SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-423

IN THE MATTER OF :
ANGEL R. PENA :
AN ATTORNEY AT LAW :

Decision

Argued: February 5, 1998

Decided: November 2, 1998

JoAnn G. Eyler appeared on behalf of the Office of Attorney Ethics

Bernard K. Freamon appeared on behalf of respondent.

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

This matter was before the Board based on a recommendation for discipline filed by Special Master Jill S. Slattery. The formal complaint charged respondent with violations of *RPC* 1.7(b) (conflict of interest), *RPC* 1.15(a) (knowing misappropriation of client funds), *RPC* 8.1(b) (false statement of material fact in connection with a disciplinary matter), *RPC* 8.4(a) (violation of the *Rules of Professional Conduct*) and *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1984. Respondent received a private reprimand in 1993 for gross neglect and lack of diligence in a matter in which he permitted the statute of limitations on a claim expire. There is pending before the Board a

recommendation by a special master that respondent be suspended for two years. In that case, the special master found that respondent and his two law partners had intentionally hidden from various authorities the 50% ownership interest in that property of two individuals who were, by law and by licensing actions, not permitted to have any ownership interest in a bar.

* * *

The Office of Attorney Ethics ("OAE") contended that respondent created two fictitious real estate transactions to conceal a conflict of interest situation created by his purchase of property from a client. Respondent currently maintains his law office in that property. According to the OAE, respondent attempted to bypass this conflict of interest situation by orchestrating two successive sham conveyances involving the same property: the first from his clients, Esther and Lorenzo Perez, and their grandson, Jorge Collar ("the Perezes"), to John and Kathleen Scifo and the second from the Scifos to respondent's parents, Alejandro and Angeles Pena. The Scifos are the parents of Frank Scifo, respondent's longtime friend and college roommate. Respondent enjoyed a longstanding, close personal relationship with all the Scifos and was often called "their third son." Allegedly, the transactions took place without the knowledge of any of the named participants.

Respondent asserted that, on March 14, 1986, a real estate closing took place at the law office of Frank Leanza, who represented the Scifos. Respondent represented the Perezes.

In turn, the sellers, the Scifos and Leanza all testified that no such real estate closing occurred. Respondent suggested that the Scifos, who had become dissatisfied with his legal services and had sued him for legal malpractice, had testified untruthfully because they were angry with him.

* * *

The HUD Mortgage

In 1985[1], the Perezes retained respondent to assist them in suspending their mortgage payments to the United States Department of Housing and Urban Development ("HUD"). The Perezes' house, located at 314 48th Street, Union City, New Jersey, had been severely damaged by fire in 1984. After a dispute developed between the Perezes and their homeowner's insurance company about the amount of damages, the insurer, Allstate Insurance Company ("Allstate"), deposited the insurance proceeds into the registry of the Superior Court.

Although the property was not habitable, the Perezes and their young grandchildren continued to reside there, prompting an investigation by the New Jersey Division of Youth

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[1] Although the grievance in this matter was filed in 1992, according to the OAE the committee investigation was delayed by respondent's lack of cooperation. The matter was transferred to the OAE by an administrative directive from the Supreme Court.

and Family Services ("DYFS"). Ultimately, DYFS removed the children from the property and from the custody of the Perezes. The Perezes then asked HUD to suspend their mortgage payments so that they could seek alternate housing while the property was being repaired. Respondent also represented the Perezes in regaining custody of the children.

On December 13, 1985 the Perezes met with HUD loan specialist Theresa Arce, who serviced their mortgage. Respondent was not present. Arce, who spoke to the Perezes in Spanish, helped them fill out the necessary forms to request the suspension of their mortgage payments. By letter of January 2, 1986 respondent asked Arce for clarification of the requirements for obtaining such a suspension. Thereafter, from January 1986 through 1988, Arce communicated only with respondent about the *Perez* mortgage. At respondent's request, Arce met with him on February 20, 1986 to discuss the requirements for assumption of the mortgage. Although Arce gave respondent some preliminary information about the *Perez* mortgage, she informed him that the HUD office in Washington, D.C. had to confirm the figures.

Arce testified that, when a property is damaged, HUD's policy is to (1) place the insurance proceeds in escrow, (2) inspect the property after the repairs are completed and (3) issue a check payable to both the homeowner and the contractor. On January 23, 1986 the Superior Court sent the insurance proceeds of $28,953.82 to HUD. After HUD placed the check in an escrow account, the Perezes authorized HUD to apply a portion of those funds to the mortgage arrears. After payment of the arrears, a balance of $15,537.50 remained in

escrow as of March 21, 1986. Eventually, all of the funds held in escrow were applied to the principal, interest and tax payments due to HUD. Although the HUD file did not contain the Perezes' written authorization to apply the insurance proceeds to the mortgage arrears, Arce testified that the funds could not have been applied to the arrears without the consent of the Perezes or their attorney. She added that a verbal authorization would have been acceptable.

After respondent again asked for information on mortgage assumption, Arce sent a letter to him on September 18, 1987, apprising him of the documents needed. She also informed respondent that HUD did not supply mortgage assumption forms. Thereafter, by letter dated December 18, 1987, HUD notified the Perezes that their mortgage payments were in arrears. The letter was returned to HUD marked "undeliverable as addressed, unable to forward." Two weeks later HUD sent an annual loan statement to the Perezes.

On February 25, 1988 respondent told Arce that the Perezes would be refinancing their mortgage loan and, therefore, paying off the HUD mortgage. Respondent announced that he would be bringing a payment of $4,500 to the HUD office within the next few days. On that same date, February 25, 1988, HUD representative William H. Brown assumed responsibility for the servicing of the *Perez* mortgage. On March 16, 1988 a payment of $4,600 was made on the mortgage.

