Supreme Court of New Jersey
Docket No. DRB 14-310
District Docket Nos. XIV-2010-0187E, XIV-2010-0188E, XIV-2010-0473E, and XIV-2011-0128E

IN THE MATTER OF

MARIA J. RIVERO

AN ATTORNEY AT LAW

Decision

Argued: January 15, 2015

Decided: June 9, 2015

Timothy J. McNamara appeared on behalf of the Office of Attorney Ethics.

Mark M. Tallmadge appeared on behalf of respondent.

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

This matter was before us on a recommendation for a (strong) censure filed by the District VB Ethics Committee (DEC). A six-count complaint charged respondent with having violated RPC 1.2(d) (counseling or assisting a client in conduct that the lawyer knows is illegal, criminal, or fraudulent), RPC 1.3 (lack of diligence), RPC 1.7(a) (conflict of interest), RPC 1.5(b) (failure to set forth, in writing, the basis or rate of the fee), RPC 1.15(a) and

(b) (failure to safeguard funds), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The Office of Attorney Ethics (OAE) urged the imposition of a one-year suspension. Respondent's counsel, in turn, took the position that either a reprimand or a censure is appropriate. For the reasons expressed below, we determine to impose a three-month suspension.

Respondent was admitted to the New Jersey bar in 1992. She has no prior discipline.

On April 11, 2014, the OAE and respondent entered into a stipulation of facts, whereby respondent admitted many of the salient facts, as well as some of the ethics charges against her. Specifically, she admitted having violated RPC 1.5(b) and RPC 8.4(c) in the three real estate transactions at issue. On July 9, 2014, the parties executed a "Stipulation of Disputed Facts."

According to respondent, over the twenty years preceding these three matters, she handled more than 1000 real estate closings. Only a handful of those involved Jorge Abbud, the individual who referred the buyers in these transactions to respondent. Apparently, Abbud was employed by each of the lenders as a loan officer, at the time of these transactions.

Although considerable attention was paid below to the issue of respondent's drafting of the contracts of sale in the three transactions, nowhere in the record is there any evidence that she

prepared them on behalf of both the buyers and the sellers. In fact, respondent testified that she first met the sellers at their respective closings.

I. The Diamantino from Gallegos Transaction

On March 10, 2008, respondent represented Christian Diamantino in the purchase of property located at 543 East 27th Street, Paterson, from Miguel and Beatriz Gallegos. The purchase price was $325,000. Respondent also represented the Gallegoses in the preparation of closing documents and related services in connection with the transaction, but then only at the closing, where she met them for the first time. In addition, she served as the settlement agent for the transaction, having drafted the HUD-1. As seen below, respondent obtained conflict-of-interest waivers from both parties.

The signature line for the preparer of the HUD-1 bore the following statement, directly underneath respondent's signature: "To the best of my knowledge the HUD-1 settlement statement which I have prepared is a true and accurate account of the funds which were received and have been or will be disbursed by the undersigned as part of the settlement of this transaction."

According to line 303 of the HUD-1, Diamantino contributed $12,215 to the settlement. Yet, respondent's trust account records reveal that she collected no funds from Diamantino for the transaction. Respondent stipulated that she did not disburse the funds in accordance with the HUD-1 that she prepared for the transaction. For instance, according to line 603 of the HUD-1, respondent paid the Gallegoses $57,543 of the closing proceeds. In fact, respondent's trust account records reveal that she did not disburse any funds to them on account of the transaction. Also, on March 12, 2008, respondent wired $45,327 to Jorge Abbud, who was not a named party to the transaction.[1] Respondent told the OAE that the Gallegoses had signed a written authorization for the funds' transfer to Abbud. She stipulated, however, that the lender's closing instructions specifically required her to accurately reflect all receipts, payees, and disbursements on the HUD-1. Respondent did not follow those instructions.

Respondent also prepared a "Use and Occupancy Agreement" for the transaction, under which the Gallegoses leased a portion of the property back from Diamantino, after the sale was complete. In addition, under the terms of a lender-prepared "Occupancy and

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[1] Abbud was later convicted of fraud and jailed for his involvement in fraudulent real estate transactions, albeit none of these transactions.

Financial Status Affidavit" (the occupancy affidavit) that Diamantino signed under penalty of perjury, the property was to become his primary residence. Respondent notarized the occupancy affidavit. She stipulated being aware that Diamantino intended to lease a portion of the property back to the Gallegoses. She also stipulated that, as settlement agent, she was obligated to notify the lender if she became aware that Diamantino did not intend to occupy the property as his primary residence. She did not so notify the lender, because Diamantino had intended to occupy an unregistered basement apartment in the house, after closing.

