SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-303
District Docket No. VA-02-058E

IN THE MATTER OF	:
RICHARD R. THOMAS, II	:
AN ATTORNEY AT LAW	:

Decision

Argued: November 18, 2004

Decided: December 14, 2004

Scott L. Weber appeared on behalf of the District VA Ethics Committee.

Thomas R. Ashley 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 disbarment filed by Special Master Bernard A. Kuttner. The five-count complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a)

(failure to communicate with a client), RPC 8.4(a) (violation of, or an attempt to violate, the Rules of Professional Conduct), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (count one); RPC 1.1(a), RPC 1.15(a) (failure to safeguard property), RPC 1.15(b) (failure to make prompt disposition of funds), RPC 8.4(a), RPC 8.4(b) (commission of a criminal act), and RPC 8.4(c) (count two); RPC 8.4(c) (count three); RPC 8.1(a) (false statement of material fact to disciplinary authorities), RPC 8.4(a), and RPC 8.4(c) (count four); and RPC 1.15(d) (failure to comply with recordkeeping rules) (count five).

Respondent was admitted to the New Jersey bar in 1996. He received an admonition in 2001, after he failed to comply with the terms of an agreement in lieu of discipline. His misconduct in the two matters giving rise to the admonition included failure to inform his clients that he was no longer acting as their attorney and failure to protect their interests upon termination of the representation. In the Matter of Richard R. Thomas, II, Docket No. DRB 01-083 (June 29, 2001).

On September 28, 2004, respondent received a one-year suspension, effective October 29, 2004, for improprieties in a real estate transaction in which he was the closing attorney. In

re Thomas, 181 N.J. 327 (2004). The order further provided that respondent may not apply for reinstatement until the conclusion of all pending ethics matters against him; that, prior to reinstatement, he must complete a seminar in real estate law and ten hours of professional responsibility courses; and that he must practice law under the supervision of a proctor for two years after reinstatement.

Respondent was involved in an unusual residential real estate transaction in which the buyer contributed virtually no funds toward the purchase, the seller received no consideration for the sale of her house, and a "mortgage broker/realtor" and, possibly respondent, received all of the sales proceeds. The presenter contended that respondent was a knowing and willing participant in this fraudulent real estate scheme, while respondent asserted that he represented only the lender in his role as closing attorney and was not aware of, or involved in, any fraud or deceit. The facts in this matter parallel those in DRB 03-452, in which respondent received a one-year suspension, following his involvement in a similarly unconventional real estate transaction. For the reasons expressed below, we determine that a two-year suspension is the appropriate discipline in this matter.

On June 1, 2001, Ruthy A. Saleem, the grievant, bought property located at 908 West Fifth Street, Plainfield, New Jersey. The seller of the property was Willie Mae Brayboy. Although the City of Plainfield assessed the property at $56,800 for tax purposes, the property sold for $106,000. Both women were in dire financial straits. Saleem had spent several months with her four children in a shelter for domestic violence victims and then was relocated to a "transitional living home." At some point, Saleem was told that she had to vacate the transitional living home. Although she looked for a residence, she was not able to find affordable housing. Meanwhile, Brayboy and her son had owned and lived at the Plainfield property since 1979. After her son passed away in November 1999, Brayboy was unable to maintain the property on her own. At the time of the ethics hearing, Brayboy was eighty-one years old. Before the closing, Saleem and Brayboy did not know each other.

In February 2001, Saleem contacted a family friend, John Daniels, Sr., hoping that, as a carpenter, he would be able to locate a home for her. Instead, he told Saleem that his son, John Daniels, Jr. ("Daniels"), was in the mortgage business with his college friend, Antonio Ellis, and suggested that she contact Daniels. Ellis and Daniels told Saleem that she could

buy property with no money down. Saleem was familiar with radio and television programs claiming that property could be purchased with no money down.

After Daniels and Ellis showed Saleem several properties, she decided to purchase the Plainfield house. Daniels told Saleem that she could receive $25,000 in extra loan funds — $20,000 to pay his father to repair the property, which was dilapidated, and $5,000 for furniture.

Before the closing, Saleem purchased homeowners' insurance for $301. On the date of the closing, Daniels instructed Saleem to bring to the closing a treasurer's check for $20.56, payable to Brayboy. Saleem followed Daniels' instructions.

The closing took place at an office building in Clark. On June 1, 2001, Saleem arrived at the closing with Daniels and Brayboy at about 5:30 in the afternoon. She stated that they waited in the lobby for about two hours for respondent to arrive. Ellis introduced respondent to Saleem as the attorney who would be handling her closing. Saleem understood that respondent was representing her, since he was handling her closing and never said that he was not her attorney. Brayboy remained in the lobby while Saleem went into an office with respondent and Ellis to sign the necessary forms. When

respondent asked about her marital status, Saleem answered that she had filed for divorce. Respondent replied, "you didn't hear it from me, you're divorced."

