SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-009

IN THE MATTER OF

STEPHEN R. SPECTOR

AN ATTORNEY AT LAW

Decision

Argued: April 16, 1998

Decided: September 28, 1998

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.

John E. Selser, III appeared on behalf of respondent.

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

This matter is before the Board based on a recommendation for discipline filed by the District XI Ethics Committee ("DEC").

A three-count complaint charged respondent with violations of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation) in each of the three counts. The charges stemmed from respondent's failure to disclose certain information in real estate transactions.

Respondent was admitted to the New Jersey bar in 1968. At the time of these infractions, he maintained a law practice in Teaneck, New Jersey. He currently practices in Englewood, New Jersey.

Respondent has no reported history of discipline. He was, however, the subject of a diversion of discipline in April 1996. A random audit conducted by the Office of Attorney Ethics ("OAE") revealed that respondent did not reconcile his trust account for a two-year period, resulting in the improper commingling of funds. After entering into a diversion agreement, respondent successfully complied with its terms.

At the DEC hearing, respondent's attorney moved to dismiss the complaint on due process grounds. Counsel argued that, based on the excessive delay in bringing an action against respondent, he was unable to adequately defend himself. Counsel pointed out that, although a grievance was filed against respondent in 1989 for conduct that occurred in 1988, respondent was not alerted of the charges until 1995. In the interim the matter was turned over to the U. S. Attorney's Office, which declined prosecution. The matter was sent back to the OAE and a complaint was not filed until July 1996. Counsel argued that, since the time of the conduct in question, the files are no longer available, respondent's memory about the transactions has faded and witnesses were unavailable to testify.

The DEC denied the motion. The Board concurs with the DEC's decision.

The facts are as follows:

Respondent represented a limited partnership named EL Hudson II, created to acquire an apartment building and convert it into condominiums. The partnership was comprised of

three general partners and seven or eight limited partners.

Respondent first represented EL Hudson in the purchase of an apartment complex in West New York, New Jersey. Subsequently, respondent represented EL Hudson in the condominium conversion as well as in the individual closings of the units. Respondent was paid $350 for each closing.

This matter involves three separate real estate closings: Correa/Unit 1-C (closing on October 7, 1988); Davila/Unit 3-C (closing on October 11, 1988); and Davila/Unit 2-A (closing on November 3, 1988). Respondent represented the seller in all of the transactions. The purchasers were represented by Luis Alum. In each of the three transactions, a contract form approved by the Department of Community Affairs was used.

The first transaction involved the purchase of Unit 1-C by Luis Correa. The contract listed a purchase price of $55,000. A rider to the contract provided for a $19,250 repair credit against the purchase price, thereby reducing the price to $35,750. Of that credit amount, $2,000 was to be used as the down payment. Alum prepared two RESPA statements for the closing. One of the RESPA statements recited the repair credit (the client's copy), while the other did not include that information (the lender's copy). Respondent signed both RESPA statements.

The OAE investigator, Joseph Jaruszewski, stated that, based on the figures used in the transaction, the purchaser was able to obtain a $41,000 mortgage against a $55,000 sale price. Because, however, the mortgage lender was unaware of the $19,250 credit, in reality the purchaser obtained more than 100 percent financing for the transaction. In fact, at the

closing the purchaser received a check for $1,463.54.

The second transaction involved the purchase of Unit 3-C by Jose Davila. In this transaction the contract showed a purchase price of $55,000, as well as a $2,000 down payment. A rider to the contract showed a $20,000 repair credit against the purchase price. The seller agreed to take back a second mortgage in the amount of $10,000. The credit and secondary financing were not disclosed to the lender. Respondent was the preparer of the mortgage documents, for which he was paid $200.

Davila, too, obtained more than 100 percent financing. The lender approved a mortgage loan in the amount of $41,250 based on the $55,000 sale price, when, in fact, the repair credit reduced the price to $35,000. The purchaser realized $13,140.11 from this transaction.

In this transaction, Alum also prepared two RESPA statements: one showed the secondary financing and credit (the client's copy) the other did not (the lender's copy). Respondent signed both RESPA statements certifying that the information contained therein was true. Respondent also signed the "Fannie Mae" affidavit, which listed a purchase price of $55,000, falsely showed equity in the property of $13,750 and did not disclose the secondary financing.

In the third transaction, Jose Davila purchased another unit, 2-A. The contract listed the purchase price as $74,000 and a $2,000 down payment. The rider to the contract showed a $25,000 repair credit and a $10,000 second mortgage from the seller. The rider also stated that the purchaser would pay $200 to the seller's attorney, respondent, for the preparation of

the note and second mortgage. Secondary financing was expressly prohibited in the closing instructions from the lender, Northstar Mortgage Corporation.

