B

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-174
District Docket Nos. XIV-02-111E
and XII-04-901E

IN THE MATTER OF	
ALCIDES T. ANDRIL	
AN ATTORNEY AT LAW	

CORRECTED
Decision

Argued: July 20, 2006

Decided: August 30, 2006

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

Donald A. DiGioia appeared on behalf of respondent.

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

This matter came before us on a recommendation for discipline (censure) filed by the District XII Ethics Committee (Dec). It arises out of an improper practice developed and implemented by respondent's secretaries in real estate matters.

Specifically, the secretaries overcharged clients for title costs so that the law firm would not have to absorb the costs associated with the secretaries' late payment of mortgage payoffs. Respondent was unaware of this practice.

For the reasons stated below, we conclude that a censure is the appropriate measure of discipline in this matter.

Respondent was admitted to the New Jersey bar in 1976. At the relevant times, he was a partner in the law firm of Forman, Forman, Cardonsky & Andril in Elizabeth.[1] He has no disciplinary history.

On May 16, 2001, a random audit performed by the Office of Attorney Ethics (OAE) led to the discovery of a $200 overcharge in a real estate matter handled at the Forman firm. When the OAE auditor questioned respondent about the overcharge, he stated that he had an arrangement with the title company to charge extra money to cover the cost of "survey readings." That was not true.

---

[1] The formal ethics complaint identified respondent's firm by this name. However, throughout the DEC hearing, the witnesses' testimony suggested that the firm's name varied over the years. For ease of reference, we refer to the firm as the Forman firm.

In a complaint dated September 2, 2004, the OAE charged respondent with violations of RPC 5.3(a) (failure to adopt and maintain reasonable efforts to ensure that nonlawyer employee conduct is compatible with professional obligations of lawyer), RPC 5.3(b) (failure of direct lawyer supervisor to make reasonable efforts to ensure that nonlawyer employee conduct is compatible with professional obligations of lawyer), and RPC 5.3(c) (imposing responsibility upon lawyer for conduct of nonlawyer employee that would violate RPCs if engaged in by lawyer), RPC 8.1(a) (knowingly making false statement of material fact to a disciplinary authority), RPC 8.1(b) (failure to correct misapprehension known to have arisen in a disciplinary matter), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). In his answer, respondent admitted to having violated RPC 5.3(a), RPC 5.3(b), and RPC 8.1(a). He expressly denied having violated RPC 5.3(c), RPC 8.1(b), and RPC 8.4(c).

In his answer, and at the DEC hearing, respondent also admitted the following facts:

> 1. Respondent "handled a substantial number of real estate matters for his firm . . . from January 1, 1999 to May 16, 2001;"

2. "[O]n 241 files identified by the Respondent[,] clients were overcharged $100 to $200 for title policies or surveys;" and

3. "[I]n total, $38,222.33 was repaid to clients by the Respondent's firm."

[1T6.[2]]

At the DEC hearing, the OAE presented Mimi Lakind, a random audit program investigator, as the only witness. Lakind testified that she began a random audit at the Forman firm on January 17, 2001. She was unable to complete the audit that day, so she returned on May 16, 2001. During the May visit, Lakind and a newly-hired OAE investigator, Rajat Gupta, inspected some real estate and personal injury files.

On the ledger card for a real estate closing for a client named Ocena, Lakind noticed that "there was some type of over disbursement." Upon examination of the file, Lakind and Gupta observed that the amount identified on the RESPA as due the title company and the surveyor was $100 more than the actual amount of each vendor's invoice and of the checks issued. The extra $200 taken from the client was characterized as a "file expense."

---

[2] "1T" refers to the hearing transcript dated October 11, 2005.

Lakind then sat down with respondent – the firm attorney who handled the real estate matters – to "get an explanation for what had happened." According to Lakind, respondent "simply and very calmly" told her that "title work involved reviewing documents and other things and he had an arrangement with the title company and the surveyors to charge extra to cover that extra work." Lakind, who had never heard of such an arrangement, noted respondent's explanation and decided to check the information later.

Lakind testified that, during the May 16, 2001 visit, she did not have a basis for challenging respondent's explanation of the overcharges on the Ocena file; therefore, she denied having given respondent instructions to straighten the matter out at that time. Although Lakind's final report stated that respondent had been instructed to end the overcharge practice "immediately and to refund all clients the funds taken in excess of the actual . . . charges," Lakind did not know when she had told him that: "I just said he was told that. I didn't say I told him in October or I told him in February but I did tell him it had to end."

After Lakind's meeting with respondent, she called one of the title companies and asked whether it had an agreement with

respondent that permitted him to charge additional money for the services rendered. The representative answered "no." Lakind also called a surveyor, who gave her the same answer.