Although she signed "quite a few" documents at the closing, Saleem emphatically denied signing the HUD-1 settlement form ("HUD-1"), or even seeing it at the closing. According to Saleem, she first heard the term "HUD-1" in February 2002, when she applied for a grant from the City of Plainfield to repair the property and was told that she needed a copy of that document. Saleem stated that received a copy of the HUD-1 from Option One Mortgage Company ("Option One") in April 2002. Upon receipt of the HUD-1, Saleem saw for the first time that Brayboy should have received substantial sums from the closing. She testified that "I got sick because I knew that Ms. Brayboy never received a dollar, and I saw then that I had been used for them to take her money."

Saleem testified that the HUD-1 was inaccurate in several respects. Although it indicated that she had paid $25,505.70 at the closing, that was untrue. She was told that she did not need to bring any money to the closing. When shown a $20,000 treasurer's check payable to Brayboy, Saleem denied that she had obtained that check, stating that she was not aware of its

existence until after she filed the grievance against respondent and met with an investigator from the Office of Attorney Ethics ("OAE"). Similarly, Saleem denied having seen a $9,000 First Union check purportedly issued by Angela M. Dawes and payable to Brayboy, along with a letter stating: "To Whom It May Concern: I give to my sister Ruthy Saleem the sum of $9,000 to purchase a home at 908 West Fifth Street, Plainfield, New Jersey. This money is given as a gift and does not have to be repaid. Angela Dawes." Saleem did not have a sister named Angela Dawes and had never heard that name before.

According to the HUD-1, a judgment in the amount of $962.30 in favor of Public Service Electric and Gas ("PSE&G") against Saleem was to have been paid at the closing; however, Saleem stated that that judgment had not been satisfied and that she had not been told to pay the judgment separately from the closing funds. Although, at the time of the closing, another judgment had been entered against Saleem for about $6,000 in connection with a minivan lease, that judgment did not appear on the HUD-1. Saleem asserted that, with respondent present, she mentioned to Ellis that the minivan lease judgment was omitted from the paperwork. In his answer to the complaint, respondent claimed that he was not aware of this judgment until he received

the ethics complaint and that Option One approved of his draft HUD-1, which did not refer to the judgment.

Although the HUD-1 listed $750 for respondent's legal fees and $100 for a title examination fee, Saleem had not been told at the closing that those fees had been charged to her. She also had not been given time to read documents at the closing because respondent had to leave. According to Saleem, respondent did not explain to her the documents that she signed at the closing.

Saleem was not given any documents at the closing because, she was told, the copy machine was not working. Although respondent assured her that he would copy the documents and mail them to her, Saleem did not receive any documents until the end of July, almost two months after the closing, and then only after she had contacted him several times.

Although Daniels had promised Saleem that she would receive $25,000 at the closing to use toward house repairs and furniture purchases, Ellis told her after the closing that "it didn't work out that way." Ellis claimed that there was a mortgage broker's fee of only a couple of thousand dollars that he had to split with Daniels. According to Saleem, respondent was present when Ellis made the above statement.

Saleem was not able to move into the Plainfield property until the end of August 2001, almost three months after the closing, because the property had become a "dope den" occupied by "drug addicts" and, after they were removed, the property required extensive cleaning and repairs. After Saleem moved in, she learned that she needed a certificate of occupancy, which she could not obtain because the property was in violation of the housing code. On November 30, 2001, Saleem received from the City of Plainfield a notice of numerous property code violations. As of the date of the ethics hearing, Saleem continued to reside at the property.

Saleem admitted that, although the closing papers indicated that she had paid $20,000 toward the purchase of the property, she knew that she had not. When she questioned that entry at the closing, Ellis replied that it was a formality and that they had to "move the numbers around." According to Saleem, respondent was present when Ellis made that statement. She believed that the $20,000 would be paid from the loan proceeds. Saleem had never purchased property before June 1, 2001. She trusted Daniels, and was concentrating on relocating her four children and obtaining a divorce from her husband. Both Daniels and Ellis assured her that the transaction was legal.

In July 2002, about one year after the closing, Saleem learned from a Federal Bureau of Investigation agent that Ellis had been murdered in February 2002 and that he had been involved in various mortgage fraud scams. The agent referred Saleem to the OAE.

As for Brayboy, she testified that, after her son passed away, she could not afford to keep the house. Ellis and Daniels, whom she had not met previously, came to her house and told her that she had to move out, which she did. They explained that the house needed repairs.

Brayboy confirmed that, at the closing, they waited a long time for respondent to arrive. According to Brayboy, Ellis brought her into a separate room where respondent told her that he was her lawyer. Although Brayboy had never sold property before, respondent did not explain the paperwork or the transaction to her. Documents placed in front of her to sign were covered with a piece of paper so that the only part of the page exposed was the signature line. Evidence was presented at the hearing indicating that Brayboy suffered from glaucoma and cataracts, making it difficult for her to see; however, she testified that at the closing she was able to see clearly.

Respondent told Brayboy that, although the copy machine was broken, he would send her the closing papers. Brayboy never received any of the closing papers.

Brayboy denied having signed the real estate contract. Like Saleem, she also denied signing, or being shown, the HUD-1 at the closing.[1] Although the HUD-1 indicated that $51,484.37 was paid to the seller, Brayboy denied receiving any funds.

At the end of the closing, Brayboy asked Ellis about her check for the sales proceeds. Ellis replied that she "broke even." Respondent was not present during that discussion.

