Bill to be one of the most trustworthy people or I would not be sharing office space in this situation with him. As a matter of fact, if I were to win the lottery, I'd probably give him the check, and I know that every penny would be accounted for. Bill has never done

> anything that was malicious, he's always very even keeled, I know that if, in fact, there was something that he did, that wouldn't be correct, that he had to be either conned or scammed.
>
> [1T15-22 to 1T16-15.][8]

Quarg has also known Policastro for years. His and her offices were in the same building, in early 2004. He also dated Policastro, "on and off," from 2002 to 2006.

According to Quarg, in December 2003, Policastro told him that she was having a cash flow problem and asked for client referrals. After the Mitchell-to-Carney contract was signed, respondent mentioned to Quarg that Mitchell was unrepresented. Quarg told respondent that Policastro was looking for work and suggested that respondent refer Mitchell to her. He asserted that respondent gave Policastro the contract on the same day of that conversation. On that evening, Policastro told him that respondent had sent her a client in a real estate transaction and that she had scheduled an appointment for the client to come to her office the next day. Later, Policastro told him that Mitchell had kept the appointment and that she would be

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[8] "1T" denotes the transcript of the DEC hearing on October 1, 2009.

representing him.

It was Quarg's understanding that Policastro did not attend the closing. Her sons, who worked at her office, told him that she was out to lunch on the date of the closing. When he mentioned to the sons that she had a closing on that day, the sons indicated that she was not expected to return to the office. Later, Quarg asked Policastro if she had attended the closing, but she "never gave [him] a direct response as to why or why not."

According to Quarg, Policastro never complained to him about being wrongfully listed as the preparer of the deed. He was familiar with Policastro's signature, which he called "pretty distinctive," and asserted that the signature on the deed was not hers. Finally, he testified that, although there was an atmosphere of camaraderie in the office building, one attorney would never sign another attorney's name on a document.

As indicated previously, after the closing, Mitchell remained in the house as a tenant. His rent was $500 a week, roughly double the amount of his former monthly mortgage payments of just under $1,000. He testified that he did not miss a single rent payment.

Months after the closing, however, Carney told respondent

that Mitchell was not current with his rent. According to Mitchell, that statement was a "falsehood." When he was faced with eviction proceedings, filed by respondent on Carney's behalf, he hired a lawyer, Anthony Arbore. He testified that, even though he had been making the rent payments, Carney had not been paying the mortgage on the house.

On the hearing date of the landlord/tenant action, Mitchell presented respondent with a $4,000 cashier's check, endorsed by Carney, which Mitchell claimed had been for rent. Respondent testified that, confronted by Mitchell's check, they had not gone forward with the eviction because Mitchell had proved that he had paid the rent. According to Carney, however, that check represented the payment of a gambling debt that Mitchell owed; she had cashed the check as a favor to him. Mitchell, in turn, disputed Carney's characterization of the check. He admitted that Danys had placed bets for him at the "track," but denied having any gambling debts.

A few weeks after the court appearance on the eviction proceeding, respondent received a letter from Arbore, advising him that Mitchell was claiming entitlement to $41,000 and that Mitchell might sue respondent, Carney, and Policastro. The complaint charged that, at that juncture, a conflict of interest

arose between respondent and Carney. Asked if respondent had advised her to consult with another lawyer, Carney replied, "Not that I recall." As seen below, respondent had a different recollection.

Ultimately, the issue between Mitchell and Carney was settled for $41,000. Mitchell was to leave the property, which Carney was free to sell. Marinaro contributed $10,000 toward the settlement. Carney agreed to contribute all but $10,000 from whatever profit she would be deriving from the sale of the house. Presumably, respondent agreed to assume responsibility for the balance of the settlement.

On October 4, 2004, Carney sold the house for $194,000. Respondent represented Carney in that transaction. Carney received $24,542.87 from the sale. She kept $10,000 for herself and paid about $14,000 toward the Mitchell settlement. That amount, when added to Marinaro's $10,000 share, would leave a balance of $17,000 for respondent to pay.