Both the Diamantino grievance and a grievance filed by Alan Kamel, the attorney for a judgment-creditor, Chase Bank, successor to Chemical Bank, alleged that respondent had failed to satisfy a $4,000 judgment against Miguel Gallegos, obtained by Chemical Bank in 1993. According to respondent, at the closing she asked Miguel Gallegos about the Chemical Bank judgment and was told that it had been paid years ago, through a wage execution. Gallegos was unable to provide respondent with any documentary proof of payment.

Apparently, at the closing, respondent attempted to contact the attorney of record for Chemical Bank, but learned that the attorney was no longer practicing law. Therefore, she directed that, in conjunction with the affidavit of title, Miguel Gallegos sign a document stating that the judgment had been satisfied. She

then proceeded with the closing, believing that, "if the judgment was legitimate and remained unpaid, then Chemical Bank would not be harmed."

Several months after the closing, Kamel informed respondent, apparently for the first time, that he represented Chemical Bank and that the Gallegos judgment had never been paid. Respondent then contacted Gallegos about the judgment. Respondent recalled that, although Abbud had agreed to pay the judgment from the closing proceeds that he had received, he had apparently not done so, because a dispute had arisen about the interest charges.

On May 28, 2008, respondent sent the Gallegoses a letter, requesting documentary proof that the Chemical Bank judgment had been satisfied. They never produced the documentation.

In a March 4, 2009 letter, Kamel told respondent that Diamantino had sold the property more than one year earlier, that Chemical Bank's judgment had increased to $4,383, and that it remained unpaid. He also asked respondent whether she planned to make his client whole by filing a claim against the title company or by obtaining funds from the Gallegoses.

Respondent admitted that she should not have closed title without satisfying the Chemical Bank judgment and that she should have either escrowed funds to satisfy that debt or halted the closing.

Respondent stipulated that she violated RPC 8.4 (c).[2] She also stipulated that she represented both the sellers (the Gallegoses) and the buyer (Diamantino) in the transaction. Although she stipulated that she failed to set forth, in writing, the rate or basis of her fee for the representation, she admitted a violation of RPC 1.5(b) as to Diamantino only, not as to the Gallegoses. As seen below, respondent argued that, by listing her fee on the HUD-1, the Gallegoses had sufficient notice of the fee she charged.

II. The Mantashian from Graham Transaction

Respondent represented Armen Mantashian in the purchase of 71 Hilltop Avenue, Clark, from Russell and Jane Graham. The sale price was $330,000. The closing was held on January 18, 2008.

Respondent also represented the Grahams in the preparation of closing documents and related services for the transaction, but then only at the closing, where she met them for the first time. As settlement agent, respondent prepared the HUD-1 settlement statement.

The HUD-1 bore the same representation of accuracy quoted above, in the Diamantino from Gallegos transaction. Although line 303 of the HUD-1 stated that Mantashian had contributed $44,800

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[2] The stipulation does not tie the violation to specific facts or conduct.

toward the purchase price, he had not contributed any funds toward the transaction. To the contrary, at closing, respondent wired $60,000 of the settlement funds to Mantashian and did not list it on the HUD-1.

Respondent stipulated that she had not properly collected or disbursed the closing funds, despite having certified that the HUD-1 contained an accurate accounting of her disbursements for the transaction. For example, even though the HUD-1 showed $212,874 in total proceeds to the sellers, respondent disbursed only $15,000 to the Grahams. Also, she wired $93,074.46 directly to Jorge Abbud, even though he was not listed on the HUD-1.

In addition to preparing the contract of sale, respondent drafted a "Use and Occupancy Agreement," which the parties signed. The use and occupancy agreement called for the sellers to pay a use and occupancy fee (in effect, rental payments) equal to the buyer's monthly expenses for the loan principal and interest, taxes, and insurance on the property. The agreement also gave the sellers a three-year exclusive option to purchase the property for fair market value, not to exceed $297,000.

Respondent stipulated that, when she prepared the use and occupancy agreement, she knew that Mantashian did not intend to use the property as his principal residence. Moreover, she

stipulated that she had not provided a copy of the use and occupancy agreement to the lender.

On January 18, 2008, respondent witnessed Mantashian execute a lender-prepared occupancy affidavit, as well as a uniform residential loan application, in connection with a mortgage loan application. In those documents, Mantashian certified under penalty of perjury that the $297,000 loan for which he was applying was for the purchase of his primary residence. That was untrue.