On June 2, 1988 Brown wrote the following note on the *Perez* file: "This [mortgage] was assumed, however, no payments after that time." This information about the assumption of the mortgage was based on a duplicate tax bill for the third and fourth quarters of 1987,

showing John and Kathleen Scifo as the owners of the property. HUD received this tax bill on February 3, 1988. Arce testified that HUD was never advised that the property had been transferred or that the mortgage had been assumed. She added that HUD never received the documents needed for a mortgage assumption.

After HUD sent to John Scifo a notice of intent to foreclose dated June 13, 1988, respondent called HUD on June 24, 1988, requesting payoff figures for the *Perez* mortgage. On June 18, 1988 HUD received a letter on the letterhead of Frank Scifo, Inc., purportedly signed by John Scifo. Enclosed with the letter were a money order for $76,952.81 and a $1,000 check from Frank Leanza's attorney trust account. The Federal Express receipt shows that the letter was sent by respondent's office.

* * *

As noted above, respondent maintained that the Perezes sold the property to John and Kathleen Scifo on March 14, 1986. Respondent understood that the Scifos were going to assume the HUD mortgage. Although respondent agreed that he met with Arce on several occasions, he contended that HUD was aware, as early as February 20, 1986, that the HUD mortgage was going to be assumed by another party. In contradiction to Arce's testimony that HUD does not supply forms for mortgage assumptions, respondent contended that he had obtained the form from HUD. Respondent asked the special master to take judicial notice

of the fact that municipalities send copies of tax bills to mortgagees, insisting that HUD received the tax bills in 1987 and 1988 showing the Scifos as owners. Hence, respondent contended, HUD was on notice as early as 1987 that the property had been sold. Respondent claimed that he had no involvement with the insurance proceeds check, either when it was initially tendered to HUD or when the Perezes endorsed it to HUD to be applied to the arrearage. Finally, respondent contended that not only did HUD inspect the repairs at the property, but that a HUD building inspector was on the site on several occasions.

The Real Estate Contract

According to the OAE, it was respondent's design to obtain the Perezes' property for himself. The OAE charged that, when respondent recognized the conflict of interest inherent in buying property from a client, he created a fictitious transaction in which the Scifos first purchased the property from the Perezes and then sold it to respondent's parents. The OAE maintained that respondent had been the *de facto* owner of the property since 1986, although the record title-holders were first the Scifos and then his parents.

On December 24, 1985 Lorenzo and Esther Perez signed a contract to sell the property to Frank and Maria Scifo. On that same day they signed an identical contract of sale, except that the purchasers were listed as John and Kathleen Scifo. Aside from the identity of the buyers, the contracts are the same. Respondent witnessed the signatures of the sellers on

both contracts and was listed as preparer. Neither contract contained the buyers' signature. Although both contracts contained the signature of Jorge Collar, the Perezes' grandson, Collar testified that he did not recall signing either contract. According to the contract, respondent was the escrow agent for the deposit moneys, a $5,000 deposit was payable upon the signing of the contract and the sellers were entitled to use the $5,000 deposit before the closing.

Esther Perez testified that, although she signed the contract of sale to Frank and Maria Scifo, she notified respondent on the same day, December 24, 1985, that she and her husband had changed their minds and no longer wished to sell the property. She asserted that, after she cashed the $5,000 deposit check that respondent had given her, she returned $4,900 to respondent, promising to come up with the $100 difference. Esther vigorously denied having sold the property or attending a real estate closing. Although she admitted receiving certain sums from respondent, she alleged that respondent had advanced funds to her with the understanding that, when she received the insurance check for the property damage, she would endorse it to him to repay the loan. According to Esther, when she returned from a trip to visit her daughter and grandchildren in Miami, she learned from respondent that, contrary to her instructions, he had sold her house.

Esther claimed that in 1988 she reported respondent's actions to an agency in Trenton. She explained that she did not denounce his conduct sooner because she was concerned that respondent would contact DYFS and that her grandchildren would again be removed from

her and her husband's custody. Esther alleged that the agency took no action because she did not have papers to document her complaint.

The Perezes were represented by William Agrait in their dispute with Allstate Insurance Company over the property damage. Agrait testified that, as of October 1985, when he ceased representing the Perezes, his clients had announced their intention to repair the property, rather than sell it.

* * *

Respondent's version of the events was as follows:

After he began representing the Perezes, they asked him to find a buyer for their property. At a Christmas party attended by respondent, his father and the Scifos, respondent's father casually mentioned that the *Perez* property was for sale. John Scifo expressed an interest in buying the property for office space for his son John Jr., a medical doctor, and for respondent's law office. After negotiations, the parties agreed to a sale price of $100,000; the Scifos would assume the HUD mortgage and the Perezes would retain the insurance proceeds. The Perezes needed the funds for deposits on two properties in Florida that they wanted to buy, for expenses to travel to Florida and for alternate rental housing. Respondent referred the Scifos to Frank Leanza, an attorney he had met at a law firm where Leanza had once been an associate and respondent a law clerk. Although Leanza purportedly

was the Scifos' attorney, respondent continued to deal directly with the Scifos due to their close friendship. Respondent testified that he and a friend went to the Scifos' home in Whitestone, New York to pick up furniture and bedding that the Scifos had given him and to pick up the $5,000 deposit for the Perezes. Respondent deposited the cash into his trust account. Because the Perezes did not have a bank account, respondent prepared a check for $5,000 listing himself as payee, cashed the check and gave the proceeds to Lorenzo Perez.

Respondent testified that the Perezes signed the contract for sale to Frank and Maria Scifo. Respondent prepared the contract and witnessed their signatures. Frank and Maria Scifo were listed as the buyers, pursuant to John Scifo's instructions. However, after John Scifo told respondent that he had changed his mind and wanted the property in his and his wife's names, respondent simply used correction fluid to change the names on the original contract. Thus, the Perezes signed only one contract that was then photocopied and changed to reflect John and Kathleen Scifo as buyers. Respondent claimed that, although he did not have a copy of the contract containing the Scifos' signatures, they had signed the contract. Respondent explained that his files were not complete because his office had been burglarized and damaged by floods, he had moved three times and the transaction had occurred in 1985.