Approximately one month before the closing on the property, respondent used his equity line of credit to fund the entire $41,000 settlement. He explained that he did so because the proceeds from the sale of the house would not be available until Mitchell vacated the house and, in turn, Mitchell would not

leave the house before the settlement was completed.

After the house was sold, respondent received a reimbursement of about $14,000, representing Carney's obligation toward the settlement. Mitchell and Carney exchanged mutual releases.

Respondent admitted that he had not advised Carney, in writing, that she should consult with counsel of her own, once he became aware that Mitchell might be suing him and Carney. He contended, however, that he had done so orally:

> [Carney] wanted to -- she wanted to settle the matter, we discussed settlement. I told her that, you know, she would need another counsel, and verbally, I didn't tell her, I didn't give it to her in writing, and she told me, "I just want to settle this matter, I just want it over and done with, I just want $10,000, and I want to be done with it," and she wanted me to go back to Arbore and settle the matter.
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> [3T83-22 to 3T84-4.]

Apparently, Carney disagreed with respondent's assessment of her eagerness to settle the case. She testified that respondent had told her that she could be "in some kind of trouble," if Mitchell were not given $41,000.

In connection with the settlement, respondent prepared a second RESPA statement for the Mitchell-to-Carney transaction,

dated September 10, 2004. On the borrower's side, the RESPA showed a sale price of $205,000; a mortgage loan of $164,000; and, at line 206, as initially instructed by the Gift Foundation, the $41,000, which was listed as "Homebuyer Gift Foundation." On the seller's side, respondent documented the return of the $41,000 (plus the $795 administrative fee) at line 509 and labeled it "Homebuyer Gift Foundation." Mitchell signed the RESPA statement.

Respondent explained the reason for the second RESPA:

> The other attorney, Arbore, had made a, you know, part of his big thing was the HUD was wrong, so we just prepared a new HUD, basically trying to reflect the homebuyer, correct the Homebuyer Gift Foundation information, it wasn't the HUD that was sent to the lender or used for the mortgage, that was way past, you know, past the closing, but it was more or less something that he seemed to, you know, have an issue with, and I guess, as far as tax purposes or whatever for his client, it would be, you know, better to have it corrected.
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> [3T84-21 to 3T85-6.]

Respondent did not send this new RESPA to the lender or to the title company.

In July 2006, almost two years after the settlement with Mitchell, Carney filed a grievance against respondent. She said that she did so because

> I went over everything and I called Mr. Mulder and I said, "I shouldn't have to give up my profit on the sale of that property, that all really should have come to me, because whatever mistake was made on the HUD wasn't my mistake, I don't do mortgages, I'm not an attorney, so I should really receive the whole profit", so he — I said, "You know, can you just give me a check for the difference?", and he — I had no response from him . . . .
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> [1T38-5 to 13.]

Specifically, Carney blamed respondent for not having obtained Mitchell's signature on the Gift Foundation document, which, she had been told, was necessary. The record does not reveal who had told her so. She admitted, however, that she "could be wrong," that she didn't know if that was "the exact conversation," and that she could have been told "something to that effect."

A review of the Gift Foundation closing instructions shows that neither the buyer's nor the seller's signatures were required. Only the settlement agent, in this case respondent, had to sign the document.

Respondent had his own explanation for Carney's grievance. According to respondent, at one point, problems had arisen between Carney and James Frechione, the individual whose name was also listed on the deed of her Toms River house. In November

2004, Carney had contacted respondent about either testifying or signing a certification to be filed with the court, presumably in a suit between Carney and Frechione. It was not until the summer of 2005, however, that Carney's attorney in that matter had sent respondent a certification, which, according to respondent, contained inaccurate statements. Respondent told the attorney that he would be willing to sign the certification if corrections were made to it, but not in its present form. Respondent testified:

> I haven't talked to [Carney] since then, my last conversation with her, after I refused to sign that certification, actually, her boyfriend called me first, and said that, you know, I just opened up a can of worms, and "She's not going to stop, and she's going to come after you now, you just did the, you know, the wrong thing, by not backing her up on the certification." I hung up with her – with him, and two seconds later, she's calling me, and she was under the impression that I was afraid of the guy, that was the other guy, in that case, and she's like, "Well, if you're afraid of him, you're afraid of the wrong person. You should be afraid of me, I'm coming after you now." And I just hung up the phone on her, and that was the last time I talked to her.
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> [3T87-1 to 15.]