Sometime after the closing, a friend told Brayboy that she had read in the newspaper that Brayboy had sold her home for $106,000. Until then, Brayboy did not know the sales price. Brayboy denied having received the $20,000 treasurer's check payable to her order or the $9,000 check purportedly issued to her by Angela Dawes. She was not aware of either check until the OAE investigator showed them to her.

At the ethics hearing, Brayboy was shown a handwritten document containing the following language:

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[1] At an OAE interview on May 14, 2003, however, Brayboy stated that the signature on the HUD-1 looked like hers.

To: Richard Thomas

All proceeds from the sale of the property at 908 West Fifth Street, Plainfield, New Jersey are too [sic] be given to Mr. Antonio Ellis of Ellis Investments and Management.

Thank-you.
Willie Mae Brayboy

[Exhibit C-3, Attachment 52.]

Brayboy denied having written the note, having signed the note, or having seen the note at the closing. She further denied having any discussion about giving Ellis or Daniels her sales proceeds. Brayboy would not have given her sales proceeds to Ellis or to anyone because she needed the funds.

For his part, respondent testified that the Brayboy to Saleem transaction was the first closing in which he had prepared all of the documents without assistance. Prior to that time, respondent had shared office space and either another attorney or staff had prepared the documents.

According to respondent, on the evening of May 31, 2001, the day before the closing, respondent received a telephone call from Alfred Perkins, a mortgage broker with CenturyBanc, asking him to handle the Brayboy to Saleem closing. Perkins told respondent that, if Saleem did not close the loan by June 1, 2001, she would be unable to obtain the mortgage loan. When

respondent asked how he would be paid, Perkins replied that Saleem would pay his fees.

Respondent testified that, in his view, his role was to close title for the mortgage company, and that he did not represent either the buyer or the seller. He conceded that he had not advised Saleem or Brayboy that he did not represent them or that they had the right to be represented by an attorney.

Contrary to the testimony of Saleem and Brayboy, respondent asserted that he arrived at the closing before they had, and that he reviewed the closing package from Option One while Ellis went to pick up the buyer and seller. Respondent stated that he had never met Ellis or Daniels until the day of the closing. After he reviewed the closing package, respondent "faxed" the HUD-1 to Option One, who instructed him to make certain changes. After making the changes, he resubmitted the HUD-1 to Option One, who approved it. He acknowledged that he executed the certification at the bottom of the HUD-1, which stated, "The HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds disbursed or to be disbursed by the undersigned as part of the settlement of this transaction." The HUD-1 also states, "It is a crime to knowingly make false

statements to the United States on this or any other similar form."

According to respondent, one of the changes that Option One made on the HUD-1 was the insertion of $1,000 as an earnest money deposit. Respondent testified that an Option One representative informed him that the HUD-1 should reflect a $1,000 gift for the borrower's down payment. In his April 24, 2003 reply to the OAE's request for information, however, respondent asserted: "I do not know who held the deposit monies of $1,000.00 listed on line 201 of the HUD-1. I do not know when or how the deposit monies were paid to the Seller."

In sharp contrast to the testimony of Saleem and Brayboy, respondent testified that both signed the HUD-1 in his presence. He stated that, after he began to explain the documents to Saleem, Ellis took over that function and oversaw the execution of the documents.

According to respondent, because Saleem claimed at the closing that she had paid the judgment to PSE&G, respondent instructed her to provide proof of payment. He stated that Saleem "faxed" to him a letter from an attorney indicating that the judgment had been satisfied. Respondent admitted that $962.30, the amount of the PSE&G judgment, should have remained

in his trust account. He offered no explanation for his failure to return $962.30 to Saleem after she purportedly furnished proof of payment. The OAE investigator testified, however, that respondent's file contained no proof that the judgment had been paid and that the file of the attorney representing PSE&G showed that the judgment had not been satisfied.

With respect to the HUD-1, respondent testified that the amount of the Plainfield tax lien listed on the form, $962.30, was an error; the correct amount was $3,725.73. According to respondent, he had mistakenly inserted the amount of the PSE&G judgment on the HUD-1 in the space for the tax lien. Respondent did not amend the HUD-1 to reflect the correct amount because he was not aware that an amendment could be made after the parties had signed the document. He claimed that he paid the tax lien in full and that there was enough money in his trust account to cover the extra $2,800.

Respondent stated that, at the closing, Saleem presented a $20,000 "Official Bank Check" that did not appear to have been altered. The $20,000 check, issued by Summit Bank, bears the same check number as the $20.56 Summit Bank check that Saleem had provided, pursuant to Daniels' instructions. According to the investigative report, a Fleet (formerly Summit) Bank

representative stated that the check had been issued for $20.56 and was never presented for payment. The OAE investigator concluded that the amount of the check had been altered from $20.56 to $20,000 to mislead the lender that Saleem had contributed sufficient funds to qualify for a mortgage.

In any event, respondent never deposited the Summit check into his trust account. In a July 21, 2003 letter to the OAE, respondent asserted that he copied the $20,000 check for his records and that the check was turned over to Brayboy.