Having represented both the buyer and the sellers to the transaction, respondent obtained (and produced) conflict-of-interest waivers signed by both Mantashian and Russell Graham.[3]

About a year after the closing, the Grahams fell into arrears on the use and occupancy agreement fees. Because the parties had escrowed only one year's fees, that fund had been depleted. In a June 24, 2009 letter, respondent notified the Grahams, on behalf of Mantashian, that they were $10,420 in arrears on their payments. The letter warned that they would be evicted and lose their option to purchase the property if they did not pay the required monthly fees, and that "[m]y client is willing to be cooperative but I'm sure you realize that he cannot be paying the mortgage amount out of pocket every month in order for you to live free in his

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[3] Respondent testified that, although Jane Graham had also signed a conflict waiver, respondent was unable to locate it.

property." She continued, "Absolutely the very worst thing you can do is to not respond to me and lose all of your rights in this property outright." Respondent also urged the Grahams to contact her to schedule an appointment so that they could discuss the matter. Respondent stipulated that she had not obtained the Grahams' informed consent to the post-closing representation of Mantashian against them.

Ultimately, the Grahams sued the lender, Abbud, Mantashian, and respondent. According to respondent's counsel, Abbud was convicted of crimes that resulted in a prison term. Respondent's malpractice carrier settled the claim against her for $275,000.

Without further elaboration, respondent stipulated having violated RPC 8.4(c) in the Mantashian matter. She also stipulated that, although she had not represented Mantashian or the Grahams before the real estate matter, she had not given them a writing, setting forth the rate or basis of her fee. She admitted a violation of RPC 1.5(b) as to Mantashian only, however. She claimed that a separate agreement for the Grahams' fee was unnecessary, because her fee was listed on the HUD-1.

III. The Mejia from Esteves Matter

On April 27, 2007, respondent represented William Mejia in the purchase of property located at 20 Alpine Place, Kearney, from

Antonio and Robin Esteves. The purchase price was $400,000. Respondent admittedly represented the sellers as well, albeit for the limited purpose of preparing closing documents and performing related services for the transaction.

As settlement agent, respondent prepared the HUD-1. Directly above respondent's signature on the HUD-1 statement was the same representation about the accuracy of the document, quoted previously.

Line 201 of the HUD-1 stated that the buyer had made an earnest money deposit of $1,000 and brought an additional $9,504 to the closing, for a total contribution of $10,504. Not only did Mejia not contribute $10,504 toward the purchase price, but respondent disbursed $23,984 of the loan proceeds to him. Although the HUD-1 also revealed that the sellers were due $40,657.59, respondent's trust account bank records indicated that she disbursed only $500 to them. Bank records also showed that respondent received $401,845 from the lender, First Magnus.

Prior to the closing, respondent sent the Esteveses the contract of sale and a conflict-of-interest waiver for their review, signature, and return. On March 2, 2007, the Esteveses returned the signed conflict-of-interest waiver. On March 26, 2007, respondent sent Mejia a conflict-of-interest waiver as well.

Respondent was unable, however, to locate a copy of it for ethics authorities.

On April 6, 2007, in response to Abbud's request that the purchase price be changed to $400,000, respondent prepared an amended contract of sale and a new use and occupancy agreement for the transaction. The stipulation is silent about the original sale price.

Mejia executed an Owner Occupancy Agreement, a Mortgagor's Affidavit of Title, and Address Certification. According to respondent, she prepared the Owner Occupancy Agreement as part of the "closing package." In those documents, Mejia certified, under penalty of perjury, that the property was to be used as his primary residence and that there were no other tenants or occupants of the property.

Although the Esteveses executed a Seller's Affidavit of Title, stating that they intended to continue to live at the 20 Alpine Place property after the sale, respondent was aware that Mejia had signed an agreement falsely certifying that he would be occupying the property as his primary residence. Respondent admitted not having informed the lender of Mejia's intention not to use the property as his primary residence.

Ultimately, the Esteveses sued the lender, Abbud, Mejia, and respondent. Respondent settled with the Esteveses for $40,000.

Without further elaboration, respondent stipulated that she violated RPC 8.4(c). She also admitted that she represented both Mejia and the Esteveses, the latter for limited purposes, and that, although she had never represented them before, she did not set forth, in writing, the rate or basis of her fee. Respondent admitted that her failure to do so violated RPC 1.5(b) as to Mejia, but not as to the Esteveses, again, because the HUD-1 listed her legal fee.

The Disputed Facts and Charges

As to the RPC 1.2(d) charge (assisting clients in illegal, criminal, or fraudulent conduct), respondent explained that, although she had prepared closing documents in these matters, knowing that they were not accurate, and although she had permitted them to be used in the transactions, she had not "intentionally" given the lenders false information, by way of those documents. Respondent viewed her actions as less than fraudulent, because they were "not intended to cause a harm to the other side." For instance, in the Mejia from Esteves matter, she gave the lender a "closing package that was signed by the borrower," including "the contract, which . . . states that there will be a use and occupancy and Mr. Abbud, on behalf of the bank, is sitting at my conference

room table saying, don't worry about it, we [the lender] don't care about that."