At the DEC hearing, one of the panel members pointed out to Carney that she had received a windfall from the transaction,

whereas, in the beginning, she had not expected to profit from it. In particular, the panel member noted that, if the deal with Mitchell had gone through as structured, she would not have received any money because the agreement was that Mitchell would buy the property back from her for "whatever was left on the mortgage." Therefore, the panel member remarked, Mitchell's failure to pay the rent caused her to have a windfall. Carney agreed with that assessment.

The first count of the complaint charged respondent with having knowledge that Carney had signed a false affidavit of title and a false second home rider and with having prepared a false RESPA statement for the mortgage lender, listing (1) a wrong purchase price ($205,000, instead of $164,000), (2) a non-existent deposit of $20,500, and (3) a non-existent second mortgage of $41,795. The complaint charged respondent with violating RPC 4.1(a)(1) (misrepresentation of a material fact to a third person) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The second count of the complaint charged respondent with failure to "provide [Carney] with written notice to seek the advice of outside counsel in connection with the conflict of interest that could arise between him and [Carney] in this

litigation;" with having represented Carney in the settlement of Mitchell's dispute, in spite of the conflict of interest; and with having provided financial assistance to Carney, presumably by issuing the settlement check from his personal account. The complaint charged respondent with having violated RPC 1.7(a) and (b) (conflict of interest) and RPC 1.8(e) (financial assistance to a client).

At the conclusion of the hearings, the DEC "carefully considered the credibility of the testimony of all witnesses . . . and carefully reviewed all evidence presented." The DEC concluded that respondent's conduct constituted "minor unethical conduct pursuant to R. 1:20-3(i)(2)(A) in that 'minor unethical conduct involves actions by the Respondent attorney that, if proven, would not warrant a sanction greater than a public admonition.'"[9]

As to RPC 4.1(a)(1), the DEC noted (1) respondent's admission that he had prepared a contract for a $205,000 purchase price and had listed a mortgage amount of $164,000; (2) his testimony that the price had been changed at the request of the Mortgage Corner, Marinaro's company; (3) his denial that he

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[9] Under that rule, "[c]lassification of unethical conduct as minor unethical conduct shall be in the sole discretion of the [OAE] Director."

had intended to defraud the lender but, rather, was following instructions given by the lender and the Gift Foundation; (4) his admission that the first RESPA was inaccurate; and (5) his subsequent preparation of a new one.

As to the false documents that Carney signed, the DEC believed respondent's testimony that he had not been apprised of the tenancy arrangement between Carney and Mitchell until several months after the closing and that, therefore, he was unaware that they contained false information.

With respect to RPC 1.7(a)(2) and (b), the DEC concluded that Carney was aware of "every step of the transaction and consented to all actions by the Respondent." In addition, the DEC remarked that Carney was obviously satisfied with respondent's services, inasmuch as she continued to employ him after the landlord/tenant issue arose.

As to RPC 1.8(e), the DEC noted that, "rather than turn away from the situation, [respondent] helped facilitate a settlement advancing money from his personal equity line." The DEC concluded that respondent

> did not intend to defraud anyone. [Carney], her boyfriend, Mitchell and the mortgage lender all had a prior relationship and did not fully disclose all the issues and their intentions to Respondent. Respondent was caught in a web all around him. When he

> discovered the inaccuracies on the RESPA, the Respondent prepared a second HUD-1.
>
> . . . .
>
> The Panel listened carefully and asked many questions throughout the three days of testimony. The Panel was of the opinion that [Carney]'s testimony was not credible. [Carney] claimed to forget important facts or claimed she did not recognize documents nor was she aware of the facts of her real estate transaction.
>
> [HPR8.]