As with the Correa and the first Davila transactions, the repair credit and second mortgage were disclosed on the client's RESPA statement only. The RESPA statement submitted to the bank did not divulge this information. As with the other two closings, the purchaser obtained more than 100 percent financing. At closing, he received a check for $11,476.28.

Respondent signed the RESPA statement containing the untrue information, as well as the "Fannie Mae" affidavit falsely listing the purchase price as $55,000 and the equity in the property as $19,000. The affidavit also failed to disclose the $25,000 credit for repairs or the $10,000 second mortgage.

Each of the RESPA statements contained the following certification:

> I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction.

The OAE investigator stated that, during the course of his investigation, he was unable to reach any individuals from the mortgage companies involved in the transactions. The investigator explained that the companies had either merged with other lenders, had gone out of business, had moved, had destroyed their files or had sold or canceled the mortgages.

Lewis Alum, the buyers' attorney, testified that, before the closings, he discussed the transactions either with respondent or with respondent's paralegal. Alum denied any involvement in structuring the transactions. He claimed that the realtors and the lending

institutions had "put the deals together" and had come up with the figures so that the buyers could qualify for a mortgage loan. Alum admitted that he had prepared both sets of RESPA statements for each of the three transactions and that respondent had filled out only the side of the RESPA statement that applied to the seller. Alum testified that the law firm for which he worked at that time had instructed him to prepare two RESPA statements: one for the client, reflecting the actual numbers, and the other for the lender.

According to Alum, the lenders knew about the actual terms of the financing, but "wanted a nice, neat package," that is, they wanted no references to any credits or secondary mortgages in the closing documents because they planned to sell the mortgages on the secondary market; if the information had been disclosed on the loan documents, the mortgages would not have been approved, in light of insufficient equity in the properties.

According to Alum, respondent was aware that the RESPAs were different, but signed them nevertheless. Alum asserted that, at the time that these transactions occurred, it was common practice for the lenders to instruct attorneys to exclude information about credits or secondary mortgages.

For his part, respondent testified that he did not negotiate any of the terms or conditions of the three contracts of sale or of the riders to the contracts. He claimed that these negotiations were conducted either by the seller or by the seller's real estate agent. Respondent added that he did not prepare the riders to the contracts, had no contact with the lenders and received no closing instructions from them. According to respondent, Alum had told him that the repair credits and second mortgages had been disclosed to and were

permitted by each of the lenders.

Respondent had no independent recollection about any of the three matters. He contended that whatever recollection he had was the result either of information supplied through the OAE investigation or the statements made by Alum.

Respondent contended that in 1988, which was either the "height of or at least the crest" of the conversions in which he was involved, he did between 750 to 1,000 closings. Respondent did little preparation for the closings, leaving that to his paralegal. The paralegal established a system whereby she would open a file for each potential closing and list the name of the purchaser's attorney inside the file. The paralegal would note in the file the terms of the rider, including any existing credits and the purchase price. Thereafter, she would insert the information relating to the closings on a master spread sheet. According to respondent, he would never see the files until the day of closing; at the beginning of the week the paralegal would give him the schedule of closings for that week. He admitted that the high volume of closings did not afford him time to look closely at the files. At the closings he would look at the bottom line and sign the documents. He would look at the RESPA statement and verify that the cash to the seller corresponded with his own notes.

Respondent conceded that he had signed two RESPA statements for these three transactions: the copy for the client and the copy for the bank.

In mitigation, respondent stated that, because of personal problems going on in 1988, he had very little recollection of what transpired at the time. According to respondent, in 1987 his father was diagnosed with cancer. His parents were living in Florida at the time.

As a result, between September 1987 and his father's death in 1988, he traveled to Florida at least twice a month, leaving on Thursday or Friday and returning on Sunday. In September 1988, after his father's condition worsened, he went to Florida every week. Around that same time his wife filed for divorce. As a result, respondent claimed, he had no recollection of the transactions settled in September, October and November 1988.

As to the "Fannie Mae" affidavit, respondent admitted certifying that the information contained therein was true. He justified his actions by saying that the lenders had knowledge of the true terms of the transactions and that, to the best of his knowledge and belief, he was giving them the information that they required.

Respondent stated that even now, if there are credits and the mortgage company instructs him not to show the credits, he prepares two RESPA statements, one with the credit and one without. He submits the one without the credits to the lender because that is what the bank advises him to do, "they don't want to see the credits."

* * *

The DEC found that respondent did not conspire with the buyer's attorney to defraud the lenders. It found, however, that respondent knew or should have known that by signing two different RESPA statements and the "Fannie Mae" affidavits someone would rely on that information. The DEC concluded that respondent violated RPC 8.4(c) by improperly certifying to the accuracy of the statements contained in the RESPA statements and in the

"Fannie Mae" affidavits.