Respondent claimed that, when Saleem produced the $20,000 check, he stated that the closing could not proceed because the borrower was required to produce $25,505.70 at the closing. Ellis and Saleem arranged to pay the balance to Brayboy the next day, Saturday, June 2, 2001. Ellis told respondent that, on Monday, June 4, 2001, he would bring to him proof of payment to Brayboy. Respondent also testified, however, that Ellis was to receive all of the proceeds. The following exchange then took place between respondent and the presenter:

> Q. But he [Ellis] said to you that they were going to pay Ms. Brayboy tomorrow, meaning Saturday?
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> A. That's correct.

Q. But then he also told you that all of the sale proceeds were going to go to him. Correct?

A. That is correct.

Q. Did you question him about that discrepancy?

A. No, I didn't. . . .

Q. Let me just understand the timing on this. What happens first is you're in the office with Ms. Saleem and Mr. Ellis and they tell you that they will give the money to Ms. Brayboy tomorrow, meaning Saturday. Correct?

A. Correct. After I told them there were insufficient funds, I told them they couldn't close because there weren't sufficient funds.

Q. Then after that, Ms. Saleem leaves?

A. That's correct.

Q. Ms. Brayboy comes in?

A. That's correct.

Q. And your testimony is that Ms. Brayboy provided you with the signed release?

A. No. Mr. Ellis wrote it.

Q. Mr. Ellis wrote the release, she signed it?

A. Correct.

Q. And at that point you were told all of the funds were supposed to go to Mr. Ellis. Correct?

A. That is correct.

Q. Did you question Mr. Ellis to say, whoa, wait a second, Antonio, just a few minutes ago you told me that money was going to be given to Ms. Brayboy on Saturday, and now you're telling me that all the money is going to you?

A. No, I did not.

Q. Why not?

A. I didn't.

Q. Did you find it at all unusual?

A. No . . . .

Q. You didn't find it at all unusual that an eighty-year old woman was going to walk away from the sale of her house for a purchase price of $106,000 with zero money in her pocket?

A. Mr. Weber, I didn't know anything about the parties. I was told to do a closing. I arrived at the closing. I was handed a closing package. Two gentlemen I never saw before in my life left. They came back with two women I never saw before in my life. Everyone knew each other. I had nothing to question.

Q. Well, you obviously had some concern, because you asked for a release. Correct?

A. Right . . . .

Q. The release, which is Exhibit 52 to C-3 was allegedly [written] by Mr. Ellis and signed by Ms. Brayboy in your presence. Correct?

A. That is correct.

Q. You didn't ask her to date it?

A. No, I did not.

Q. You didn't ask there to be a witness to witness the signature of it and place the witness' signature next to Ms. Brayboy?

A. No, I did not.

Q. You didn't write the word release or ask anyone to write the word release on top of it?

A. No, I did not.

(T285-1 to T288-18.)[2]

Respondent claimed that, because Brayboy was at the closing with Ellis, respondent was not responsible for explaining matters to her. He testified that, after Brayboy signed the closing documents, Ellis told him that Brayboy's proceeds were to be paid to Ellis because he had "saved" her house from foreclosure. Respondent conceded that he did not recall seeing any reference to a foreclosure in the title search and that he

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[2] T refers to the transcript of the May 27, 2004 hearing before the special master.

had not questioned Ellis about the accuracy of his statement. As stated above, respondent insisted on a "release" before he would disburse Brayboy's funds to Ellis.[3] Respondent did not explain the "release" to Brayboy because she was present when Ellis stated that he would be receiving the proceeds; he, therefore, "figured she has to know what it is."

On Monday, June 4, 2001, Ellis provided respondent with a copy of a $9,000 First Union check payable to Brayboy, purportedly from Saleem's sister, Angela Dawes. Ellis also gave respondent a document stating that Dawes was giving Saleem $9,000 toward the purchase of the Plainfield property by issuing a check directly to Brayboy. Respondent did not contact Brayboy to determine if she had received the funds. When respondent questioned Ellis about the fact that the $9,000 check, in addition to the $20,000 check produced at the closing, exceeded the $25,505.70 that was due from the buyer, Ellis replied that other monies had been owed to him.

As with the $20,000 Summit check, respondent did not deposit the Dawes check in his trust account. The OAE investigator testified that, according to First Union, the

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[3] As the special master observed, the document was an assignment, not a release.

$9,000 Dawes check was never presented for payment, leading the investigator to conclude that it was a bogus check designed to give the appearance that Saleem was a qualified buyer.

According to the OAE investigator, respondent stated that he could not disburse funds until he had proof that Saleem had paid the balance of the closing costs. After Ellis provided him with a copy of the $9,000 check from Dawes, respondent began issuing trust account checks to disburse the closing proceeds. The first check that respondent issued, number 1606, was payable to Ellis in the amount of $22,358.07, containing the following language in the memo column: "As per Willie Mae Brayboy's directive seller's proceeds for 908 West Fifth Street." Respondent explained that, when Ellis showed him proof that Saleem had paid the additional $9,000, Ellis insisted that he receive his money immediately. After respondent issued check number 1606 to Ellis for $22,358.07, Ellis left, only to return about an hour later, saying that the bank would not cash the check because he was African-American. Respondent accompanied Ellis to PNC Bank, the same bank where he maintained his trust account, vouched for Ellis' identity, gave assurances that the check had been issued from his trust account, and asked the bank

to cash the check. The bank representative refused, stating that it would take ten business days for such a large check to clear.