On October 2, 2001, Lakind called respondent and asked if he wanted to reconsider his May 2001 explanation. Respondent explained to Lakind that his original explanation had been prompted by his surprise in learning about the overcharges. He then told Lakind that his secretaries had been responsible for this practice, of which he was unaware and which he was shocked to discover. Further, respondent told Lakind that all clients had been refunded their overpayments.

On October 19, 2001, Lakind wrote a letter to the Forman firm and requested, within ten business days, "a listing of all files on which you have refunded trust funds that were deducted at closing for amounts in excess of the actual billing by their parties, such as title companies and surveyors," among other things. On October 31, Forman firm partner Robert Cardonsky responded, stating, in pertinent part:

> As you were informed there were overcharges associated with the billing for title costs for [sic] which we were unaware and which were discovered in the course of your last visit. We were able to ascertain that this practice had occurred during approximately eighteen months preceding your May audit.

> We have reviewed all of the files closed during this period and have returned all of the overcharges to each client with a letter of explanation. A [sic] per your request attached hereto is a list of the files for which overcharges were refunded.
>
> [Ex.R-5.]

Lakind returned to the Forman firm in February 2002. At that time, she interviewed respondent's secretaries. Lakind described her interview of one of them:

> Well, Miss Anjos said that she and Miss Fernandes started this practice because the real estate practice that Mr. Andril had was so voluminous they couldn't keep up with it as far as getting the payoffs in time.
>
> Even though the seller was being charged for overnighting the payoffs, they said there were times they didn't get the payoffs out on time and so they needed to find a way to have extra money to cover that.
>
> And the problem occurred when they were doing closings that were FHA closings, which are federally insured loans, I believe. On those RESPAs the attorney was not allowed to put any miscellaneous charges, couldn't charge for overnight, couldn't charge a variance between the notice of settlement and the actual amount.
>
> The only thing you could put on there were the actual disbursements you were going to make, the actual amount of the notice of settlement, . . . the actual amount of the filings fees, et cetera, but no postage, copying, fax, miscellaneous charges, they

were not permitted. If you put them on there, they kicked the RESPA back.

So they said [sic] the only way that they could generate any extra money without raising the fee — because Mr. Andril explained to me that the real estate business was very competitive *among* attorneys. There were a lot of attorneys doing real estate, that he got business from a number of real estate brokers that routinely recommended him and that the only way to continue to do that was to keep his fee low and competitive.

So they couldn't raise the fee so what they did was they added the money to the title policy and sometimes the survey, most of the times just the title policy, and that extra money was taken out with a file expense check and they would then have the extra money if they were too busy to make the mortgage payoff.

That's the explanation they gave me for why they did this practice.

[1T61-6 to 1T62-23.]

Notwithstanding the secretaries' testimony that mortgage payoffs were not always made in a timely fashion, Lakind's sample review of the files uncovered no matter in which a payoff had been delayed.

The secretaries told Lakind that respondent knew nothing about their overcharging practice. After Lakind met with the secretaries, she talked to respondent again. Lakind testified

that, when she brought up the issue of non-FHA mortgages, respondent became very angry and wanted to know why Lakind was "suddenly doing this," inasmuch as "everybody did it, it was not something that was out of the ordinary."

The following witnesses testified on respondent's behalf: Forman firm secretaries Grace Anjos and Isabel Fernandes; Forman firm bookkeeper Marilyn Bell-Harris; Forman firm attorneys Patricia Eiges and Robert Cardonsky; and attorney Luis R. Sanchez, who was respondent's expert witness in this disciplinary matter. Respondent also testified.

Anjos testified that she worked at the Forman firm from September 1984 through March 2004 when, at respondent's request, she left to join him at his new firm. Anjos had been doing real estate closings since 1987. By 1999, when the practice was implemented, Anjos considered herself a "[w]ell experienced" real estate secretary.

Fernandes testified that she was employed by the Forman firm from 1996 through 2001. She had been a real estate secretary there from 1999 through the end of her employment. She, too, went with respondent to his new firm, but eventually left the position because of the long commute.

Anjos and Fernandes testified that the overcharging practice was Anjos's idea, that Fernandes went along with it, and that respondent knew nothing of it. This was consistent with what they told Lakind in February 2002, and a private investigator on May 31, 2001.[3]

Anjos and Fernandes processed the Forman firm's real estate closings. Respondent had a high-volume practice, with 600 to 700 closings per year, and up to five to eight a day. The firm charged real estate clients a flat fee – $850 in the case of a "purchase closing."

The secretaries testified that the overcharging practice was implemented in approximately 1999, as a way to "cover" for their payoff delays. Although the practice first started with FHA loans, eventually it expanded to non-FHA matters as well.

Some files were overcharged $100, while others were overcharged $200. There was no method for determining how much a file would be overcharged.