The Real Estate Closing

As mentioned above, the Perezes vehemently denied having attended a real estate closing or having agreed to sell their home. By deed dated March 14, 1986, but not recorded until July 1, 1986, the property was conveyed from the Perezes to John and Kathleen Scifo. Respondent prepared the deed. Although respondent witnessed the Perezes' signatures, Esther Perez and Jorge Collar denied having signed the deed or any closing documents.[2] The presenter, noting that the Perezes had signed blank documents for respondent, such as medical authorizations in unrelated matters, contended that respondent had access to their signatures. Respondent also drafted two affidavits of title and witnessed Lorenzo's and Esther Perez's signatures on one of them and Jorge Collar's signature on the other. The Real Estate Settlement Procedures Act ("RESPA") settlement statement, also prepared by respondent, listed him as settlement agent and bore the signatures of the sellers only. The RESPA contained the following information: (1) sale price of $100,000, (2) settlement charges of $1,000 charged to buyers, (3) deposit money of $10,000, (4) HUD mortgage of $68,500 and (5) $21,500 due from buyers to sellers. There was no listing for loan costs, escrows for interest or hazard insurance, settlement fee, abstract or title search, title examination, title insurance binder, document preparation, attorney's fees, title insurance, recording fees, survey costs or realty transfer tax. The only settlement charge was $1,000 charged to the buyers for garbage removal. As will be seen below, respondent testified that he had mistakenly charged that item to the buyers, instead of the sellers.

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[2] Lorenzo Perez did not testify at the hearing before the special master.

Frank Leanza testified that he never represented the Scifos on any matter, including the purchase of the *Perez* property. He asserted that a thorough search of his files revealed no record of this transaction. Leanza, an experienced attorney in 1986, cited numerous problems with the contract and closing documents, asserting that, had he represented the buyers, he would not have permitted such terms. Leanza cited the following deficiencies in the contract, among others:

(1) His office address was incorrectly listed.

(2) He would not have allowed a release of the deposit without a title search.

(3) He would have required (a) a contingency that the HUD mortgage could be assumed, (b) a representation that the zoning code permitted office use and (c) a risk-of-loss provision.

(4) The contract was not signed by the buyers.

(5) The buyers were to pay a commission of three percent to respondent. Leanza remarked that it is unusual for an attorney to collect a realtor's commission and even more unusual for the buyers to pay it.

Leanza commented on the omission from the RESPA of typical closing costs. In addition, he remarked that, if he had been the buyers' attorney, he would have been named as the settlement agent. Leanza noted that a title insurance policy was not issued until April 30, 1987, more than one year after the closing, and that it did not insure the mortgagee, HUD.

Although Leanza testified that he did not represent the Scifos and was not involved in the *Perez* real estate transaction, four checks were issued from his trust account to HUD, in payment of the mortgage:

Date	Amount	Exhibit Number
2/22/88	$2,400	P-45a
3/02/88	2,200	P-45b
4/11/88	1,000	P-45c
5/05/88	1,000	P-45d
Total	$6,600	

Leanza's explanation was that he had previously deposited in his trust account equivalent amounts, against which he had drawn the above checks. According to Leanza, he had run these checks through his trust account at respondent's request; respondent felt that, as the Scifos' tenant, he would be in a conflict of interest situation if he paid HUD in the Scifos' behalf.

The following checks were stamped "for deposit only" and deposited into Leanza's account:

Date	Amount	Exhibit Number
2/19/88	$2,400	P-43a
3/02/88	1,200	P-43b
3/01/88	1,000	P-46c
3/31/88	1,000	P-46d
4/30/88	1,000	P-46e
Total	$6,600	

Exhibits P-43a and P-43b were drawn on respondent's business account, were payable to John Scifo and contained the following notation in the memo column: "Jan Feb rent 1988" and "March rent," respectively. Exhibits P-46c, P-46d and P-46e were drawn on Bryan K. Bajakian's bank account, were payable to John Scifo and contained the following notation

in the memo column: "March rent", "April rent" and "May rent," respectively. Bryan Bajakian, a chiropractor, was another college friend of respondent, who also rented office space at the property.

Leanza explained that, because respondent was his good friend, he went to look at the property and to congratulate respondent; although respondent had moved into his office, work was still being done on the property. At that time, respondent represented to Leanza that respondent owned the building.

For their part, John and Kathleen Scifo testified that they never signed a contract to buy the *Perez* property, never attended a real estate closing in connection with that property, never retained Frank Leanza to represent them (and had only met him while waiting to testify at the ethics hearing), never agreed to assume the HUD mortgage, never made any repairs to the property and, as discussed below, the only payments they received from respondent related to loans that they had extended to him.

* * *

In contrast to the testimony of the other purported participants, respondent claimed that a real estate closing had taken place on March 14, 1986 at Leanza's law office. According to respondent, the Scifos paid a $5,000 deposit upon the signing of the contract and another $5,000 within fourteen days of the expiration of the attorney review period. Although respondent was listed as the real estate broker, he did not charge a commission. The sellers, the Perezes, were unable to attend the closing, because they were in Florida; they

returned on the following day. They signed the documents in advance of the closing and did not attend the closing at Leanza's office. Respondent testified that he prepared the deed and two affidavits of title, and also witnessed his clients' signatures on those documents. Respondent stated that, in addition to himself and Leanza, John Scifo and respondent's father attended the closing. Although respondent was not sure, he did not believe that Kathleen Scifo was present.