The DEC recommended a "Private Reprimand for Respondent's minor unethical conduct.[10] Although it is not immediately apparent from the panel report what precisely the DEC viewed as unethical conduct, the report refers to respondent's preparation of an "inaccurate" RESPA statement.

Following a de novo review of the record, we are satisfied that the record clearly and convincingly establishes that respondent's conduct was unethical.

At the outset, we find that, although the record developed below may not contain clear and convincing evidence that

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[10] Private reprimands were abolished in 1995 and replaced by admonitions. After the hearing, the DEC corrected its recommendation for an admonition.

respondent participated in a real estate transaction that he knew to be fraudulent, he undoubtedly facilitated it. In this regard, his overall conduct was at least reckless. As the OAE presenter told the hearing panel in his summation, respondent

> facilitated the transaction, either knowingly or unknowingly, chiefly by preparing documents that were not accurate, the Affidavit of Title, reviewing the Second Homebuyers Rider, which indicated should be a first purchase money borrower, that's if you believe Mr. Mulder, he knew about the arrangement before the closing took place. The most obvious violation is the second RESPA, correcting it, and then not sending it out to the parties who should have it, the title company, the bank, et cetera . . . .
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> [3T119-23 to 3T120-7.]

We agree with the presenter's assessment that, if it may be believed that respondent was either unaware of or did not pay due attention to the false contents of the contract and some of the closing documents, at a minimum he assisted in the completion of a transaction that unquestionably involved one hundred percent financing, by willingly taking directions from the mortgage broker, Marinaro, without exercising an independent judgment of either their accuracy and/or propriety. As detailed below, we find one instance of misrepresentation: respondent's representation, on the RESPA statement, that there was a second

mortgage on the property. We find also that his preparation of and failure to review closing documents that contained a number of inaccuracies amounted to recklessness.

We start with the contract price. Respondent knew that the original price was $164,000. He also knew that Carney had no funds of her own for a down payment. That being so, the entire purchase price would have to be financed by a mortgage loan. Indeed, Fremont approved a $164,000 loan to Carney.

At some point, the originally stipulated price by the parties, $164,000, was changed to $205,000. Coincidentally, $164,000 is eighty percent of $205,000. Eighty percent of the purchase price is the typical mortgage amount approved by lenders.

Respondent asserted that the change from $164,000 to $205,000 had been prompted by a request from Marinaro, following an appraisal for $205,000. However, appraisals that are required by the lender to determine if the value of the house supports the requested mortgage loan do not lead to the renegotiation of the price contemplated in the contract of sale. Right there and then, respondent should have suspected that some irregularity was afoot. The transaction then began to resemble a one hundred percent financing deal. Indeed, Carney testified that Marinaro

had told her that the price had to be increased to $205,000 so that she could get her mortgage loan approved. She was granted a $164,000 loan, which happened to be the amount of the original purchase price.

The unusual character of the deposit should have further signaled to respondent that the lender was financing the entire purchase price. Although Garibaldi testified that the Home DownPayment Gift Foundation was, ostensibly, a legitimate enterprise, the fact that the deposit came in and got out almost immediately and that the source of the deposit was not disclosed to the lender should also have alerted respondent that Fremont was financing the whole purchase price, as opposed to the typical eighty percentage. Yet, he proceeded as the lawyer in the transaction, without certifying himself that its nature did not violate any standards, policy, or laws.

We are aware that, in some situations, the lender knows about the artificially inflated purchase price, but approves the one hundred percent loan anyway because the loan will be sold on the secondary mortgage market. Nevertheless, the lender's approval of such loans does not lessen the misrepresentation -- indeed, fraud -- that the closing attorney facilitates. The new mortgage company will be the one defrauded, to the extent that

it will be carrying a loan that is not in accordance with the typical loan-to-value ratio, that is, a loan not supported by the actual value of the property. One hundred percent financing endangers the lender's collateral. In re Alum, 162 N.J. 313, 315 (2000).