The Diamantino from Gallegos complaint alleged that respondent lacked diligence by failing to satisfy the Chemical Bank judgment against Miguel Gallegos, appearing in the title search. Respondent proceeded with the closing, based on Gallegos' assurances that the judgment had been paid. Respondent denied lacking diligence in the matter. She contended that, although she had sought further information from Kamel about the debt, he had failed to comply with her request. As mentioned above, at the time of the DEC hearing, the judgment remained open of record.

As previously indicated, respondent admitted that she had violated RPC 1.5(b) with regard to the buyers in these matters, but not as to the sellers. Respondent's position was that the HUD-1 statements listed the fee that she had charged the sellers, who had signed conflict-of-interest waivers containing the parameters of her representation. Respondent believed that those documents, combined, satisfied the requirements of RPC 1.5(b).

Respondent also denied the charge that, by representing both the buyers and the sellers in these transactions, she had engaged in a conflict of interest, under RPC 1.7(a). She denied that she had been involved in the negotiation phase of any of the contracts of sale or ancillary documents that she had drafted. She asserted

that she had merely "filled in the blanks" on the real estate contracts, by inserting the terms previously agreed upon by the parties. She, thus, denied that she had "prepared" the contracts, in the sense of having participated in the negotiation phase of the transaction.

In addition, respondent claimed that she had disclosed to the parties the conflict of interest inherent in the dual representation of buyer and seller and had obtained written waivers from them. In the case of the sellers, the waivers were designed "so they realize that this is what I am going to do for you. I am also representing the buyer and if you agree to this fine, and if not, you have the right to your own attorney." For example, the waiver signed by Russell Graham read as follows:

> I have agreed that Maria J. Rivero, Esq. may represent us in the sale of my property located at 71 Hilltop Avenue, Clark, N.J. to Armen A. Mantashian. Ms. Rivero's services to me will consist of preparing the closing documents on my behalf, obtaining any mortgage pay-off statements, tax or water deficiencies or other adjustments to be made at closing, and addressing any title issues that may appear on the title search. It is specifically understood and agreed that the terms of the Contract for Sale of Real Estate and the Use and Occupancy Agreement and Option to Purchase were drafted by Ms. Rivero at the direction of both parties but were negotiated directly between the parties prior to securing her services.
>
> I hereby acknowledge that I have been informed that Maria J. Rivero, Esq. may have a potential conflict of interest in this representation in that she is representing the Buyer, Armen A. Mantashian, in this purchase. I have been informed

> that I am free to select other counsel at any time and that in the event a conflict arises between me and the Buyer that I have a right to request that Ms. Rivero recuse herself and not represent either party thereafter in this transaction.
>
> I hereby knowingly and voluntarily waive the potential conflict and I wish for Maria J. Rivero, Esq. to continue to represent me as specified above.
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> [Ex.20.]

Respondent obtained similar waivers from the buyers, although she was unable to locate the one from Mejia.

The complaint also charged respondent with having failed to safeguard funds (RPC 1.15(a) and (b)), by disbursing lenders' funds to Abbud, who was not a party to the transactions. Respondent denied that her actions had violated that rule in any of the matters. She further denied that the closing proceeds in these matters had been lenders' funds, asserting that they belonged to the sellers and that she had disbursed them in accordance with the sellers' instructions.

In his summation, respondent's counsel characterized respondent as not a venal person, but an "unwitting dupe," who trusted Abbud and the parties to the transactions. She thought that Abbud had the lenders' authorization to direct her to act as she did.

As mentioned before, the OAE recommended that respondent receive a one-year suspension. Respondent's counsel urged either a reprimand or a censure.

The DEC found three violations of RPC 1.5(b), in that respondent failed to have a written fee agreement with the buyers in each of the three real estate transactions. As to the sellers, the DEC rejected respondent's argument that, combined, the conflict waivers from the sellers and the HUD-1 recitation of the fee they paid her satisfied the requirements of RPC 1.5(b).

With regard to the concurrent conflict of interest charges (RPC 1.7(a)), the DEC disagreed with the OAE's interpretation of the "preparation" of a real estate contract. Under the OAE's interpretation of Advisory Comm. on Professional Ethics Op. 243, 95 N.J.L.J. 1145 (1972) (Opinion 243), an attorney may represent both buyer and seller in the same transaction only if the attorney had no involvement in the negotiation of the terms or drafting of the contract. The OAE considered respondent's typing the contract to constitute "preparation" and, therefore, a conflict of interest, under RPC 1.7(a) and Opinion 243.