Samuel S. Fisher, a Certified Public Accountant, testified in respondent's behalf that the Perezes received $46,246.02 from the closing: $40,703.80 to themselves, according to respondent's banking records, and $5,542.22 that was disbursed to third parties at their request. Although Fisher noted that the Perezes were actually due an additional $791.48 from the closing, he contended that, because the records were not complete, it was possible that they received the full amount. He remarked that, given the amount of the transaction, it was not unusual for the numbers not to reconcile, due to mathematical errors and other factors. Fisher obtained the records from respondent, relying on respondent's assertions that he had disbursed funds to third parties in behalf of the Perezes.

Respondent could not explain why he had not recorded the deed until July 1, 1986, more than three months after the closing. He asserted that, after the closing, two unrecorded mortgages executed by the sellers became known: one to the City of Union City for $1,500, dated December 12, 1985 and another to Angel and Isabel Montalvo for $6,200, dated December 30, 1983. Respondent paid the *Montalvo* mortgage five months after the closing

by trust account check dated August 18, 1986 in the amount of $1,089.02, ostensibly the then remaining unpaid balance of the mortgage. The record does not disclose whether the mortgage held by the City of Union City was satisfied.

Respondent also could not explain why he had not obtained a title insurance commitment until April 30, 1987, more than one year after the closing. Respondent stated that, because this was one of his first closings, he did not know what had to be done. When respondent was asked whether he had a responsibility to insure that the mortgage executed by the Perezes in favor of HUD had been properly assumed so that they were no longer liable, he answered: "I relied upon directions from the client and HUD in this. I had never done one of these before."

With respect to the HUD mortgage, respondent did not know why, in September 1987, more than one and one-half years after the closing, he had requested information from HUD on mortgage assumption and again in June 1988.

The Renovation of the Property

According to the complaint, during 1986 and 1987 the property was repaired and renovated into office space. Respondent's father, Alejandro Pena, was the general contractor. Respondent testified that his father spent between $55,000 and $75,000 on the repairs. Pena, who spoke little English, was retired at the time the property was being

repaired. There was no evidence adduced at the hearing that Pena had any background, knowledge or skill in building construction. Of the various construction permits issued, none listed John and Kathleen Scifo as owners. One permit indicated that respondent was the owner, while others had Frank Scifo or Frank and Kathleen Scifo (although Frank's wife is named Maria, not Kathleen) as owners. Two of the contractors listed on the construction permits appeared as recipients of payments made from respondent's business account records. Manuel Cofino, listed as the owner's agent on an electrical and plumbing permit application, received the following payments from respondent in 1986, according to respondent's account ledgers:

Date	Amount	Notation
06/20/86	$168.80	None
07/03/86	200.00	"Cleaning"
07/03/86	250.00	None
07/07/86	450.00	"1099"
07/12/97	193.00	"6/Exp."
07/23/86	1,000.00	"Note"
08/25/86	80.00	"6/Exp."
09/06/86	250.00	"Repairs"
09/22/86	350.00	"Repairs"
10/06/86	250.00	"Repairs"
10/25/86	100.00	"Repairs"
11/10/86	250.00	"Withholding"
11/28/86	275.00	"Repairs"
12/04/86	275.00	"Repairs"
12/29/86	700.00	"Withholding"

In addition, the following was paid to Manuel Cofino from respondent's trust account:

06/16/86	$100.00	None
09/10/86	1,200.00	None
09/25/86	750.00	None

Furthermore, according to respondent's check register for his business account, on August 25, 1987 he paid Charles Hulley $5,000. Hulley was also listed on a work permit as an electrical contractor.

Respondent moved his law office onto the property in December 1987. He claimed that he spent between $5,000 and $10,000 on "extra things" for his office.

Michael Ahl, respondent's law partner, testified that respondent first showed him the building in November 1986. He remembered that he and respondent had argued over the fact that the law firm had paid for repairs to the building. Ahl questioned respondent about the propriety of such payments since Scifo owned the building. Respondent answered that it would be beneficial for their law practice to present a good building.

* * *

Respondent alleged that, shortly after buying the property, Scifo lost interest in the project because his son no longer wished to establish a medical office in Union City. According to respondent, Scifo asked respondent's father to be the general contractor and supervise the repairs on the property.

Respondent denied that he had paid contractors for work on the property. He stated that he had hired Manuel Cofino to act as an interpreter on immigration matters. Respondent could not remember when or for how long Cofino worked in his office. Respondent

explained that, whenever Cofino worked on a personal injury case, he would pay Cofino from the trust account as an expense of that case.

Despite the fact that respondent's father, Alejandro Pena, spoke little English, respondent contended that John Scifo had spoken with his father when Scifo had visited the property to check on the repairs.

Respondent's cousin, Richard Diaz, testified that he worked for his brother, Gary Diaz, in installing windows at the property. According to Richard, because his brother had done work at Scifo's home before, Scifo had hired Gary to work on the office property. Richard testified that he had worked at the property for four or five days in the evening and had seen Scifo there on one or two occasions.

Gary Diaz, too, testified at the hearing. He stated that, for one and one-half months during the summer of 1986 he had replaced all the doors and windows at the property. Scifo had paid him in cash for this work. Gary asserted that Scifo had visited the job site and had selected the windows for the property. Gary testified that he had previously met Scifo at family functions involving respondent.

Neither Gary nor Richard Diaz knew Rubin Reyes, who had applied for a permit to, among other things, replace the windows.

Juan Villalobos testified that he worked for six or seven months at the property as a construction helper for respondent's father, who paid him $200 per week in cash. He also testified that Scifo visited the job site and spoke with Alejandro Pena. Villalobos asserted

that, about three years later, in 1989, he did construction and landscaping work at Scifo's home and at respondent's home. Although Villalobos testified that neither he nor his wife, Virginia, also known as Irma, had ever worked for respondent, he could not explain why respondent had issued the following checks:

Date	Amount	Payee	Notation
04/26/89	$140.00	Juan	None
06/07/89	617.08	Virginia	Cleaning
06/16/89	100.00	Juan	None
07/07/89	207.40	Virginia	None
07/14/89	250.00	Juan	Repairs
08/08/89	271.07	Irma	None
08/28/89	150.00	Juan	Cleaning
08/28/89	250.00	Juan	Painting
10/05/89	500.00	Juan	None
11/02/89	458.74	Irma	None
11/07/89	150.00	Juan	None

Villalobos indicated that some of the payments to "Juan" could have been made to his son, also named Juan, who had done some work for respondent.