---

[3] The investigator, Frank Kelly, though available, did not testify. Instead, the parties stipulated that, in May 2001, the secretaries gave him information that was consistent with their hearing testimony with respect to who initiated and developed the practice and respondent's lack of knowledge.

Anjos explained why the practice started with FHA loans. She testified that the firm "couldn't charge for the FedEx's, overnights, you know, the usual," including notices of settlement, despite the fact that the charges were actually incurred. Thus, the firm was required to absorb these costs.

The other problem involved the payment of per diem interest charges. Anjos and Fernandes explained that a mortgage payoff was supposed to be sent out on the day of the closing, but that frequently did not happen due to the volume of work. The additional interest, which would accrue on a per diem basis, had to be paid by the firm. This entailed asking the bookkeeper for the money.

According to Fernandes, due to the bookkeeper's workload, she could not always issue the check on the day of the closing. Because Anjos did not want the bookkeeper to know that she had "screwed up sending mortgages out late," Anjos decided to overcharge the files instead.

Not every file incurred per diem charges, but extra money was charged. Anjos explained: "It became a habit after a while."

Fernandes testified that the bookkeeper never asked why the secretaries had stopped making requests for money. When

Fernandes was asked whether there were "other avenues" that she could have pursued "to make sure that those penalties did not accrue," she answered: "Okay. Yes, uh-hum."

According to Fernandes, prior to the institution of the practice, respondent was made aware that sometimes the firm had to "cover" the secretaries' delays. He asked the secretaries to "be careful."

Fernandes and Anjos knew that their overcharging practice was wrong, but feared losing their jobs as a result of their payoff delays.

When the secretaries' misconduct came to light, they offered to resign. The offer was not accepted; they were not made to contribute to the refunding of the overcharges to the clients. In addition, there was no discussion about reporting the matter to the police or prosecutor.

Respondent testified that he never looked at the real estate file expense checks before signing them because he had "confidence" in the firm's bookkeeper. According to respondent: "We pretty much raise the corner and you sign them. You're counting on everybody else getting it right." In fact, respondent added, it would have been impossible to find the time to "sit down and analyze every single check and compare those

checks to the closing statement and compare the bills to the rest."

According to the bookkeeper, Fernandes and Anjos rarely asked her to issue checks for additional monies on real estate matters. Occasionally, however, they would get "a couple days behind and . . . ask for a lot of money" because the interest due had increased. This annoyed the bookkeeper because the money belonged to the firm. However, she never reported to any superior the payment of the extra funds, and no one ever questioned her about it.[4]

At some point, the bookkeeper testified, Fernandes and Anjos stopped requesting additional funds from her. This was around the time that the office had been reorganized; and, therefore, the bookkeeper assumed that the secretaries had become "so organized that they just didn't need me anymore."

The Forman firm witnesses were uniform in their description of what transpired after the secretaries' conduct had come to light at the May 16, 2001 audit visit. After Lakind left that day, respondent told his partner, Robert Cardonsky, what had

---

[4] Respondent testified that the bookkeeper never told him that she was writing checks to cover for the secretaries' delayed payments.

happened. Either that day or the next, a distressed and angry respondent confronted Anjos and Fernandes who confessed, and, in their hysteria, ran into the ladies' room and refused to come out. Eventually, respondent and Cardonsky had to go into the ladies' room to try to calm them down and coax them out. The scene was described by the firm's witnesses as "pandemonium," "emotional turmoil," "hysterical," "frenzy," and "melt down."

Anjos and Fernandes testified that respondent, who was very upset and angry, asked them what had happened and why they "did this." Anjos told him that she had "started bumping the prices on the title costs," to which he truthfully retorted: "but I never told you that." Crying, Anjos and Fernandes told him that, due to the volume of work, they were making a lot of mistakes.

The secretaries did not pocket the money that they overcharged. The money went into the firm's coffers. No single partner, particularly respondent, benefited from the overcharging practice because the partners were paid a weekly salary and shared in firm profits on a strict percentage basis, which was not based upon the amount of business generated per partner.

The Forman firm witnesses also were uniform and adamant in their opinion that no one, including respondent, knew what Anjos and Fernandes had been doing. Respondent's partners, Patricia Eiges and Robert Cardonsky, testified about respondent's state of mind and the actions he and the firm took after May 16, 2001.

Eiges testified that, on May 17, 2001, respondent told her that the overcharges had been uncovered, the secretaries had confessed, and he "had kind of given a crazy explanation [to Lakind] about doing title review and/or survey reviews for the title company, and that's what that charge was for that particular file." According to Eiges, respondent told Lakind the story because he "felt he had to give her an explanation." He was "very upset" with the explanation and told Eiges that he wanted to contact Lakind and tell her that he had given her "a false explanation as to that particular file."

Eiges, who conceded that the secretaries were overworked, believed that they should have been fired. However, she was outvoted by respondent and Cardonsky, who chose to retain them because the firm needed them to help straighten out the files.