The DEC concluded as follows:

> With respect to the conflict of interest allegations, the Complaint asserts only a violation of RPC 1.7(a), namely a concurrent conflict of interest. In circumstances of a concurrent conflict of interest, multiple representation can occur if each affected client

> provides informed consent in writing after full disclosure and consultation, with certain exceptions set forth in the Rule. See, RPC 1.7. The OAE asserts that ethics Advisory Opinion 243 expressly states that the same attorney cannot represent a buyer and a seller in the preparation of a real estate contract. Respondent asserts that she did not represent both the buyers and the sellers during the preparation and execution of the real estate contract, as the drafting of the contract (which Respondent asserts was simply a ministerial task, not representation) occurred during her representation of the buyers, and that her representation of the sellers occurred only with respect to the subsequent preparation of closing documents and the conduct of the closing (Hearing Testimony). Given the particular circumstances of this matter . . . the panel does not hold that RPC 1.7(a) was violated by clear and convincing evidence.
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> [HPR8.][4]

The DEC remarked that respondent may have violated another conflict-of-interest rule, RPC 1.9(a), however, based on the letter that she had sent to the Grahams, eighteen months after representing them (as sellers) and Mantashian (as buyer) in the same transaction. Respondent's June 24, 2009 letter to the Grahams demanded the payment of back rent on behalf of Mantashian. Because the complaint did not charge an RPC 1.9(a) violation, however, the DEC did not find that infraction, but mentioned the issue as a "cautionary matter."

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[4] "HPR" refers to the August 13, 2014 hearing panel report.

The DEC also dismissed the RPC 1.3 charge in the Diamantino from Gallegos transaction, on the basis that respondent had relied on Miguel Gallegos' representation to her that the Chemical Bank judgment had been satisfied by a wage execution. Moreover, the DEC noted respondent's significant steps, after she learned that the judgment remained open, to accommodate the collection efforts of the lienholder.

Finally, the DEC did not find that respondent had counseled or assisted her clients in conduct that she knew was illegal, criminal or fraudulent, under RPC 1.2(d) (mistakenly referred to as RPC 1.3(d) in the hearing panel report). The DEC was unable to attribute the necessary mens rea to respondent or her clients, which the DEC considered to be a pre-requisite to a violation of that rule. The DEC rested its finding on the fact that Abbud knew that at least two of the buyers did not intend to live in the premises, as their primary residences. The DEC also considered that "fraud requires intent to deceive and justifiable reliance, both of which are absent here given Mr. Abbud's actual knowledge. The panel also notes the absence of any criminal prosecution of Respondent, sellers, or buyers, despite the incarceration of Mr. Abbud."

In mitigation, the DEC found that respondent was "another victim" of Abbud's "mortgage rescue criminal enterprise;" that she

had no prior discipline; and that her demeanor at the hearing showed the impact of "the lessons learned."

The DEC considered that, "given [respondent's] history of approximately one thousand real estate closings, the three subject transactions evidencing the ethical failures described herein during the plethora of foreclosure rescue fraud schemes that were prevalent before the recently implemented industry wide crack down" warranted the imposition of a "strong" censure.

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

Respondent agreed to represent three buyers in real estate transactions arranged by loan officer Jorge Abbud. In all three matters, which closed between April 2007 and March 2008, respondent served as the settlement agent and drafted the HUD-1s. Respondent gave the parties the use and occupancy agreements and other customary closing documents for their signature, including sellers' and buyers' affidavits of title. She prepared some of those documents, while others were prepared by the lender. Nevertheless, respondent witnessed the signing of various false affidavits and certifications for the closings. She also disbursed funds in a manner inconsistent with the HUD-1s in all of the transactions. Throughout the proceedings below, she admitted that,

to the extent that she disbursed to Abbud funds that did not appear at all on the HUD-1s and disbursed to the buyers and the seller's funds in amounts that were at odds with the HUD-1s, she was guilty of conduct involving dishonesty, fraud, deceit, or misrepresentation, violations of RPC 8.4(c).

Respondent also admitted that RPC 1.5(b) required her to provide her buyer clients, whom she did not regularly represent, with a writing setting forth the rate or basis of her fee and that, by failing to do so, she violated that RPC. She denied, however, that she had violated that rule with regard to the sellers. RPC 1.5(b) requires that, "when the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation." Respondent's HUD-1 cannot be viewed as the writing communicating the basis or rate of the fee. Likewise, the conflict waiver merely described the scope of the representation. We, therefore, reject respondent's attempt to cobble together documents, after the fact, in an attempt to show full compliance with RPC 1.5(b). We find that respondent's failure to provide written fee agreements to the sellers, too, violated RPC 1.5(b).

Respondent vehemently denied that her actions in these matters constituted failure to safeguard funds, under RPC 1.15(a)

and (b). According to the OAE, by making disbursements to a non-party to any of the transactions, Abbud, and to others in amounts that were at odds with the HUD-1s, respondent failed to safeguard the lenders' funds in all three matters. Respondent countered that the loan proceeds belonged to the sellers, not to the lenders, and that the buyers and sellers had instructed her to disburse the proceeds in the manner that she did.