When Ellis demanded at least some of the money, respondent issued to Ellis trust account check numbers 1607 and 1608, in the amounts of $9,000 and $13,358.07, respectively. Although respondent added his name as payee on the $9,000 check, the bank continued to refuse to cash it. Finally, respondent and Ellis went to a different branch of PNC bank, where Ellis cashed the $9,000 check. Respondent denied receiving any of the $9,000.

In a June 27, 2003 letter, the OAE investigator asked respondent several questions about the checks to Ellis. On July 21, 2003, respondent replied:

> The checks to Ellis were sequentially issued first because I could not issue any checks until I had proof that Saleem paid the outstanding balance of her closing costs to Brayboy. Ellis brought me proof of the payment the following business day and insisted that he get his check so I gave it to him. I do not recall as to how I arrived at the figure paid to Ellis. I guess Ellis may have told me the figure. I do not know the services Ellis rendered.
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> [Exhibit C-3, Attachment 22.]

Respondent testified that he had not seen the property before the closing, did not know of its condition, and was not

aware that a certificate of occupancy was needed, adding that the closing instructions did not mention any such requirement.

Respondent claimed that, after the closing, Saleem asked him for a copy of the HUD-1, which he "faxed" to her; sometime later he sent to her another copy, in response to another such request.

According to respondent, the $25,505.70 entry on the HUD-1, representing "cash from borrower," was accurate because Saleem brought $20,000 to the closing and provided proof afterward of additional funds paid to Brayboy. As to the $51,484.37 representing "cash to seller," respondent testified that Brayboy would have received that amount, but for her assignment of proceeds to Ellis. Respondent claimed that Ellis received those funds as follows: Ellis took the $20,000 treasurer's check that Saleem brought to the closing; on June 4, 2001, respondent issued two checks to Ellis for $9,000 and $13,358.07; and, respondent assumed, Ellis kept the $9,000 check payable to Brayboy from Angela Dawes.[4]

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[4] Those funds total $51,358.07, or $126.30 less than the $51,484.37 listed on the HUD-1 as the amount due the seller. As noted above, the OAE investigator testified that neither the $20,000 check nor the $9,000 check was presented for payment.

Respondent did not prepare a client ledger card for the Brayboy to Saleem transaction. According to a client ledger card that the OAE investigator prepared, the transaction ended with a negative balance of $76.78 because respondent disbursed more funds than he had received, thus affecting other trust account funds. In addition, the OAE investigator testified that, because respondent had not recorded the redemption certificates for the Plainfield tax liens, the liens were still outstanding. She also asserted that respondent had failed to forward the original recorded deed to Saleem, which remained in his file.

After the OAE investigator obtained bank records, she compared the actual disbursements with those shown on the HUD-1 and noted the following discrepancies:

Description	HUD-1 Entry	Actual
Amount of Loan	84,800.00	85,899.00
Deposit	1,000.00	None
Cash from Borrower	25,505.70	None
Plainfield Tax Lien	962.30	3,725.73
Cash to Seller	51,848.37	None
Commitment Fee to Option One	515.00	None
Tax Service/Flood Search	82.00	None
Courier Fee	50.00	None
Fed Ex Fee	25.00	None

The special master found that respondent knowingly misappropriated client funds by disbursing the settlement proceeds to Ellis and to himself. The special master rejected as

not credible respondent's claim that the document that Brayboy signed authorized him to pay the sales proceeds to Ellis. According to the special master, respondent knew that a handwritten note would not relieve him of the obligation to make the required HUD-1 disbursement to the seller; respondent knew that the document was a forgery; and, even if respondent's claim were accepted, the document did not authorize respondent to disburse any funds to himself. The special master noted that respondent "conceded that he personally cashed attorney trust account check #1607 in the amount of $9,000" and found that respondent disbursed to himself and Ellis more than the net sales proceeds due to the seller.

The special master concluded that respondent exhibited gross neglect by failing to make required HUD-1 disbursements, making unauthorized disbursements, failing to protect the interests of the buyer and seller, failing to ensure that the HUD-1 was accurate and that all closing settlement payments were made timely, and failing to deliver clear title. The special master further concluded that respondent displayed a lack of diligence by failing to ensure that the seller received the sales proceeds, by failing to promptly comply with Saleem's demands for closing documents, by failing to ensure that the

HUD-1 was accurate and truthful, by failing to ensure that the redemption certificates were recorded, and by failing to ensure that the HUD-1 was followed by promptly making all the post-closing disbursements.

In addition, the special master concluded that respondent failed to keep Saleem and Brayboy informed about the real estate transaction and failed to promptly comply with their reasonable requests for information. The special master also found that, by not disbursing the closing proceeds, respondent failed to promptly deliver funds to a client or third person.

The special master found further that respondent violated the recordkeeping rules by failing to prepare or maintain a client ledger card in connection with the closing. He also concluded that respondent's misrepresentations to the OAE investigator violated RPC 8.1(a) and that respondent violated RPC 8.4(a) by breaching the Rules of Professional Conduct.