Rental of the Property

As mentioned earlier, Bryan Bajakian was a friend of respondent from their college days. Bajakian, a chiropractor, testified that, in December 1987, respondent had told him that he had purchased a piece of property with funds borrowed from Scifo. Respondent had asked Bajakian if he was interested in renting office space from respondent. Bajakian had

agreed. He had negotiated the terms of the lease with respondent, with whom he had only an oral agreement.

Although Bajakian understood that respondent owned the building, at respondent's direction he had prepared the rental checks with John Scifo's name as payee. Bajakian testified that, when he had questioned respondent about the payee, respondent had replied that was the way he wanted it. Bajakian believed that respondent was using the rental checks to pay back the loan to Scifo. Most of the time, Bajakian gave the rent checks to respondent. On a few occasions, he gave the checks to respondent's law partner, Michael Ahl.

Bajakian rented space for about two years, until December 1989 or January 1990. As discussed earlier, three of the Bajakian rent checks were deposited into Leanza's trust account, from which Leanza drew checks payable to HUD. Although the balance of the rent checks contained John Scifo's endorsement on the reverse side, Scifo testified that he received only the first two checks, issued by Bajakian on January 16, 1988 and January 30, 1988. According to Scifo, those checks were given in payment of the loan he had made to respondent. Scifo denied having received any other rent checks. Although respondent contended that Scifo had authorized him to sign Scifo's name to the checks and give them to respondent's father, Scifo denied this contention.

The record also contains seventeen checks from respondent's business account issued between February 1988 and September 1989. The checks were payable to John Scifo, and

contained the notation "rent" in the memo column. The checks were cashed and deposited into respondent's parents' bank account or deposited directly into their bank account.

* * *

According to respondent, John Scifo received the rent checks issued by Bryan Bajakian. Respondent contended that he was authorized to endorse John Scifos' name to the rent checks that respondent issued and to deliver the checks or their proceeds to respondent's parents. John Scifo denied having given such authorization. One of the checks was payable to Frank Scifo. Respondent contended that he had mistakenly prepared the check with Frank Scifo's name as payee, claiming that he also had Frank Scifo's authorization to sign his name. Frank Scifo, too, denied having authorized respondent to sign his name.

<u>**The Scifo Loan**</u>

According to the OAE, on March 1, 1986 respondent signed a promissory note for $30,000 in favor of John and Kathleen Scifo. On March 13, 1986 the Scifos gave respondent a cashier's check in that amount. The note provided that, upon repayment, the Scifos were to convey the property to respondent. Frank Scifo testified that he witnessed respondent's signature on the note and that respondent supplied the form for the note. According to Frank Scifo, the note secured a pre-existing loan. Respondent made payments on the note from time to time, making the last payment of $1,500 in 1996. He made two payments by

endorsing Bajakian's rental checks to the Scifos. With the final loan payment respondent enclosed a note apologizing for what he had done to the Scifos:

> I am enclosing a check in the amount of $1,500 as final payment of the principal on the outstanding loan, and $500 towards the interest. I am trying to put together more money as payment on the interest. I will forward it as soon as possible . . .
>
> I regret all that has occurred over the past year. I never planned to hurt your family, or mine . . . I can't explain the pain I feel, or the remorse for the pain I have caused . . .

Michelle Epstein, an attorney admitted in New York and New Jersey, testified that John Scifo retained her to collect two loans he had made to respondent: the $30,000 loan and a $25,000 loan made in 1992. She asserted that, during telephone conversations with respondent, he never denied receiving the two loans.

Respondent, in turn, claimed that he did not sign the $30,000 promissory note until 1991 or 1992. He contended that, although he had not actually borrowed money from the Scifos, he had signed the note at their request because they were being audited by the Internal Revenue Service ("IRS") and needed to account for the funds. By this statement, thus, respondent admitted that he participated in an attempt to defraud the IRS. The Scifos denied that they had requested respondent to sign a fictitious promissory note, adding that, although the IRS had audited their business, they were not required to pay additional taxes.

Although the promissory note contained a Whitestone, New York address for the Scifos, they had moved from Whitestone in 1989.

The Property Conveyance from the Scifos to Respondent's Parents

According to the OAE, on June 28, 1988 respondent's parents refinanced their home mortgage, borrowing $186,079.82. Before the refinance, their mortgage balance was $414.32. After payment of closing costs, the loan proceeds were used as follows: $67,541.32 was used for a down payment on respondent's home in River Vale, New Jersey, and the balance of $105,000 was placed into an escrow account, with respondent's partner, Michael Ahl, named as trustee. At respondent's direction, Ahl issued several checks from the escrow account. Ahl testified that he learned from respondent that some of the funds in the escrow account would be used to pay off a loan that respondent owed for the Union City property. Ahl issued a check for $25,000 payable to the Scifos, giving the check to respondent. Ahl also issued a $76,982.81 check from the escrow account, payable to cash. The proceeds of the check were used to purchase a money order to pay off the HUD mortgage. The money order and a $1,000 check issued on Leanza's trust account were sent by respondent's office to HUD. As discussed above, Leanza testified that he ran several checks through his trust account as a favor to respondent. Respondent admitted that he wrote the Perezes' loan number on the Leanza check before it was sent to HUD. The remaining escrow monies were either distributed to respondent, his wife Michelle or his law firm.