We need not address the issue of the rightful owner of the funds that went to Abbud, although they were clearly lenders' funds. More properly, respondent's failure to disburse the funds as provided in the lenders' closing instructions and on the HUD-1s violated a more serious RPC, RPC 8.4(c), as respondent admitted. Respondent's conduct in this regard was deceitful and fraudulent. Despite having certified to the accuracy of the amounts collected and disbursed, as listed on the HUD-1s, those certifications were false. That the parties (and Abbud) had authorized the disbursements that were at variance with the HUD-1s does not excuse respondent's conduct. She certified to the world – and, particularly to buyers in the secondary mortgage market – that the amounts received and distributed were as itemized on the HUD-1s, knowing that her certifications were false.

Respondent further violated RPC 8.4(c), when she gave Mantashian and Mejia, the buyers, documents that they signed under oath, representing that they would use the property as their primary residence. That was untrue and respondent knew it to be untrue. Another falsity contained in Mejia's document (Mortgagor's Affidavit of Title) was that there would be no tenants on the property. In fact, the Esteveses continued to live on the property, a circumstance known by both Mejia and respondent.

In furnishing affidavits of title or owner occupancy agreements to the buyers for their signatures and having them sign those documents with the above representations, respondent facilitated what is commonly known as occupancy fraud. That type of fraud takes place when, in order to obtain more favorable loan terms, the borrower (the buyer) misrepresents to the lender that the property will be owner-occupied. Lenders typically offer lower mortgage rates and higher loans for owner-occupied homes, because investment properties historically present a higher delinquency risk.

Again, even if it were true that the original lenders here, as stated by Abbud, were aware that the sellers would remain as occupants of the property, the secondary mortgage market would have been misled by the buyers' sworn representations of sole occupancy, contained in their affidavits of title. By permitting

the buyers, Mantashian and Mejia, to make such misrepresentations, respondent facilitated the occupancy fraud committed by them.

In the same vein, respondent violated RPC 1.2(d). That rule states, in relevant part, that "a lawyer shall not . . . assist a client in conduct that the lawyer knows is . . . fraudulent." Undoubtedly, respondent knew that she effectively assisted her clients to lie on the HUD-1s and loan documents, all in an effort to mislead the original lenders and the future purchasers of their mortgage loans on the secondary mortgage market. Abbud's design was to leave the appearance that the matters had been handled in accordance with the lenders' instructions and according to the HUD-1s that respondent prepared for the transactions. Respondent blindly followed Abbud's directions.

As previously noted, the closing documents were rife with "fraud alerts" and other warnings about fraudulent documents. Respondent shirked her duty, as attorney and as settlement agent, to inform the clients that what they were about to do was fraudulent and to refuse to close the transactions, if they insisted on committing fraud on the lenders. Instead, respondent assisted them. We find unconvincing her explanation that the lenders were aware of Abbud's scheme. There is no indication in the record that Abbud had the lenders' authority to alter the terms of the transaction. Respondent, thus, undoubtedly violated

RPC 1.2(d), by assisting her clients to perpetrate a fraud on the lenders.

We dismissed as inapplicable the charge that respondent lacked diligence in connection with the $4,000 Chemical Bank judgment. More properly, respondent shirked her fiduciary duty to the lender. By taking Gallegos' word that the judgment had been satisfied, she permitted a lien to remain on the property, thereby affecting the lender's rights. She also prevented the buyer from having clear title to the property. We consider this conduct to be an aggravating factor.

There are the charges of conflict of interest to be considered. RPC 1.7(a)(1) states, in relevant part, that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client."

The interests of the buyer and the seller in a real estate transaction are diametrically opposed, presenting an obvious conflict of interest, at early stages of the transaction. Some conflicts, however, are waivable, if certain precautions are taken. They appear in RPC 1.7(b), which reads as follows, in relevant part:

> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation . . . ; [and]
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> (2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

At times, however, the conflict is nonwaivable. Advisory Comm. on Professional Ethics Op. 243, 95 N.J.L.J. 1145 (1972), addressing the issue of the concurrent representation of buyer and seller in a real estate transaction, concluded that the same attorney cannot represent both parties in connection with the preparation and execution of a contract of sale, because, the opinion states, it is at this negotiation phase that a buyer's and seller's interests are at greatest variance. The buyer wants the property for as little money as possible and the seller wants to maximize the sale price.[5]

The OAE argued that, because respondent admittedly drafted the contract and because her name appeared as "preparer" on closing documents, she engaged in an unwaivable conflict of interest.

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[5] Although the opinion does not directly address this issue, its language indicates that the consent of the parties will not cure the conflict. Michels, New Jersey Attorney Ethics, 519:2-2 at 425 (Gann 2015).