Finally, the special master found that respondent engaged in dishonest, fraudulent, and deceitful conduct by making misrepresentations on the HUD-1, proffering the HUD-1 as a true document when he knew it to be false, failing to disburse the sales proceeds to Brayboy and other payees, and making misrepresentations to the OAE.

According to the special master, a determination of whether respondent violated RPC 8.4(b) (commission of a criminal act) was beyond his scope of authority and jurisdiction. He, thus, made no findings in that regard.

The special master recommended disbarment.

Following a de novo review of the record, we are satisfied that the special master's finding that respondent's conduct was unethical is supported by clear and convincing evidence. There is little doubt that the Brayboy to Saleem transaction was replete with fraud. The issue is the extent of respondent's participation in, or awareness of, the fraud.

Respondent viewed his role as the attorney closing title for the mortgage company. Although he claimed that he did not represent either Saleem or Brayboy, he did not advise them of that fact, or that they had the right to be represented by an independent attorney at the closing. He did not refute Brayboy's testimony that he introduced himself to her as his attorney. Both Saleem and Brayboy had a reasonable belief that respondent was acting as their attorney at the closing and that he was there to protect their interests.

In In re Hurd, 69 N.J. 316, 330 (1976), the Court discussed an attorney's obligation to non-clients:

> Twenty years ago this Court recognized that "[i]n addition to the duties and obligations of an attorney to his client, he is responsible to the courts, to the profession of the law, and to the public * * *. He is bound even in the absence of the attorney-client relation to a more rigid standard of conduct than required of laymen." In re Gavel, 22 N.J. 248, 265 (1956). We there specifically reapproved the proposition that the fiduciary obligation of a lawyer applies to persons who, although not strictly clients, he has or should have reason to believe rely on him, id., quoting from Drinker, Legal Ethics (1953), p.92.

Here, both Saleem and Brayboy reasonably believed that respondent represented them at the closing. Respondent took no action to correct their misapprehension. Moreover, Saleem was a first-time home buyer, and Brayboy was advanced in years and had never sold property before this transaction. Under these circumstances, respondent had a fiduciary obligation to protect their interests. He utterly failed to carry out that duty.

The irregularities surrounding the real estate transaction were so numerous and substantial that respondent had to know about the fraud. Respondent failed to deposit the purported borrower's funds into his trust account. Even if the Brayboy to Saleem sale was the first real estate transaction that respondent handled on his own, he must have known that all funds must be deposited into, and disbursed from, his trust account.

Yet, he claimed that the $20,000 check that Saleem allegedly brought to the closing was taken by Ellis, and that, after the closing, Ellis gave him a copy of the $9,000 check supposedly given by Dawes as a gift to Saleem for her purchase of the property. According to respondent's own testimony, he simply copied these checks for his records, failing to deposit them in his trust account.

Even more suspicious was respondent's disbursement of funds after the closing. The first check that respondent issued was to Ellis. He claimed that, until Ellis provided proof that Saleem had produced the required funds, he could not disburse the closing proceeds. It is self-evident that, until all of the funds are received, a settlement agent may not issue checks to the various payees. The fact that respondent, properly or not, was satisfied that the buyer had brought the necessary funds simply justified respondent's actions in disbursing the closing proceeds at that time. It did not explain why Ellis was the first party to receive payment.

Although respondent claimed that Ellis demanded payment, respondent offered no justification for issuing funds to Ellis first. In his answer to the ethics complaint, respondent could not explain how he had arrived at the amount of the check,

$22,358.07, except to speculate that Ellis had suggested that figure. Respondent should have known, from his preparation of the HUD-1, the amount that was due to the seller, $51,484.37. If, as he claimed, he believed that Ellis was entitled to the sales proceeds based on the purported assignment from Brayboy, he should have issued a check to Ellis in accordance with the amount shown on the HUD-1.

The above improprieties, although serious, pale in comparison to the purported assignment of the sales proceeds from Brayboy to Ellis. According to respondent, at the closing, Ellis stated that, because he had "saved" Brayboy's property from foreclosure, the sales proceeds were to be paid to him. Respondent did not question Brayboy about this alleged agreement. He did not explain the "release" to her. He did not assure himself that Brayboy had agreed to the assignment and understood that she would not receive any consideration upon the sale of a house that she had owned for more than twenty years.

Respondent also did not ask why Ellis was entitled to the funds. Although the record does not indicate whether the property was in danger of foreclosure, Brayboy may have been in a better position if the property had been sold at a foreclosure sale. In foreclosure, she would have had an opportunity to

receive some compensation in the event, albeit unlikely, that the property were sold for more than the mortgage balance and other charges. In contrast, Brayboy's assignment of the proceeds to Ellis guaranteed that she would receive no funds upon the sale of her house.

Moreover, if respondent believed that Brayboy had agreed to the assignment, he should have issued a check for the sales proceeds to Brayboy for her to endorse to Ellis. In that way, the funds would have been disbursed in accordance with the HUD-1 and the parties could have effected the purported assignment.

In short, respondent took no action to protect an elderly, unsophisticated seller, who clearly was relying on him to protect her interests.

Unquestionably, two phony checks were involved in the closing. Saleem obtained a treasurer's check from Summit Bank for $20.54, which was altered to $20,000. The record does not identify the person who altered the check or explain the circumstances of the alteration. Similarly, the $9,000 check from Dawes was bogus. Saleem did not have a sister or know anyone named Angela Dawes. Significantly, these two checks are the only checks that respondent did not deposit in his trust account.