Although the property was purportedly transferred to respondent's parents in 1988, it was not until October 31, 1991 that the property was actually conveyed from the Scifos to respondent's parents, Alejandro and Angeles Pena. Respondent's law partner, Glenn Rocca, prepared the deed, which recited a consideration of $1. Oddly, the cover letter that Rocca

sent to the Scifos enclosing the deed was dated November 27, 1991. It post-dated the deed, dated October 31, 1991. The cover letter stated, in part: "I need you to transfer the title to Mr. and Mrs. Pena, then, I need them to transfer the title to us."

For their part, the Scifos conceded that they had signed the deed. However, they contended that they had not bought the property. Instead, according to the Scifos, after they had loaned respondent the $30,000, respondent decided to secure the loan by transferring title to them, rather than executing a mortgage in their favor. The Scifos stated that they had signed the deed after respondent had paid off the loan.

Respondent, in turn, asserted that the Scifos had sold the property to his parents in 1988. Although respondent was not sure of the sale price, he believed that his parents had agreed to pay off the HUD mortgage and to compensate the Scifos for expenses incurred with the building, a sum of about $25,000. Respondent explained that the conveyance had not been made until 1991 because of an oversight on his part in not preparing the deed.

<u>The 1590 Anderson Partnership</u>

In 1990 respondent and his law partners, Ahl and Rocca, formed the 1590 Anderson Partnership ("the partnership") to manage real estate. According to Ahl, the partnership collected rent from the tenants at the Union City property and paid the mortgage on respondent's parents' home; although the law firm did not pay any rent, it paid the utilities,

taxes and repairs on the Union City property. The partnership owns a cooperative unit at 1590 Anderson Avenue, Fort Lee, New Jersey.

Respondent's Psychiatric Expert

Oscar Sandoval, a psychiatrist whose expert report was submitted into evidence, diagnosed respondent with major depression, adding that he also suffered from a borderline personality with dependent traits. Dr. Sandoval explained that an individual with a borderline personality is very dependent on the approval of others. He remarked that, because respondent considered John Scifo as a father figure, he wanted to please Scifo. Dr. Sandoval opined that respondent's judgment as an attorney could have been impaired by his subconscious need to please others and to be accepted by them. Dr. Sandoval doubted that respondent would have signed John Scifo's name without authorization, because respondent would not want to jeopardize his relationship with Scifo.

On cross-examination, Dr. Sandoval acknowledged that respondent overreported psychopathology and exaggerated his psychological discomfort. Dr. Sandoval asserted that respondent is not legally insane and that, although respondent reported a prior history of alcoholism, he showed no sign of current alcohol abuse.

* * *

Many of the witnesses who testified at the ethics hearing had given prior inconsistent statements or had taken contradictory positions, raising concerns about their credibility. A summary follows:

Esther Perez

William Agrait, who represented the Perezes in their dispute with Allstate Insurance Company over the extent of damages, testified that a member of the Perez family stole his file, including the insurance check. He then obtained an order from a Superior Court judge voiding the check. However, Esther testified that the insurance company had given her the check. In addition, Esther accused Agrait of trying to sell her house without her consent.

Frank Leanza

Although at the ethics hearing Leanza testified that he did not represent the Scifos at a real estate closing, during a 1995 interview with the OAE he stated that he remembered representing "a guy by the name of Scifo who bought some property in Union City, an old building in Union City."

John Scifo

At the ethics hearing, Scifo testified that he (1) had no involvement with the *Perez* transaction, (2) had not bought the property, (3) had not made any repairs to the property and (4) had not attended the March 14, 1986 real estate closing. However, during a June 8, 1995

OAE interview, Scifo asserted that he had indeed bought the building for his son John Jr.'s medical office. He claimed that, at a party, respondent's father had mentioned the building to him; they had agreed that Scifo would buy the property and Alejandro Pena would be responsible for the renovations. Scifo further alleged at the OAE interview that, after his son decided to remain in Staten Island, he was "stuck" with the building. He remembered that, in 1991, Alejandro Pena had sent him a deed conveying the property to Scifo for $1. Scifo added that he had obtained an attorney through Alejandro Pena. Although he could not recall the attorney's last name, because he had a son named Frank, he remembered that the attorney's first name was Frank. Scifo stated that Alejandro Pena had insisted in giving him title to the property, in order to secure a loan from him to Pena.

At the ethics hearing, Scifo explained that, initially, at respondent's request, he had tried to protect respondent by asserting that he had bought the Union City property; however, when he realized that he was placing himself in jeopardy, he decided to be more forthcoming. Thus, he testified, while he initially had told the OAE that he had bought the building, in reality he had merely loaned money to respondent.

Respondent

Respondent's testimony is at odds with that of numerous witnesses, including the Perezes, Leanza, Bajakian and the Scifos. Arce, a neutral witness, stated that HUD never performed any inspection on the property to determine the progress of the repairs. Arce noted that, if there had been any inspections, she would have accompanied the building inspector. Yet, respondent maintained that he talked to a HUD inspector on the site at least

twice. In addition, respondent took inconsistent positions on key issues. On several occasions, respondent represented that he owned the Union City property. In a deposition given in an unrelated civil matter, respondent testified that he resided at the property. According to Leanza's and Bajakian's testimony, respondent represented to them that he owned the building.

Respondent was not able to produce any documents signed by the Scifos relating to the real estate closing. During the investigation of the grievance, respondent explained that the RESPA appeared incomplete because the only disbursement related to trash removal. He did not mention the existence of another RESPA. At the ethics hearing, however, respondent claimed that, although he did not have a copy, he had prepared a final RESPA containing closing costs and disbursements.

There were numerous inconsistencies in respondent's statements given during the grievance investigation and in his testimony about the financial terms of the property transactions, the HUD mortgage, the rental payments and the Scifo loans. Although some minor discrepancies may be expected because of the amount of time that has elapsed since this matter took place, not all inconsistencies can be attributed to the passage of time.