Respondent, in turn, urged the DEC to consider that she had no part in the negotiation of the contracts in these matters and that she had simply memorialized the wishes of the parties, when she drafted the contracts. She contended that she performed a ministerial act, as a scrivener, and that she had not prepared any of the closing documents until after the parties had fully negotiated the terms of the contracts of sale. There is no evidence to refute respondent's claims, as no one else privy to these transactions testified below. Moreover, there is no evidence in the record that respondent prepared contracts of sale on behalf of the sellers, whom she met at the closing.

That respondent represented both buyers and sellers in some aspects of these transactions is undisputed, however. But we cannot find a violation of RPC 1.7(a). Respondent testified that she had explained the conflict to all of the clients in the three transactions and had obtained written conflict waivers from them. Those waivers are both comprehensive and fully informative. There is no evidence to contradict respondent's version of the events in this regard. Because the clients gave informed consent, confirmed in writing, after full disclosure, we determine to dismiss the RPC 1.7(a) charges in all three matters.

Finally, as to the conflict charge for respondent's June 24, 2009 representation of Mantashian for the collection of rent from

the Grahams, RPC 1.7(a), the concurrent-conflict-of-interest rule, is not applicable. The real estate closing took place on January 18, 2008. Thus, by June 2009, the Grahams were former clients. More properly, then, RPC 1.9(a) would apply. That rule states that "a lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interest of the former client unless the former client gives informed consent confirmed in writing."

Respondent admitted that she did not have the Grahams' consent to her post-closing representation of Mantashian. Her actions would, therefore, be in violation of RPC 1.9(a). Because, however, the complaint did not cite that RPC, as required by R. 1:20-4(b), we cannot find that it has been violated. R. 1:20-4(b). But we find that respondent's conflict situation post-closing is an aggravating factor.

In summary, respondent is guilty of RPC 1.2(d), RPC 1.5 (b), and RPC 8.4(c) in all three transactions.

The discipline imposed for misrepresentations on closing documents has ranged from a reprimand to a term of suspension, depending on the seriousness of the conduct, the presence of other ethics violations, the harm to the clients or third parties, the attorney's disciplinary history, and other factors, whether in

aggravation or in mitigation. See, e.g., In re Barrett, 207 N.J. 34 (2011) (reprimand for attorney who misrepresented that a HUD-1 statement that he signed was a complete and accurate account of the funds received and disbursed as part of the transaction; the HUD-1 reflected the payment of nearly $61,000 to the sellers, whereas the attorney disbursed only $8,700 to them; the HUD-1 also listed a $29,000 payment by the buyer, who paid nothing; finally, two disbursements totaling more than $24,000 were left off the HUD-1 altogether); In re Mulder, 205 N.J. 71 (2011) (reprimand for attorney who certified that the HUD-1 that he prepared was a "true and accurate account of the funds disbursed or to be disbursed as part of the settlement of this transaction;" specifically, the attorney certified that a $41,000 sum listed on the HUD-1 was to satisfy a second mortgage; in fact, there was no second mortgage encumbering the property; the attorney's recklessness in either making or not detecting other inaccuracies on the HUD-1, on the deed, and on the affidavit of title was viewed as an aggravating factor; mitigating circumstances justified only a reprimand); In re Agrait, 171 N.J. 1 (2002) (reprimand for attorney who, despite being obligated to escrow a $16,000 deposit shown on a HUD-1, failed to verify and collect it; in granting the mortgage, the lender relied on the attorney's representation that the deposit had been made; the attorney also failed to disclose the existence

of a second mortgage prohibited by the lender; the attorney's misconduct included misrepresentation, gross neglect, and failure to communicate to the client, in writing, the basis or rate of his fee); In re Ansetti, 212 N.J. 66 (2012) (censure for making misrepresentations on HUD-1s in two matters and certifying the accuracy of the documents; the attorney also engaged in a conflict of interest); In re Gahwyler, 208 N.J. 353 (2011) (censure for attorney who, in one real estate transaction, did not memorialize his fee arrangement, engaged in a conflict of interest by representing both sides, misrepresented the parties' disbursements and receipts on the HUD-1 statement, and certified the accuracy of those figures, thereby misleading the lender; the attorney's misrepresentations led to litigation in bankruptcy court involving the parties and the attorney; mitigation included the attorney's unblemished record of over twenty years, his noteworthy civic involvement, and the fact that his intentions were not ill-founded); In re Soriano, 206 N.J. 138 (2011) (censure for attorney who assisted a client in a fraudulent real estate transaction by preparing and signing a HUD-1 statement that misrepresented key terms of the transaction; also, the attorney engaged in a conflict of interest by representing both the sellers and the buyers and failed to memorialize the basis or rate of his fee; the attorney had received a reprimand for (1) abdicating his responsibilities