Notwithstanding all of the above, we are unable to find that respondent knew that the price had been artificially inflated to justify one hundred percent financing. The proofs do not clearly and convincingly demonstrate that he had actual knowledge of the character of the loan transaction. On the other hand, there were ample warning signs to cause him to question the propriety of raising the purchase price to $205,000, after the parties had agreed to $164,000. Instead, he changed the contract price because Marinaro asked him to do so.

Next, respondent disregarded the Gift Foundation's instructions on where to list the deposit on the RESPA statement (blank line 206 on the borrower's side and blank line 506 on the seller's side) and, instead, posted it on the seller's side, at line 505, intended for "payoff of second mortgage loan."

Respondent's explanation for labeling the $41,000 as a second mortgage was that, because he knew that the $41,000 had to be returned to the Foundation at the closing, he thought that

it was "pretty logical" to characterize it as a lien, more specifically, a second mortgage. We find that reasoning pretty illogical. Given that respondent was allegedly unaware of how the Foundation gift worked, one would expect that he would follow the Foundation's instructions to the letter, rather than fashion a view of his own. His chosen characterization of the $41,000 conveyed the false impression -- to the lender and to anyone else reviewing the RESPA -- that $41,000 from the closing proceeds would be used to satisfy an existing second mortgage on the property. Although we cannot find clear and convincing evidence that respondent called the $41,000 a second mortgage with a specific sinister purpose in mind, it is unquestionable that he made a misrepresentation when he signed a RESPA containing the following false statement: "The HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds disbursed or to be disbursed by the undersigned as part of the settlement in this transaction." In truth, the $41,000 was not disbursed or to be disbursed in satisfaction of a second mortgage, which, of course, did not exist. Here, thus, respondent violated RPC 4.1 and RPC 8.4(c), as charged in count one of the complaint.

Another inaccurate entry on the RESPA was the listing of a

$20,500 deposit, which, of course, Carney had not tendered. Respondent's testimony was that he had split the $41,000, on the borrower's side of the RESPA, as a $20,500 deposit (line 201) and $22,350.31 as "cash from borrower" (line 303).[11] Why respondent divided up the $41,000 in such fashion was not satisfactory explained and raised worrisome questions about his motivation. Why did he deviate from the Foundation's instructions on how to list the $41,000 gift deposit? Did he intend to mislead the lender that Carney had given a $20,500 deposit? It did not escape our attention that $20,500 happens to be ten percent of the ostensible purchase price. Telling also were respondent's testimony that the $20,500 check transactions between him and Carney occurred because the lender "wanted to see the [deposit] coming from Carney's account . . . " and Garibaldi's testimony that the source of the $41,000 (the Foundation gift) was not disclosed to the lender.

Despite the foregoing questions, however, we are unable to find, to a clear and convincing standard, that respondent's intent was to mislead the lender that Carney had made a $20,500

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[11] $20,500 plus $22,350.31 exceeds the $41,000 sum by $1,850.31. The difference consists of Carney's "closing costs" (reduced from $9,650.31 (lines 103 and 106) to $1,850.31 by a $7,800 "Seller Concession" (line 213).

deposit. The record developed below does not sustain a finding in this context. But we do find that his decision to split the deposit in two sums on the borrower's side of the RESPA was another example of the inaccuracies that ran through the entire transaction and, in particular, the RESPA figures.

The problems continued. As indicated in the recitation of facts, the affidavit of title that Carney signed contained incorrect statements, indeed misrepresentations: (a) that Carney had owned the property since 1999; (b) that she was in sole possession of the property; and (c) that there no tenants or other occupants of the property.[12]

When questioned about the above statements, respondent offered a non-responsive explanation. He admitted that his office had prepared the affidavit of title, but told the hearing panel that Carney's primary residence address, in Toms River, should have been listed on the affidavit, instead of 56 Spinnaker Drive, the property address. He attributed that inaccuracy to a computer error.