Cardonsky testified that, on the day of May 16, 2001, respondent went to him, "incredibly upset" about Lakind's questions. He told Cardonsksy that, when he was asked about the

"negative balance," he "kind of panicked and gave some cockamamie explanation, which was not truthful and he was beside himself about that."

The next day, according to Cardonsky, respondent "went crazy" and was "just really incredibly upset" after he had learned about the overcharges. Respondent's reaction convinced Cardonsky that he did not know about the improper practice. In addition, respondent's demeanor was such that, in Cardonsky's opinion, there was no way that he could have known what the secretaries had been doing. Cardonsky, too, was upset because respondent had not been supervising the secretaries to make sure this would not happen.

Cardonsky and respondent confirmed that the secretaries were not fired because the firm needed them to help sort out the files, particularly because it was in the middle of the "busiest season," and because they had not profited from the overcharges. Anjos and Fernandes were longtime employees, and the firm prided itself on the fact that it was like one big family. The secretaries also were "extremely contrite" and willing to do anything to rectify the situation. Moreover, according to Cardonsky, respondent should have supervised them better.

In order to rectify the situation, respondent took $50,000 out of his personal equity line. Letters were written to the clients informing them that they had been overcharged and enclosing refunds. The letters did not explain how the overcharges had occurred.

After the incident, the Forman firm took corrective action to prevent a reoccurrence of the misconduct. According to Eiges, the firm hired "another girl to help with the real estate department," and the real estate practice was conducted with "much more supervision."

At oral argument before us, too, respondent's counsel asserted that more employees have been hired, all charges now reflect the exact amount of fees and expenses, and closing documents are sent out immediately after the closing to avoid additional per diem interest.

Respondent testified that he had a very busy practice, with five to six closings a day. He handled the real estate files during the attorney review, inspection, and mortgage commitment phases. Once the mortgage commitment was issued, the file was turned over to one of the secretaries, who then set up the closing. The secretaries prepared the HUDs and informed the

clients how much money they were required to bring to the closing.

Respondent and Eiges testified that they never checked the figures on the HUD statements against the invoices. According to respondent, he did not have the time to check figures for title and surveys, in particular, because there were multiple title bills. His emphasis was upon time management and focusing on the legal issues. He knew that surveys generally ran between $400 and $500. Title charges varied because of the "number of components that went into that." He relied upon his staff to get these numbers correct.

Respondent trusted Anjos and Fernandes completely. They were not "just secretaries." For example, in 2001, when his wife developed cancer, they had arranged his schedule so that he could be with his wife and tend to his real estate matters.

Respondent testified about his conversation with Lakind on May 16, 2001. She questioned him "for a good three hours" about several trust account recordkeeping issues. Because respondent could not answer many of her questions, Lakind was upset with him.

Respondent temporarily left the office that day to attend a closing, and, when he returned, Lakind spoke to him again. She

and Gupta placed a real estate file (Ocena) in front of him and asked for an explanation of the negative balance in the trust account and the $200 difference between the actual costs of title and survey and the amounts charged the client. Respondent explained what transpired:

> [Gupta]'s standing next to me and she's — Miss Lakind is scowling and, you know, for that one moment in time I just wanted the whole thing to end and I realized there is something wrong here. Maybe one is a coincidence, but both? It was a very strange circumstance. And the first thing that came to my mind was to tell her that I was authorized to do survey readings for the title company and that's why those charges were on there.
>
> . . . .
>
> No, it wasn't the truth and it was — you know, you regret — you regret a statement sometimes as it's still coming out of your mouth, but you know, I wanted to be — I wanted to be free of Miss Lakind.
>
> It had been a tough day, a bad day, and I just didn't want to spend any more time with her and it was a stupid, stupid thing to say that I'll regret perhaps forever, but it was not the truth.
>
> [5T96-13 to 5T97-8.][5]

---

[5] "5T" refers to the hearing transcript dated December 14, 2005.

In fact, respondent testified, he "had no clue" as to what he was thinking when he made the false statement. He wanted to talk to Anjos to find out what had happened with the file, but she had gone for the day.

At the end of the day, respondent told Cardonsky about his "cockamamie" answer to Lakind's question. He forthrightly admitted to Cardonsky that it was a misrepresentation.

When respondent confronted Anjos the next day, she could not explain why she had embarked upon the overcharging practice. He told Anjos and Fernandes that they had to talk to Cardonsky immediately and tell him the truth.

Respondent then "started grabbing the files [he] had most recently closed and looking at those." Respondent and Eiges testified that, after everything had come to light, they and the two secretaries started pulling files and reviewing the HUD statements against the bills. They worked day and night to accomplish the task.