as an escrow agent in a business transaction, thereby permitting his clients (the buyers) to steal funds that he was required to hold in escrow for the purchase of a business and (2) misrepresenting to the sellers that he held the escrow funds); In re Frohling, 205 N.J. 6 (2001) (censure for attorney who, in three "flip" real estate transactions, falsely certified on the settlement statements that he had received the necessary funds from the buyers and that all funds had been disbursed as represented on the statements; the attorney's misrepresentations, recklessness, and abdication of his duties as closing agent facilitated fraudulent transactions; the attorney also engaged in conflicts of interest by representing both parties in the transactions and was found guilty of gross neglect and failure to supervise a non-lawyer employee; prior reprimand); In re Kaminsky, 212 N.J. 60 (2012) (three-month suspension for attorney who, in six matters, acted as the buyers' attorney and settlement agent and prepared HUD-1 statements containing false information about the transactions, including non-existent down payments from the buyers and fictitious amounts of proceeds to the sellers at closing; in two instances, the attorney failed to disclose the existence of side agreements; he was also guilty of a conflict of interest in one matter); In re Nowak, 159 N.J. 520 (1999) (three-month suspension for attorney who prepared two settlement

statements that failed to disclose secondary financing and misrepresented the sale price and other information; the attorney also engaged in a conflict of interest by arranging for a loan from one client to another and representing both the lender (holder of a second mortgage) and the buyers/borrowers); In re Gensib, 209 N.J. 421 (2012) (six-month suspension for attorney who prepared and certified as accurate HUD-1s in five real estate transactions; engaged in a conflict of interest; and failed to memorialize fee agreements; the attorney had an ethics history); In re Fink, 141 N.J. 231 (1995) (six-month suspension for attorney who failed to disclose the existence of secondary financing in five residential real estate transactions, prepared and took the acknowledgment on false HUD-1 statements, affidavits of title, and Fannie Mae affidavits and agreements, failed to witness a power of attorney, and made a false statement to a prosecutor about the closing documents); In re Alum, 162 N.J. 313 (2000) (one-year suspended suspension for attorney who participated in seven real estate transactions involving "silent seconds" and "fictitious credits"; the attorney either failed to disclose to the primary lender the existence of secondary financing or prepared and signed false HUD-1 statements showing repair credits allegedly due to the buyers; in this fashion, the clients were able to obtain one hundred percent financing from the lender; because the attorney's

transgressions had occurred eleven years before and, in the intervening years, his record had remained unblemished, the one-year suspension was suspended); In re Newton, 159 N.J. 526 (1999) (one-year suspension for attorney involved in nine fraudulent real estate transactions; the attorney prepared false and misleading HUD-1 statements in eight transactions, took a false jurat, and engaged in multiple conflicts of interest); and In re Frost, 156 N.J. 416 (1998) (two-year suspension for attorney who prepared misleading closing documents, including the note and mortgage, the Fannie Mae affidavit, the affidavit of title, and the settlement statement; the attorney also breached an escrow agreement and failed to honor closing instructions; the attorney's ethics history included two private reprimands, a three-month suspension, and a six-month suspension).

Respondent's conduct was similar to that of the attorney in Gahwyler, who received a strong censure. Like respondent, Gahwyler misrepresented the parties' disbursements and receipts on the HUD-1 statement, albeit in one transaction, as against respondent's three. Like respondent, Gahwyler was guilty of assisting his client in conduct that he knew was fraudulent. Both respondent's and Gahwyler's actions resulted in litigation involving the parties and the attorney. Both Gahwyler and respondent failed to provide their clients with written fee agreements, although, here,

respondent failed to do so in six instances. Finally, both attorneys engaged in a conflict of interest, respondent with a former client and Gahwyler when he improperly represented both parties to the real estate transaction.

The mitigation presented here is also similar to Gahwyler's. Both attorneys had no prior discipline in more than twenty years at the bar, lacked any ill motive for their actions, and did not profit from their misconduct, other than receiving a fee. In addition, here, the DEC remarked that respondent's demeanor at the hearing showed the impact of "lessons learned."

In aggravation, respondent, a very experienced real estate practitioner with more than 1000 settlements to her name, had to know that the transactions were permeated with improprieties. She also caused substantial harm to clients, as much as $275,000 in the Grahams' matter alone.

Taking into account the totality of the circumstances, which includes the breadth of respondent's experience in residential real estate transactions, we determine that a three-month suspension is appropriate in this case. Members Gallipoli, Hoberman and Zmirich voted for a six-month suspension.

Member Rivera did not participate.

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

Disciplinary Review Board
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Maria J. Rivero
Docket No. DRB 14-310

Argued: January 15, 2015

Decided: June 9, 2015

Disposition: Six-month suspension

Members	Disbar	Six-month Suspension	Three-month Suspension	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh			X			
Clark			X			
Gallipoli		X				
Hoberman		X				
Rivera						X
Singer			X			
Zmirich		X				
Total:		3	4			1

Ellen A. Brodsky
Chief Counsel