In mitigation, the DEC considered the long time period between the time of the violations and the filing of the ethics complaint — eight years — as well as respondent's personal problems at the time of the transactions.

The DEC recommended the imposition of a reprimand.

* * *

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

It is undeniable that respondent violated RPC 8.4(c) by executing documents that contained false information and was submitted to the lenders. The documents included RESPA statements for the three transactions and two "Fannie Mae" affidavits. The documents, which respondent certified as being accurate, failed to include crucial information about repair credits and secondary financing. Although it is possible that these documents were prepared under the instructions of the lenders and that it was common practice for lenders to discourage the disclosure of secondary financing or credits, falsely certifying to the accuracy of the documents is, nevertheless, an ethics violation.

Relying on a number of cases involving violations of RPC 8.4(c), the presenter urged the imposition of a suspension. One of those cases is In re Labendz, 95 N.J. 273 (1984), where the attorney received a one-year suspension. In Labendz, the attorney attempted to

defraud the bank by submitting a false loan application to secure a higher mortgage loan for his clients. The conduct in Labendz, however, was specifically aimed at defrauding the lending institution. This case is significantly different. Respondent had no involvement in the structuring of the transactions and in the dealings with the lending institutions. In fact, as the seller's attorney, he was only involved at the end of the transaction or when required to prepare a second mortgage.

His conduct was more similar to that displayed in In re Blanche, 140 N.J. 519 (1995), which resulted in a reprimand. There, the attorney failed to disclose secondary financing in closing documents, contrary to the lenders' written instructions. Here, both respondent and Alum contended that the lenders instructed them not to disclose the credits or secondary financing on the closing documents because it was their intention to resell the mortgages in the secondary market. Under these circumstances, it cannot be said that the lenders were defrauded. The only exception might be Northstar, the mortgagee in the Davila/Unit 2-A transaction. Northstar's closing instructions expressly prohibited secondary financing. Nevertheless, since no one from Northstar testified, it is not known whether Northstar waived or changed that prohibition by oral agreement.

In a case recently decided by the Court, In re Sarsano, 153 N.J. 364 (1998), a reprimand was imposed for similar misconduct. That matter also involved Alum as the buyer's attorney. In Sarsano, the attorney reviewed the documents with his clients and realized that secondary financing was necessary. He believed that the bank documents did not preclude secondary financing. The attorney knew that the seller was taking back a

second mortgage, that the RESPA statement he submitted to the bank did not disclose the second mortgage and that, although there had not been specific instructions from the lenders prohibiting secondary financing, they usually frowned upon or prohibited secondary financing. This notwithstanding, the attorney did not contact the lending institution to determine whether secondary financing was permitted. He then omitted the reference to the secondary financing because he was concerned that the closing would not take place. The mortgage loan was eventually the subject of foreclosure. There, too, two RESPA statements were prepared to mislead the bank. The attorney's conduct in that matter was a violation of RPC 8.4(c) for which a reprimand was imposed.

Here, unlike Sarsano, respondent's misconduct encompassed three matters. However, respondent was not involved in soliciting clients, obtaining financing or preparing the RESPA or "Fannie Mae" affidavits. In addition, the extensive length of time that elapsed between the events and the filing of the complaint (eight years) as well as respondent's serious family problems should be considered.

Based on the foregoing, a six-member majority determined that a reprimand was sufficient discipline for respondent's misconduct. One member dissented, voting for a three-month suspension. One member recused himself and one member did not participate.

One more point is deserving of mention. The Board was gravely concerned with the fact that respondent signed false certifications to facilitate closing the transactions. That conduct was at minimum deceitful, if not an outright fraud – at least vis-á-vis Northstar Mortgage Corporation. Even more alarming, though, was respondent's testimony that this

type of conduct, submitting false information to lenders, is prevalent among lawyers. Attorneys are hereby reminded that knowingly submitting false information in any aspect of a real estate transaction constitutes serious unethical conduct. Henceforth, attorneys who engage in such grievous behavior will be facing more serious discipline.

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

Dated: 9/28/98

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Stephen R. Spector
Docket No. DRB 98-009

Argued: April 16, 1998

Decided: September 28, 1998

Disposition: Reprimand

Members	Disbar	Three-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			x				
Zazzali			x				
Brody			x				
Cole						x	
Lolla			x				
Maudsley		x					
Peterson			x				
Schwartz							x
Thompson			x				
Total:		1	6			1	1

Robyn M. Hill 10/20/98
Robyn M. Hill
Chief Counsel