Respondent's explanation is faulty. The property that must be listed on an affidavit of title is the property that is the

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[12] We discuss the latter misrepresentation below, in conjunction with the second home rider.

subject of a new mortgage loan, not any other properties owned by the buyer. Neither the lender nor the title company care about other parties' interests, claims, or liens in other properties owned by the buyer, but only that there are no threats to the buyer's ownership or right to possession of the subject property, that is, the property that serves as collateral for the loan. Despite the flaw in respondent's explanation, however, we cannot find clear and convincing evidence that the wrong address was inserted purposefully on Carney's affidavit of title.

As to the representation that Carney had owned the property since 1999, respondent's counsel, post-oral argument before us, submitted a letter claiming that the 1999 date referred to Mitchell's, not Carney's, ownership of the house. Counsel asserted that "[t]he Respondent's office incorrectly used that date in the Affidavit of Title signed by the Buyer-Grievant [Carney]. This obviously is an inaccurate date that Respondent failed to notice and correct at the closing." The OAE presenter had no objection to the introduction of that letter into the record.

Because it is possible that respondent neglected to see that false representation and because we cannot conjure up any

reason why the 1999 date would have affected the lender's or the title company's rights, we accept respondent's contention that the date was a mistake that he failed to detect. Nevertheless, that this alleged mistake is one additional notch in a string of many others gives us great concern.

The second home rider, too, was not free of misrepresentations. It falsely stated that Carney would be occupying the property as a second home, that she would have "exclusive use and enjoyment [of the property] at all times," and that she would not rent the property. Respondent testified that the lender had prepared the rider and that he was unaware that Mitchell would continue to live in the house. The DEC believed respondent. We see nothing in the record that would justify a contrary finding. We, therefore, dismiss the charge that respondent allowed his client to sign a second home rider that he knew contained misrepresentations.

One final document that contained inaccuracies was the deed, which respondent was certain that his office had prepared for Policastro's "use for the closing." There, Carney's address was listed as 56 Spinnaker Drive and Mitchell's as 52 Stokes Avenue, Budd Lake. Although the purpose of the incorrect addresses is not immediately apparent, they are two more links

in the chain of wrong information that respondent either forged or failed to detect.

The complaint also charged that respondent's continued representation of Carney's interests, after the landlord/tenant action, constituted a conflict of interest because, at that point, Mitchell had suggested that he might sue Carney, Policastro, and respondent, a situation that might cause respondent's and Carney's interests to collide. According to the complaint, by continuing Carney's representation without observing the safeguards of RPC 1.7, respondent impermissibly engaged in a conflict of interest situation. Such continued representation would have been permitted, according to the rule, if the client had consented thereto, after full disclosure of the circumstances.[13]

Respondent testified that he had orally advised Carney to obtain another lawyer. She could not recall such advice. In view of their conflicting testimony and the absence of other evidence that respondent failed to advise Carney to consult with another lawyer, we are unable to find that respondent violated RPC 1.7.

The charged violation of RPC 1.8(e), too, cannot be

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[13] Parenthetically, the RPC 1.7 in effect in 2004 did not require a writing. Oral disclosure was sufficient.

The charged violation of RPC 1.8(e), too, cannot be sustained. That paragraph of the rule addresses situations in which the attorney creates a conflict of interest by providing financial assistance to the client, either during contemplated litigation or during litigation. The danger is that the attorney may give advice to the client that is contrary to the client's interests, such as recommending an unfavorable settlement so that the attorney may obtain reimbursement for the loan to the client.

That was not the case here. At the time that respondent advanced his own funds, the terms of the settlement had already been reached. Respondent merely offered to fund the settlement with a view toward its swift completion. Because Carney was unable to contribute her share of the settlement funds until Mitchell vacated the house and the house was sold, and because Mitchell wanted his money before he vacated the house, the parties had reached an impasse. In order to resolve it, respondent volunteered to advance the settlement funds, subject to reimbursement by Carney. In doing so, he did not create a conflict of interest. He merely expedited the conclusion of the settlement.

One last point must be addressed. Although, at the DEC

hearing, considerable time was spent on respondent's post-settlement preparation of a second RESPA, neither did the complaint charge him with any wrongdoing in this regard nor does the record support a finding of any impropriety. As respondent testified, the RESPA was not prepared to deceive the lender or any other party or to right an intentional wrong, but to comply with Mitchell's attorney's request (or demand) that, for whatever reason, the terms of the settlement between Carney and Mitchell be memorialized on a RESPA statement. It should be noted that the RESPA was not backdated to March 2004, when the closing took place, but bears the settlement date, September 2004. Aside from some minor changes in utility charges, the only difference between the original RESPA and the new one was the listing of the entire $41,000 sum as "Homebuyer Gift Foundation," as opposed to a $20,500 deposit and $22,350.31 in "cash from borrower." That RESPA was not given to the lender. Even if it had, however, by the time it was prepared, six months after the closing, it would have been too late for the lender to cure any noted improprieties. We, therefore, find no ill-motivation in respondent's preparation of a new RESPA and failure to present it to the lender.

In short, of all instances of misrepresentation charged in

the complaint, we find respondent guilty of only one: his statement that the RESPA that he prepared was a "true and accurate account of the funds disbursed or to be disbursed as part of the settlement of this transaction." In fact, the $41,000 was not or would not be disbursed to satisfy a (non-existent) second mortgage. The remainder of respondent's inaccurate statements were the product of either failure to detect serious mistakes of his own or of his staff, or recklessness, or willingness to take directions from another without exercising an independent judgment. We are referring to the price change at Marinaro's request and consequent one hundred percent financing; the representation on the RESPA that Carney had tendered a $20,500 deposit and would bring $22,000 in cash at the closing; and the inaccuracies on the deed and on the affidavit of title. We consider such improprieties to be either lesser-included offenses of the misrepresentation charges or aggravating factors.

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; and In re Blanch, 140 N.J. 519 (1995) (attorney failed to disclose secondary financing to a mortgage company, contrary to the company's written instructions).

Suspensions have been imposed in more serious situations. 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 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 RESPA statements showing repair credits allegedly due to the buyers; in this fashion, the clients were able to obtain one hundred percent financing from the lender; because the attorney's transgressions had occurred eleven years before and in the intervening years his record had remained unblemished, the one-year suspension was suspended); 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 misrepresentation was comparable to that of attorneys Agrait, Spector, Sarsano, and Blanch, who were reprimanded for preparing false RESPA statements (omission of secondary financing). In Agrait, Sarsano, and Blanch, like here, the attorneys' conduct was limited to one transaction.

But we also have to consider the plenitude of inaccuracies that took place in this matter. In some instances, they were immensely troubling and just short of actual misrepresentations. We balance them against several mitigating factors. Specifically, Mitchell suffered no financial or other injury. To the contrary, he netted $41,000 from the deal, aside from being able to pay $150,000 in debts, remain living in the house, and have a fresh start. Carney, also, profited from the transaction. Originally, she was not expected to derive any economic gain from her arrangement with Mitchell. In the end, she had a $10,000 windfall. In addition, this is respondent's first brush with the

disciplinary system since his 1996 admission to the bar; he has a reputation for honesty and integrity, as attested by his former employer and colleague, Quarg; he paid $17,000 out of his own funds toward the settlement of Mitchell's claim against Carney; and his misdeeds took place seven years ago. Although counsel urged the consideration of respondent's inexperience as a lawyer, we noted that he had practiced law for seven years before this incident.

Weighing respondent's unethical conduct and the aggravating factors against the mitigating circumstances, we determine that a reprimand is sufficient discipline in this case.

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
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of William H. Mulder
Docket No. DRB 10-212

Argued: July 22, 2010

Decided: November 1, 2010

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	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
Julianne K. DeCore
Chief Counsel