Upon review of the files, it appeared that the first file overcharge happened on May 27, 1999. Although there was no rhyme or reason to the pattern of overcharging, "the definite trend" was consistent with Anjos's testimony that, eventually, overcharging "became a common practice."

Respondent contradicted Lakind's testimony that she confronted him with the truth in October 2001. According to respondent, he called Lakind within five to ten days of May 16, 2001, from a pay phone in the courthouse, but he could not reach her.[6] When respondent returned to the office, there was a message from Lakind. He then called her again and described the conversation as follows:

> I told her that — I started off by saying I need to tell you that I lied and she said, her first words to me were I know you lied because I called your title company and I spoke to the title officer and he told me that that was never an arrangement that you had with the title company. I told her that the girls had been doing this, had been doing it for some time and told her that I didn't know exactly for how long. I told her that, you know, I was trying to figure out.
>
> And she was obviously very busy and she was being very dismissive and she was telling me, you know, it doesn't matter. You signed the closing statements. You're responsible for everything that goes on in the office. The captain of the ship came up a number of times. You're the captain of the ship and you obviously aren't aware of the in re: [sic] Wright case.

---

[6] Lakind denied vigorously that respondent had first corrected his misstatement in May 2001.

> I don't make it a practice of reading ethics cases. I had no idea what that was and it was a very disturbing phone call because I was trying to apologize, but, you know, she wouldn't really accept an apology. I had committed some grievous act that, you know, in her — the way she was talking to me I should have to pay for it.
>
> And I'm not trying to diminish the seriousness of what I said, but it was a very disturbing phone call. You know, it was hard enough to make and then get piled on on top of that, you know, like I said, she's a very difficult person to talk to without feeling like you're on your heels all the time.
>
> . . . .
>
> [S]he said to me I want you to go back — I want you to produce for me all the files, because I had told her I thought it was 18 months or so, a year, 18 months as a rough guesstimate after I had spoken to the girls, and she said to me I want you to pull all the files for the last two years and I want you to provide me with a copy of the closing statement, the survey bill, the title bill and the ledger sheet. I said fine. I will. And that was the end of the conversation. It was not a long conversation, but it was very intense. You know, it was an intense conversation.
>
> [5T113-18 to 5T114-5.]

After the conversation ended, respondent told Eiges about it, and she located the Wright case. He was certain that the conversation with Lakind had taken place in May 2001, because he

called his ethics lawyer to schedule an appointment immediately thereafter.

Anjos, Cardonsky, and Eiges insisted that, within two weeks of Lakind's May 16, 2001 visit, respondent called Lakind and corrected his misrepresentation.

Eiges testified that respondent told her of a conversation that he had had with Lakind "within a week or two weeks following the whole thing unfolding." Respondent told her that Lakind had cited the Wright case, and he asked Eiges to pull it for him. Eiges, in turn, asked an associate to print out the case on Westlaw.

Anjos testified that she was with respondent when, about a week to ten days later, he called Lakind. However, she walked out of his office before their conversation took place so she did not hear what he said. She recalled that Lakind had first called respondent, and he was returning her call, as he had the phone message in his hand at the time.

Cardonsky testified that, within "maybe a little more than a week," respondent (who, Cardonsky added, was obsessed with the lie he had told Lakind) called Lakind and told her that his May 16 statement was not accurate. Cardonsky recalled the event because respondent had come to him afterward, "and he was pale

as a ghost and really shaken apparently by the response he had received." Cardonsky recalled respondent's telling him that Lakind had made a reference to his being "the captain of the ship." He also recalled respondent's citing the Wright case that Eiges was scrambling to obtain. He admitted that he did not witness the conversation between respondent and Lakind.

Respondent testified that, when he spoke to Lakind in mid- to late-May 2001, he and his staff already had started pulling files. However, Lakind told him that she wanted files pulled for the previous two years.

Although respondent claimed that Lakind told him, in May, to pull the files, he stated that she did not direct him to refund the overpayments. Nevertheless, respondent insisted that the clients be reimbursed as soon as possible. On June 4, 2001, respondent deposited $50,000 from his equity line into the firm's business account. His equity line was used, rather than his partners', because he had the equity available. Although, at the time, respondent did not know how much money had been overcharged, he selected the $50,000 amount because he believed that the overcharges might total at least that amount. Respondent estimated that, by the end of June 2001, between

eighty-five and ninety percent of the overcharged clients had been reimbursed.

Although most of the clients had been paid back by the end of the summer, respondent did not inform Lakind of this action. By that time, he had retained counsel and, accordingly, intended that all communications go through his lawyer.

Sometime in October 2001, respondent testified, Cardonsky informed him that he had had a telephone conversation with Lakind, in which she requested information with respect to what the firm was doing to "rectify some of the trust issues that she had identified and what [respondent] had done with regard to . . . the overcharges." Cardonsky asked respondent to prepare the firm's response on the refund issue, which was incorporated into Cardonsky's October 30, 2001 letter to Lakind.