In addition, respondent testified that, before the closing, he had not met Ellis. Yet, several days later, respondent not only issued the first closing check to Ellis, but also assisted Ellis in cashing the check. Respondent left his office during business hours, accompanied Ellis to a bank, tried to persuade a bank representative to cash the check for Ellis, issued two separate additional checks to Ellis, added his own name to one of the checks in an effort to convince the bank representative to cash it, and went to a second branch, where the check was cashed. Respondent expended a lot of effort, seemingly at his own inconvenience and for no personal benefit, to assist someone he hardly knew.

The HUD-1 that respondent prepared contained numerous serious inaccuracies and misrepresentations. According to the HUD-1, Saleem paid $25,505.70 and Brayboy received $51,484.37. Instead, Saleem paid $20.56 toward the acquisition of the property and Brayboy received no funds upon the sale of her house. The HUD-1 also listed a $1,000 deposit, when no deposit had been paid; a tax lien of $962.30 that was actually $3,725.73; and several expenses and fees that were never paid.

Other circumstances surrounding the Brayboy to Saleem sale should have made respondent suspicious, if, as he claimed, he

was not involved in any impropriety. Saleem and Brayboy were separated at the closing, each being brought individually into the closing room to sign the documents. The hour of the closing – 7:00 in the evening – was unusual. According to Saleem, when she questioned Ellis about the documents showing that she had paid $20,000 toward the property, respondent was present when Ellis replied that they had to "move the numbers around." Saleem also testified that, in respondent's presence, Ellis stated that there were not enough funds to remit to Saleem the $25,000 that he had promised she would receive for property repairs and furniture, and that he would be receiving only a couple of thousand dollars that he would split with Daniels. Yet, respondent issued a check to Ellis for more than $22,000. Brayboy's testimony that documents placed before her for execution were covered except for the signature line was not rebutted. Respondent also did not contradict Saleem's testimony that he indicated on the closing documents, including the deed, that she was single after she informed him that, while she was in the processing of obtaining a divorce, she was still married at the time of the closing.

Both Saleem and Brayboy testified that they had not signed the HUD-1 and that they had not seen it, or been aware of its

existence, until well after the closing. They also stated that they arrived at the closing before respondent and waited nearly two hours for him to appear. Respondent contradicted both of these statements. Saleem and Brayboy would have nothing to gain by misrepresenting these facts. The record, thus, raises serious questions about respondent's credibility.

We are unable to agree, however, with the special master's conclusion that respondent was guilty of knowing misappropriation. There is no clear and convincing evidence in the record that respondent knowingly misappropriated the funds. The special master noted that respondent conceded that he personally cashed the $9,000 check issued jointly to himself and to Ellis. The record indicates that respondent assisted Ellis in cashing the check. Respondent's testimony that he did not receive any of the funds was not contradicted. We recognize that an attorney can be found guilty of knowing misappropriation, even if the funds are taken for the benefit of a third party. In re Noonan, 102 N.J. 157, 160 (1986). Knowing misappropriation "consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking." Ibid. Here, the record does not contain clear and convincing evidence to support a finding that

respondent knew that he did not have the authority to turn over the funds to Ellis.

Respondent was guilty of other serious infractions, however. His failure to obtain a certificate of occupancy, to record the certificates of sale to remove the tax liens, to satisfy the two outstanding judgments against Saleem, and to provide Saleem with the original deed constituted gross neglect and lack of diligence, violations of RPC 1.1(a) and RPC 1.3. His failure to provide the closing documents to Saleem and Brayboy violated RPC 1.4(a).

Respondent also failed to safeguard property of clients or third persons, a violation of RPC 1.15(a), when he disbursed the closing proceeds to Ellis and overlooked the judgments in favor of PSE&G and the leasing company, which should have been satisfied from the closing proceeds.

By disbursing Brayboy's proceeds to Ellis, respondent failed to promptly deliver funds to a client or third person, a violation of RPC 1.15(b). Respondent's failure to prepare and maintain a client ledger card violated RPC 1.15(d).

While communicating with the OAE during the investigation, respondent produced the $20,000 altered Summit Bank treasurer's check and the $9,000 Dawes check as proof that Saleem had

provided consideration for the Plainfield property. Because the record does not clearly and convincingly establish that respondent knew that those checks had been altered and had not been provided by Saleem, we dismiss the charge that respondent violated RPC 8.1(a) by making misrepresentations to the OAE.

The complaint charged that respondent's participation in defrauding Saleem, Brayboy, and the mortgage lender constituted the commission of a crime, a violation of RPC 8.4(b). Although we cannot conclude from the record that respondent's conduct in that regard amounted to a criminal offense, it is undeniable that respondent's misrepresentations on the HUD-1 constituted a crime. Respondent certified that, "The HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds disbursed or to be disbursed by the undersigned as part of the settlement of this transaction." As mentioned above, the HUD-1 contained numerous false statements, most notably, the funds paid by the buyer and to the seller. The HUD-1 form also stated that, "It is a crime to knowingly make false statements to the United States on this or any other similar form." Respondent's misrepresentations on the HUD-1, thus, violated RPC 8.4(b) and (c). Moreover, respondent's involvement in the fraudulent real estate transaction also violated RPC 8.4(c).