* * *

The special master found that respondent bought his clients' property in March 1986, using the Scifos as "straw men" to conceal the conflict of interest he created in purchasing property from his clients. The special master determined that respondent had borrowed

money from the Scifos to buy the property, satisfying the loan and the HUD mortgage with funds received from the refinance of his parents' home. The special master found that the 1590 Anderson partnership is repaying respondent's parents' mortgage.

The special master determined that the Perezes received the $10,000 deposit in two $5,000 installments, plus $22,000 in checks. She could not find by clear and convincing evidence that they had received the insurance proceeds. Thus, the special master could not find sufficient evidence that respondent knowingly misappropriated the insurance funds.

The special master found that respondent knew that he had a conflict of interest and tried to hide the conflict through machinations to create the appearance that the Perezes had sold the property to the Scifos, who, in turn, had sold the property to respondent's parents. The special master concluded that respondent violated *RPC* 1.7(b) and *RPC* 8.4(a) and (c). Although the special master found that respondent misrepresented the facts in statements given to the DEC and OAE, she did not address the charge of a violation of *RPC* 8.1(b).

The special master recommended that respondent be suspended, without specifying a term of suspension.

* * *

Following a *de novo* review of the record, the Board is satisfied that the special master's finding of unethical conduct is clearly and convincingly supported by the evidence. Respondent admitted that he engaged in a conflict of interest in representing the Perezes in the sale of real estate to respondent's close friends, the Scifos. Although respondent

contended that he had made some effort to disclose the conflict to his clients, he conceded that he had violated *RPC* 1.7(b).

The complaint also charged respondent with knowing misappropriation of client funds, in violation of *RPC* 1.15(a). The basis for this charge was that the application of the insurance proceeds to reduce the HUD mortgage balance benefitted the ultimate owners of the property, i.e., respondent and/or his parents. In other words, because the Perezes sold the property subject to the HUD mortgage and, as conceded by respondent, were entitled to the insurance monies, when the insurance proceeds were used to pay the HUD mortgage, the Perezes were deprived of those funds. However, there is no clear and convincing evidence that respondent took his clients' funds, a necessary element of the offense of knowing misappropriation. *RPC* 1.15(a) provides as follows:

> A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.

It is unquestionable that the insurance check was never in respondent's possession. The uncontroverted evidence shows that respondent was not present when the Perezes endorsed the insurance check to HUD. Indeed, the special master found that respondent may not have even been aware that HUD was holding those funds and had applied them to the mortgage.

Moreover, respondent's misconduct does not fit within the definition of knowing misappropriation of trust funds.

> The misappropriation that will trigger automatic disbarment under *In re Wilson*, 81 *N.J.* 451 (1979), disbarment that is 'almost invariable,' *id.* at 453, consists simply of a lawyer taking a client's money entrusted to him, knowing

that it is the client's money and knowing that the client has not authorized the taking.

[*In re Noonan*, 102 *N.J.* 157, 160 (1986)]

Here, not only is there no evidence that respondent took client funds, but there is no evidence that any client funds had been entrusted to him. Even if respondent or his parents had received the benefit of the insurance proceeds, such circumstances do not amount to knowing misappropriation. Moreover, respondent's contention that his clients received all of the funds to which they were entitled, less perhaps about $1,200, was not rebutted. Respondent's expert testified that, had he been supplied with complete records, he might have been able to resolve that relatively small discrepancy, which, in any event, was probably due to mathematical errors. Simply put, there is no evidence, let alone clear and convincing, that respondent took his clients' money. The Board, thus, dismissed the charge of knowing misappropriation.

The remaining charges of *RPC* 8.1(b), *RPC* 8.4(a) and *RPC* 8.4(c) relate to respondent's dishonesty. At first blush, respondent's position that the Perezes sold the property to the Scifos appears outlandish. After all, every other purported participant in the real estate closing – the Perezes, the Scifos and Leanza – denied that such a closing occurred. Moreover, the HUD records do not disclose any notice of sale of the property or assumption of the mortgage until two years after the closing, when respondent submitted the mortgage payoff with funds received from his parents after they refinanced their home mortgage. However, John Scifo initially asserted that he had indeed bought the building and had been represented by an attorney named "Frank," although he later recanted that version and Leanza, too, told the OAE that he had represented Scifo in the purchase of property in Union

City. In addition, Leanza issued four checks to HUD from his trust account, having first deposited two rent checks from Scifo and three from Bajakian; Leanza explained that he merely ran checks through his trust account as a favor to respondent. Furthermore, Esther Perez had also accused her prior attorney, Agrait, of trying to sell her property without her consent, raising concerns about her credibility.

On the other hand, there is strong evidence that respondent purchased the property from the Perezes. The record suggests that respondent borrowed $30,000 from the Scifos. Indeed, he signed a promissory note on March 1, 1986 and received a check for $30,000 on March 13, 1986, one day before the closing. It appears, thus, that he borrowed the $30,000 from the Scifos to buy the *Perez* property. If this is true, respondent violated *RPC* 1.8 for engaging in a business transaction with clients – the Scifos – without observing the requirements of the rule. In any event, even if respondent's version is accepted, then his conduct was more serious because he allegedly signed the promissory note to assist the Scifos in defrauding the IRS. Under this scenario, he would be guilty of a violation of *RPC* 8.4(c).