At the DEC hearing, respondent expressed remorse for his misrepresentation to Lakind. However, he vehemently denied that he had not taken steps to promptly rectify the misrepresentation that he made to her in May 2001, claiming that he could not have done so before knowing the source of the problem.

Respondent conceded that he had failed to supervise the secretaries. However, he claimed that "it would have taken an incredible amount of supervision to catch this because . . . it

wasn't something I would normally ever look for." He explained: "My focus was not on those particular items in the closing, it was on other things." He did not ratify or authorize their conduct in any "way, shape, or form."

Attorney Luis R. Sanchez testified as respondent's expert in the field of real estate practice. Sanchez's firm handles about 600 real estate closings per year. He participates in a "substantial number" of them.

Sanchez testified that respondent is the busiest real estate practitioner in Elizabeth. Respondent's secretary told Sanchez that, on one particular day, respondent had twelve closings.

Sanchez stated that the practice of increasing title and survey fees in excess of actual costs is "reprehensible." He opined that, if a mortgage were not paid off promptly, then the per diem interest should come out of the attorney's pocket.

Sanchez testified that he does not prepare RESPA statements. His secretaries prepare the closing documents, such as the HUD and RESPA statements and the affidavits of title. Sanchez does not verify the accuracy of his staff's HUD statements by comparing them with the bills, including charges

and bills for title costs. He depends upon his staff to be accurate.

According to Sanchez, while the RESPA for an FHA loan must reflect actual costs, a conventional matter requires the estimation of certain fees. In his practice, for example, the firm charges "a flat fee as an estimate for what the mortgage recording would be or the deed recording." The mortgage filing fee is $40 for the first page and $10 per page for each additional page. Depending on the size of the mortgage, the fee could total hundreds of dollars. Thus, estimations are required. Sanchez testified: "There are times when you will make $10 and there are times when you lose $10."

Sanchez stated that, because there are many costs associated with a closing, such as the mortgage cancellation fee, FedEx charges, and the charge for paying off a tax sale certificate, it is not extraordinary to have an $800 attorney's fee, plus an additional $600 in costs associated with the closing. Attorneys typically charge an attorney's fee plus estimated costs.

According to Sanchez, unlike the mortgage recording fees, surveyors charge within a certain range. Thus, if Sanchez saw a surveyor charge on a RESPA that far exceeded that range, he

would be suspicious. Title charges are different, however. An attorney cannot "eyeball" a title charge and know whether it is generally accurate.

Sanchez explained that title charges depend upon many factors, such as the value of the property, and the number of endorsements to the policy. Thus, in his expert opinion, an experienced attorney would not be suspicious if he saw a HUD statement title charge that was $200 more than the actual charge incurred.

Sanchez described respondent as "a very honest person . . . widely regarded as a very professional person," and extremely devoted to his practice and clients. When lawyers involved in real estate transactions in which many homes down a chain have to close on the same day learn that respondent is involved, they say "it's not a problem because it will get done." Respondents' clients who have had to go to Sanchez's firm for representation when conflicts arise speak highly of his devotion to them. Sanchez has never known respondent to have done anything inappropriate in his practice.

The Forman firm witnesses also steadfastly maintained that respondent's reputation for integrity and honesty was impeccable. In addition, respondent and Cardonsky testified

that respondent performed pro bono work for the Elizabeth Port Presbyterian Church and an organization called Brand New Day, which builds and renovates low-income housing for Elizabeth's low-income residents. Respondent also has represented many people in the local Portuguese community.

The DEC found that respondent did not know about the secretaries' overcharging practice. The DEC also found that respondent did not correct his misrepresentation to Lakind until she called him in early October 2001. The DEC determined that, in addition to respondent's admission, clear and convincing evidence supported the conclusion that he had violated RPC 5.3(a), (b), and (c), and RPC 8.1(a) and (b).

According to the DEC, the overcharging practice adopted by the secretaries was "incompatible with the professional obligations of a lawyer practicing in the State of New Jersey." Moreover, it was "the attorney's responsibility to review each and every cost associated in a real estate transaction and . . . ensure that only proper costs were charged to a client." Finally, there was no evidence that, prior to May 16, 2001, respondent's firm "had adopted and maintained reasonable efforts to assure that conduct such as the practice here would not

occur." Thus, the DEC concluded, respondent violated RPC 5.3(a).

The DEC also concluded that respondent violated RPC 5.3(b) because he had direct supervisory authority over the secretaries and, yet, he "failed to make reasonable efforts to ensure that the conduct by his two real estate secretaries was compatible with his professional obligations." For example, respondent paid no attention to the checks he was asked to sign, merely lifting the corner and placing his signature on them. This "lack of attention to detail permitted an environment to exist in which the secretaries were free to do as they please." Accordingly, they were able to adopt the overcharging practice.