In sum, respondent's infractions included violations of RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.15(a), (b), (c), and (d), and RPC 8.4(a), (b), and (c).

Respondent's misconduct in this matter was serious. Both the buyer and seller were substantially harmed. After the real estate closing, Saleem purchased a house that was in such extreme disrepair that she was cited for housing code violations by the City of Plainfield. Judgments against her were not satisfied at the closing. She was not able to move into the property until three months after the closing. Brayboy suffered even more harm. At the age of seventy-nine, she sold a house that she had owned for more than twenty years and received none of the sales proceeds. The lender must have been defrauded as well because its requirement that the buyer provide cash at the closing was not observed. Option One most likely would not have extended the loan to Saleem under circumstances where she provided no money toward the purchase of the property. Contrary to respondent's contention, thus, Saleem and Brayboy were victims of, not participants in, fraudulent conduct.

Discipline for engaging in fraudulent activity usually results in the imposition of a suspension. See, e.g., In re Newton, 159 N.J. 526 (1999) (one-year suspension for attorney

who participated in a scheme to defraud lenders by drafting lease/buyback agreements that were prepared to avoid secondary financing and to allow the sellers, not the investors, to remain on the premises, such that the lenders were led to believe that the investors would occupy the subject properties as their primary residences; also, the attorney took at least one false jurat and, in eight transactions, acknowledged documents that contained misrepresentations, including affidavits of title, "Fanny Mae" affidavits, agreements, and RESPA statements); In re Panepinto, 157 N.J. 458 (1999) (two-year suspension imposed on attorney who pled guilty in federal court to conspiracy to commit bank fraud in connection with a fraudulent loan from the attorney to a client; the scheme involved deceiving a lender that the funds were available to the purchaser of real estate in order to induce a mortgage commitment); In re Frost, 156 N.J. 416 (1998) (two-year suspension where the attorney breached an escrow agreement, failed to honor closing instructions, and prepared misleading closing documents, including the note and mortgage, the "Fannie Mae" affidavit, the affidavit of title, and the settlement statement; the attorney's ethics history included two private reprimands, a three-month suspension, and a six-month suspension); In re Kaplan, 154 N.J. 13 (1998)

(attorney suspended for two years after pleading guilty to one count of an indictment charging him with wire fraud for making an interstate telephone call for the purpose of avoiding detection of misrepresentations made by the buyer and seller of realty, who had engaged in a scheme to defraud a lender); In re Berger, 151 N.J. 476 (1997) (two-year suspension was imposed on an attorney who submitted false information to his insurance agent with the intent to defraud the law firm's insurance carrier in connection with a fire loss); In re Pocaro, 142 N.J. 423 (1995) (attorney suspended for one year for engaging in fraudulent conduct while acting as attorney for the borrower in a sale-leaseback transaction involving race horses); In re Fink, 141 N.J. 231 (1995) (six-month suspension where the attorney 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, Fannie Mae affidavits, and agreements); and In re Labendz, 95 N.J. 273 (1984) (one-year suspension where the attorney assisted his clients in obtaining a larger loan by submitting a fraudulent mortgage application and altering the contract submitted with the mortgage application to reflect a greater sale price).

As noted earlier, Saleem and Brayboy suffered serious damage. Although Ellis appeared to be the primary culprit, respondent permitted the buyer and seller, and probably the lender, to be victims of fraud. Respondent's disciplinary history includes an admonition and a one-year suspension for identical misconduct. Respondent's participation in two fraudulent real estate transactions involving Ellis shows a deficiency of character. If respondent were given the benefit of the doubt, perhaps his involvement in one improper transaction could be explained by monumentally poor judgment, lack of experience, or extreme naiveté. His participation in two such schemes, however, demonstrates venality and is deserving of a lengthy suspension.

We, therefore, determine that a two-year suspension, to be served consecutively to the one-year suspension imposed in October 2004, is the appropriate level of discipline in this matter. The conditions imposed in the September 28, 2004 order of suspension (that respondent may not apply for reinstatement until all pending ethics matters against him are concluded and until he completes a seminar in real estate law and ten hours of professional responsibility courses, and that he practice under the supervision of a proctor for two years after reinstatement) continue to apply. Members Ruth Jean Lolla and Barbara F.

Schwartz voted to disbar respondent, finding that he knowingly misappropriated client funds, and that, even if the evidence of knowing misappropriation were not clear and convincing, his overall conduct requires disbarment. Chair Mary J. Maudsley did not participate.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
William J. O'Shaugnessy, Vice-Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Richard R. Thomas, II
Docket No. DRB 04-303

Argued: November 18, 2004

Decided: December 14, 2004

Disposition: Two-year suspension

Members	Two-year Suspension	Disbar	Admonition	Disqualified	Did not participate
Maudsley					X
O'Shaughnessy	X				
Boylan	X				
Holmes	X				
Lolla		X			
Pashman	X				
Schwartz		X			
Stanton	X				
Wissinger	X				
Total:	6	2			1

Julianne K. DeCore
Chief Counsel