What seems clear is that the record does not in any way support respondent's version of the events. There is no evidence of a sale from the Perezes to the Scifos and from the Scifos to the Penas. The documents produced by respondent, including the deed from the first transaction, were not signed by the Scifos. The RESPA prepared by respondent was woefully inadequate. None of the standard closing costs are assessed. The only cost, a charge for garbage removal, was assessed to the buyer instead of the seller. During the investigation of the grievance, respondent did not indicate that he had prepared a different

RESPA for the closing, as he testified at the hearing. As pointed out by the special master, respondent did not know how to prepare a closing statement, even for a sham transaction. He did not record the deed until more than three months after the closing. Respondent, who alleged that Leanza had authorized him to obtain title insurance for Leanza's client, did not obtain a title commitment until more than one year after the closing. Leanza testified in great detail about the problems with the RESPA and other closing documents, raising serious doubt that he was involved in the transaction. Respondent did not notify HUD of the sale or take any steps to ensure that the HUD mortgage had been properly assumed, thus leaving his clients exposed to liability for that loan. It is also peculiar that the closing would be held on the one day that the Perezes were in Florida and not available.

The Board, thus, agreed with the findings of the special master that respondent purchased the property from the Perezes, using the Scifos as "strawmen," and then concocted a second phony transaction from the Scifos to his parents. In the second transaction, the Scifos signed as sellers, purportedly transferring title to respondent's parents after respondent repaid the $30,000 loan from the Scifos. Indeed, respondent's actions were consistent with those of a property owner; he negotiated the rent with Bajakian; he represented to Bajakian and Leanza that he owned the property; and respondent's law firm currently pays the taxes and repairs on the property. The 1590 Anderson partnership pays respondent's parents' mortgage.

In summary, respondent bought property from his clients in flagrant violation of the conflict of interest rule; created two phony transactions to conceal his misconduct; made numerous misrepresentations to the DEC, the OAE and the special master in giving

conflicting accounts about the property transactions; and admittedly attempted to defraud the IRS. For similar misconduct, the Court has imposed suspensions ranging from one to three years.

In *In re LaVigne*, 146 *N.J.* 590 (1996), the attorney was involved in a conflict of interest situation when he represented buyers and sellers, including himself, in multiple and complex property transactions, in violation of *RPC* 1.7(b) and (c), failed to safeguard funds of his clients and of third parties, in violation of *RPC* 1.15(a) and (b) and engaged in a pattern of deceit and dishonesty, making numerous representations to his clients and to third parties, in violation of *RPC* 8.4(c). The Court imposed a three-year suspension, remarking that the attorney had come close to disbarment.

In *In re Haft*, 146 *N.J.* 489 (1996), the attorney violated *RPC* 1.7(b), *RPC* 1.8(a) and *RPC* 8.4(c) by borrowing money from a client without explaining the risk to the client or advising the client to consult independent counsel. The attorney also gave the client a mortgage note as security for the loan, without disclosing that the property that was the subject of the mortgage was also owned by respondent's wife or that there were two mortgages that had priority over the client's. The attorney did not record the mortgage. Moreover, on a subsequent mortgage application, the attorney failed to disclose the existence of the mortgage given to the client, disclosing only the two recorded mortgages. The attorney was suspended for one year.

In *In re Humen*, 123 *N.J.* 289 (1991), the attorney represented a friend, an elderly widow, in the purchase of property from another friend of the attorney, who took back a purchase money mortgage. Because of the seller's concern that the client would not be able

to make the mortgage payments, the attorney did not record the deed or mortgage. The attorney then persuaded the client to permit him to manage the property, after which he never accounted to the client for the income produced by the property. Instead, he misrepresented to the client that the property was operating at a loss. The attorney bought the property from the client, paying less than she had three years earlier, despite the appreciation of property values. Finally, the attorney loaned money to the client on terms favorable to the attorney, without disclosing to her that he was the lender. He failed to advise the client to seek independent counsel in all of these transactions. The Court suspended the attorney for two years.

Finally, in *In re Weston*, 118 *N.J.* 477 (1990), Weston's father, a principal in a condominium development, acted as financial counselor to purchasers of units in the condominium development. After the owners of a particular unit became dissatisfied with the negative cash flow of this investment, Weston's father arranged for the sale of their equitable interest in the property. However, there was no conveyance of record, thereby permitting the buyer to bypass the requirements of qualifying for a mortgage. When the new owner also became disenchanted with the investment, Weston's father again obtained a purchaser. Once again, a conveyance of the equitable interest was made without the recording of any documents. The subsequent purchaser, too, decided to sell the property, at which point Weston's father determined to buy it. He then determined to convey legal title to a subsequent purchaser. However, the record title was still In the original owner's names and their mortgage had never been discharged. Instead of obtaining the necessary documents to clear the title of all equitable and legal claims, Weston forged, and In some cases directed

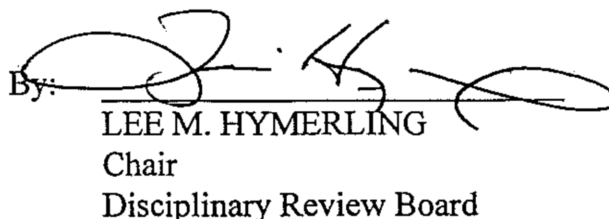
his staff to forge, the names of the prior owners. After the buyer's attorney challenged the authenticity of the signatures, Weston assured him that they were genuine, only to admit the forgeries after the buyer's attorney obtained a report from a handwriting expert. The Court suspended Weston for two years, finding that he had made a false statement of material fact, breached his responsibilities regarding nonlawyer assistants and made misrepresentations with knowledge that his statements would be relied on, all in violation of *RPC* 4.1(a)(1), *RPC* 5.3 and *RPC* 8.4(a) and (c).

Here, there are some mitigating factors. Although respondent was involved in a conflict of interest situation, there was no evidence of economic harm to his clients. In addition, the acts for which respondent is being disciplined occurred between 1986 and 1988, nine to eleven years ago. Respondent has no prior ethics history, although one pending matter involves allegations of serious misconduct. Lastly, at the time respondent represented the Perezes, he was young and inexperienced, having been recently admitted to the bar.

Based on the foregoing, the Board unanimously determined to suspend respondent for eighteen months. One member did not participate.

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

Dated: 11/2/98



By: ______________________
LEE M. HYMERLING
Chair
Disciplinary Review Board