Respondent also violated RPC 5.3(c), according to the DEC, when, despite previous notice of shortages, he failed to conduct a reasonable investigation that would have uncovered the secretaries' conduct. For example, respondent had been made aware of shortages, but, instead of investigating the reasons, had simply told his staff to be more careful. In addition, he "placed too much trust in his staff," and "failed to make reasonable investigation of his real estate files." Respondent had never compared any of the charges listed on the RESPA with the actual invoices.

The DEC further concluded that respondent violated RPC 8.1(a) by lying to Lakind when she asked him about the overcharges. In addition, respondent violated RPC 8.1(b) when he failed to correct his May 2001 misrepresentation until five months later, after Lakind first confronted him about it.

On the other hand, the DEC concluded that respondent did not violate RPC 8.4(c) because he had been unaware of the secretaries' practice.

In terms of discipline, the DEC believed that respondent's "utter lack of appropriate supervision, which resulted in 241 clients being overcharged for real estate title work and survey costs, warrants a higher sanction of discipline." But for the random audit, the DEC surmised, the secretaries' practice would have continued, and the 241 clients would have suffered financial loss. In addition, the DEC was "troubled" by the lack of discipline imposed upon the secretaries. Accordingly, the DEC recommended that respondent be censured.

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

We first dispose of the most serious charge, that is, the alleged RPC 8.4(c) violation. That rule prohibits a lawyer from

engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation." This charge was predicated upon the claim that respondent was aware of the overcharges. Like the DEC, we find no evidence that, prior to May 16, 2001, respondent had any idea that Anjos and Fernandes were marking up title and survey costs on the RESPA statements. We, therefore, dismiss the RPC 8.4(c) charge.

We find, however, clear and convincing evidence that respondent violated RPC 8.1(a), although not (b). These two provisions prohibit a lawyer "in connection with a disciplinary matter" from

> (a) knowingly mak[ing] a false statement of material fact; or
>
> (b) fail[ing] to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter.
> . . .

Respondent admitted having violated RPC 8.1(a) when he made a misrepresentation to Lakind on May 16, 2001, by telling her that the title company had authorized the overcharges.

As to RPC 8.1(b), although the timing of respondent's correction of his misrepresentation to Lakind was hotly contested, we find irrelevant the date when he set the record straight; this provision of the rule does not apply to the facts

before us. In our view, RPC 8.1(a) expressly covers acts of commission, that is "making" outright misrepresentations to a disciplinary authority. RPC 8.1(b), in turn, applies to acts of omission, that is "fail[ing]" to disclose a fact "necessary to correct a misapprehension known by the person to have arisen in a matter." RPC 8.1(b), therefore, applies to instances when a disciplinary authority misunderstands (i.e., misapprehends) a fact; the attorney knows that the individual is under a misunderstanding; and the attorney permits the individual to continue under the misapprehension, rather than correct the false impression. The facts of this case do not paint this scenario. Respondent made an outright misrepresentation to a disciplinary authority, a violation more properly covered by RPC 8.1(a). Therefore, we determine to dismiss the RPC 8.1(b) charge.

Finally, we conclude that respondent violated RPC 5.3(a) and (b), although not (c). The rule in effect at the time of the misconduct in this matter provided:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (a) every lawyer or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that

> the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or ratifies the conduct involved;
>
> (2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or
>
> (3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.

Respondent admitted to having violated RPC 5.3(a) and (b). We agree that he violated these rules. The clear and convincing evidence established that he abdicated all responsibility for, and undertook no efforts to insure, the accuracy of the RESPA statements prepared by his secretaries.

There is, however, no evidence that respondent violated RPC 5.3(c). Nothing suggests that respondent ordered or ratified the secretaries' conduct. RPC 5.3(c)(1). There is no evidence that he knew of the secretaries' conduct before its discovery by Lakind. Therefore, prior to May 16, 2001, respondent was never in a position where he could have avoided or mitigated the consequences of their misconduct. RPC 5.3(c)(2).

Although the DEC faulted respondent for not conducting an investigation when he learned that the secretaries had not been getting out the mortgage payoffs in a timely fashion, there was no basis for him to have done so. Respondent was informed of the late payments and of the firm's need to cover the additional per diem interest charges before the secretaries had started overcharging clients. Obviously, he could not have discovered a practice that had not yet been adopted and implemented.

Finally, we do not find that respondent violated RPC 5.3(c)(3). This rule pertains to "negligent hiring practices that fail to disclose past instances of misconduct by the nonlawyer." Kevin H. Michels, New Jersey Attorney Ethics: The Law of New Jersey Lawyering § 41:2-3 at 984 (2006). No evidence was presented with respect to this issue. Therefore, there is

nothing in the record to sustain the conclusion that respondent was negligent in hiring the secretaries.

There remains the quantum of discipline to be imposed for respondent's violations of RPC 8.1(a) and RPC 5.3(a) and 5.3(b). In one case, an attorney who made a misrepresentation to a district ethics committee investigator received a private reprimand (now an admonition).[7] When the misrepresentations are accompanied by other ethics infractions, however, a reprimand may be imposed, depending on the seriousness of the other infractions. See, e.g., In re Sunberg, 156 N.J. 396 (1998) (reprimand imposed upon attorney who failed to consult with a client before permitting two matters to be dismissed, fabricated an arbitration award, and lied to the OAE about the fabrication; mitigating factors included the attorney's unblemished disciplinary record, the passage of time since the incident, the lack of personal gain, the absence of harm to the client, the aberrational nature of the misconduct, and the attorney's remorse), and In re Powell, 148 N.J. 393 (1997) (reprimand imposed upon attorney who misrepresented to the DEC that an

[7] Because private reprimands are confidential, the name of that attorney is not disclosed in this decision.

appeal had been filed and who also displayed gross neglect, lack of diligence, and failure to communicate with his client).

Attorneys who fail to supervise nonlawyer staff are typically admonished or reprimanded. See, e.g., In the Matter of Brian C. Freeman, DRB 04-257 (September 24, 2004) (attorney admonished for failing to supervise his paralegal, who also was his client's former wife, which resulted in paralegal's forging client's name on the retainer agreement and, later, on a release and a $1000 settlement check in one matter and on a settlement check in another matter; the funds were never returned to the client; mitigating factors included they attorney's clean disciplinary record, and the steps he took to prevent a reoccurrence); In the Matter of Lionel A. Kaplan, DRB 02-259 (November 4, 2002) (attorney admonished for failure to supervise his bookkeeper, which resulted in recordkeeping deficiencies and the commingling of personal and trust funds; mitigating factors included the attorney's cooperation with the OAE, including entering into a disciplinary stipulation, his unblemished thirty-year career, the lack of harm to clients, and the immediate corrective action that he took); In re Bergman, 165 N.J. 560 (2000), and In re Barrett, 165 N.J. 562 (2000) (companion cases; attorneys reprimanded for failure to supervise

secretary/bookkeeper/office manager who embezzled almost $360,000 from the firm's business and trust accounts, and from a guardianship account; the attorneys cooperated with the OAE, hired a CPA to reconstruct the account, and brought their firm into full compliance with the recordkeeping rules; a bonding company reimbursed the losses caused by the embezzlement); and In re Hofing, 139 N.J. 444 (1995) (reprimand for failure to supervise bookkeeper, which resulted in the embezzlement of almost half a million dollars in client funds; although unaware of the bookkeeper's theft, the attorney was found at fault because he had assigned all bookkeeping functions to one person, had signed blank trust account checks, and had not reviewed any trust account bank statements for years; mitigating factors included his lack of knowledge of the theft, his unblemished disciplinary record, his reputation for honesty among his peers, his cooperation with the OAE and the prosecutor's office, his quick action in identifying the funds stolen, his prompt restitution to the clients, and the financial injury he sustained).

We find that, at a minimum, a reprimand would be the appropriate measure of discipline for respondent's violations of

RPC 5.3(a) and (b) and RPC 8.1(a). However, we have to consider factors in mitigation and aggravation of respondent's conduct.

In mitigation, respondent has an unblemished thirty-year career; the events at issue took place five years ago; he took immediate steps to investigate the problem with the Ocena file, to determine the extent of the scheme, and to reimburse his clients for the overcharges; he expressed remorse; he has an impeccable reputation for honesty and integrity; and he does pro bono work and assists the local Portuguese community in Elizabeth.

In aggravation are the number of files involved (241), the amount of money taken from the clients (more than $38,000), respondent's delay in correcting the false statement that he made to Lakind in May 2001, and the risk that respondent's lack of supervision over the secretaries' work posed to clients and third parties who relied on the accuracy and propriety of the real estate transactions. Left unsupervised, employees may, with relative impunity, engage in improper conduct of almost unimaginable consequences.

We find that the factors in aggravation outweigh those in mitigation. Thus, in this case, we determine that a censure is

the appropriate measure of discipline for respondent's misconduct.

Vice-Chair Pashman did not participate.

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

Disciplinary Review Board
William J. O'Shaughnessy Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Alcides T. Andril
Docket No. DRB 06-174

Argued: July 20, 2006

Decided: August 30, 2006

Disposition: Censure

Members	Disbar	Suspension	Censure	Reprimand	Admonition	Did not participate
O'Shaughnessy			X			
Pashman						X
Baugh			X			
Boylan			X			
Frost			X			
Lolla			X			
Pashman			X			
Stanton			X			
Wissinger			X			
Total:			8			1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel