SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 16-171
District Docket No. XIV-2014-0240E

IN THE MATTER OF	
CATHLEEN J. CHRISTIE A/K/A CATHLEEN J. CONEENY	
AN ATTORNEY AT LAW	

Decision

Argued: October 20, 2016

Decided: February 7, 2017

Jason D. Saunders appeared on behalf of the Office of Attorney Ethics.

Respondent's counsel waived appearance.

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 reprimand, filed by the District IX Ethics Committee (DEC). The DEC's recommendation was based on its finding that, in a residential real estate transaction, respondent violated three of nine charged Rules of Professional Conduct, RPC 1.7(a)(2) and (b)(3) (concurrent conflict of interest), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and

RPC 8.4(d) (conduct prejudicial to the administration of justice). For the reasons set forth below, we determined to dismiss all of the charges brought against respondent.

Respondent was admitted to the New Jersey bar in 1998. At the relevant times, she maintained an office for the practice of law in Wall.

On October 21, 2016, we imposed an admonition on respondent for her violation of RPC 5.5(a)(1) (practicing law in a jurisdiction where doing so violates the regulation of the profession in that jurisdiction). In the Matter of Cathleen J. Christie, DRB 16-270 (October 21, 2016). Specifically, respondent represented six clients in both civil and criminal matters while she was ineligible to practice due to nonpayment of the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection.

In this matter, respondent was charged with the following RPC violations:

- RPC 1.7(a)(2) (prohibiting a lawyer from representing a client if the representation involves a concurrent conflict of interest, that is, for the purposes of this case, "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer");

- RPC 1.7(b)(3) (permitting the lawyer to proceed with the representation, despite the conflict, under certain conditions, provided that "the representation is not prohibited by law");

- RPC 5.5(a)(2) (prohibiting a lawyer from assisting another in the unauthorized practice of law);

- RPC 8.1(a) (knowingly making a false statement of material fact in connection with a disciplinary matter);

- RPC 8.1(b) (knowingly failing to disclose, in connection with a disciplinary matter, "a fact necessary to correct a misapprehension known by the person to have arisen in the matter");

- RPC 8.3(a) (failing to report to "the appropriate professional authority" another lawyer whom the attorney knows "has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects");

- RPC 8.4(a) (knowingly assisting another in violating the RPCs);

- RPC 8.4(b) (committing "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects");

- RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and

- RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).

The charges arise out of respondent's conduct in connection with a real estate transaction involving A & S Title Agency, LLC (A & S), which she owned and operated from 2010 to 2014. A & S provided title insurance and conducted real estate closings.

A & S employed, as independent contractors, three licensed closing and title agents, including Erin McCaffery and Christy Fabricatore. Although McCaffery worked mostly as a closing

agent, she also was a title agent. Fabricatore mostly handled title work, but she also conducted some closings.

OAE disciplinary auditor Joseph Strieffler testified that respondent's conduct was brought to the OAE's attention during the course of its multiple investigations of former New Jersey attorney Stuart A. Kellner, who was temporarily suspended on August 27, 2012. In re Kellner, 211 N.J. 562 (2012).[1] Specifically, on June 26, 2013, McCaffery informed the OAE that Kellner was present at a real estate closing that took place on the tenth of that month.

In January 2014, in connection with its investigation of McCaffery's grievance against Kellner, the OAE subpoenaed respondent's file for the June 10, 2013 sale of a Bernardsville property to McCaffery's husband, Peter. Respondent directed Fabricatore to gather the file, including e-mails, and send it to the OAE.

On May 16, 2014, presumably based on information obtained from the subpoenaed file, the OAE docketed a grievance against respondent, for the following misconduct: she engaged in a

[1] On May 6, 2014, Kellner was disbarred for the knowing misappropriation of client funds. In re Kellner, 217 N.J. 335 (2014). He subsequently pleaded guilty to a second degree crime arising out of the subject of the ethics matter. The nature of the crime was not identified in the record.

conflict of interest regarding the Bernardsville closing because A & S was involved in the transaction in which she had represented the McCafferys, and she assisted Kellner in the unauthorized practice of law by permitting him to "represent the sellers as a 'Short Sale Specialist' when [she was] on notice that he was a suspended NJ attorney." The facts underlying the Bernardsville real estate transaction follow.

On December 16, 2012, a few months after Kellner was temporarily suspended, Brian and Dina Sant Angelo (sellers) granted a limited power of attorney to him and Grace Nacienciano "for the purpose of Closing, Insurance, Mortgage Payments, or any other matters" involving the sale of their Bernardsville home, which was listed on Zillow, a real estate website, as for sale by owner. Kellner was the Zillow contact person for the listing. When McCaffery contacted Kellner, he represented himself as either "legal counsel" for the Sant Angelos or "a seller attorney . . . representing" the Sant Angelos.

On February 8, 2013, the Sant Angelos and Peter entered into an agreement of sale. At that time, Peter was not represented by counsel. McCaffery testified that, "from the beginning," she "negotiated everything" with Kellner, including the purchase price. She also dealt directly with Peter's lender.

On April 11, 2013, America's Servicing Company (ASC)[2] approved a short sale of the property. The closing was to take place on or before June 10, 2013.

McCaffery chose A & S to handle the closing due to her ten-year personal relationship with Fabricatore, who sent closings to McCaffery to handle. The agency agreed and offered some discounts to her. According to respondent, McCaffery paid A & S's expenses only.

Fabricatore handled the closing from beginning to end. Respondent was not present when title to the property was transferred to Peter and funds were disbursed.

McCaffery described her relationship with respondent as friendly. She did not, however, retain respondent to represent Peter as an attorney for the transaction. According to respondent, McCaffery knew that respondent could not serve as both her attorney and as attorney for A & S. McCaffery simply wanted A & S to "do the title and close the deal." McCaffery did not expect to pay respondent an attorney fee, and respondent had no expectation of receiving one. Indeed, respondent was not working as an attorney at the time.

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[2] ASC serviced mortgages for Wells Fargo Bank, N.A. (Wells Fargo).

In addition to negotiating the sale with Kellner and the sellers' bank, McCaffery worked directly with Peter's lender regarding his compliance with certain conditions required for approval of the mortgage. McCaffery also continued to negotiate with Kellner regarding access to the sellers' home, prior to the closing, in order to complete repairs as well as other items required by the bank.

Notwithstanding respondent's claim that she did not represent either Peter or the McCafferys as counsel, in a March 18, 2013 letter to Kellner, she asserted that she represented them in the transaction, enclosed a copy of the mortgage company's pre-approval certification, and requested a copy of the short sale approval. At the disciplinary hearing, respondent explained her identification of the McCafferys as her clients in the letter, by stating that "[l]awyers do that. You have a friend, and they need help, you shoot out a letter and you know that's going to help them."

McCaffery testified that, from the beginning, Kellner, whom she described as "a real jerk," was "very noncommunicative, very difficult throughout the whole process." She discussed his behavior with Fabricatore "a lot," including "how to handle him."

For example, one of the bank's conditions involved mold remediation, which the bank authorized to be performed by a contractor, rather than a professional remediation company. Kellner insisted that a professional remediation company perform the work, however. Yet, he did not cooperate in the scheduling for the work to be undertaken, by, for example, denying the McCafferys access to the house and arriving late, when appointments were scheduled.

To assist McCaffery with the difficulty she was having with Kellner, respondent wrote another letter to him, on April 29, 2013, identifying the items that required "immediate attention," including the mold remediation, and requesting that he tell her "how and when this issue will be taken care of," as the closing date was on the horizon and the property had to be re-inspected after the work was completed. Respondent denied that the items listed in the letter were subject to negotiation. Rather, they were requirements imposed by the bank.

When respondent wrote the letters, McCaffery knew that respondent could not serve both as her attorney and as attorney for the title company. She simply wanted respondent to send a quick letter. Respondent wrote the letters on her law firm letterhead, believing that Kellner would take McCaffery

seriously if he thought she had a lawyer. Thus, McCaffery did not sign a disclosure document waiving the conflict.

Respondent acknowledged that the two letters to Kellner were addressed to him as an attorney. At the time, she did not know that he was suspended from the practice of law. Kellner never informed respondent that he was suspended, and she did not speak to him until after she learned from the OAE, in early June 2013, that he had been suspended.

Although the record does not contain a copy of Kellner's letterhead, his office sent several e-mails to McCaffery and Fabricatore, none of which identified him as a lawyer. His e-mail address was stuartakellner@gmail.com, and the name associated with that e-mail was "OFFICE OF STUART A. KELLNER."[3]

The original closing date appears to have been May 1, 2013. It was rescheduled to June 7, 2013, but did not take place until June 10, 2013.

The May 1, 2013 draft HUD-1 listed a $2,850 attorney fee on line 1111, but no attorney was identified. On the estimated HUD-1,

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[3] Despite the absence of any indication that Kellner was a lawyer, the disclaimer at the bottom of Kellner's e-mails stated, in pertinent part, that the content was "attorney privileged and confidential information intended only for the use of the individual or entity named above."

dated June 7, 2013, line 1111 identified Kellner as the attorney who was due the attorney fee, but listed no amount.

When the closing finally took place, on June 10, 2013, "attorney fee" now appeared on line 1110, identifying respondent and a $750 fee. The figure was not placed in either the buyers' or the sellers' column as an item to be paid at settlement. According to respondent, and as explained below, the $750 was not an attorney fee and, therefore, its identification as such on the HUD-1 was a mistake.

Line 1111 reflected the same $2,850 fee due to Kellner, but he was now identified as "Short Sale Specialist." In accordance with the HUD-1, A & S disbursed $2,850 to Kellner on June 10, 2013. $950 was disbursed to respondent, which included a $200 closing fee.

It is not clear why the closing did not go forward on June 7, 2013, though it likely was due to the revelation, two days earlier, that Kellner was, and had been, temporarily suspended from the practice of law. The circumstances surrounding this development follow.

On the morning of June 5, 2013, while the parties were preparing for the closing, Fabricatore requested from Grace Nacienciano (who held power of attorney, along with Kellner, for the sellers) the "seller's docs," which included the deed and

affidavit. Fabricatore followed up with another e-mail at 12:53 p.m. At 1:02 p.m., Grace e-mailed Fabricatore and stated: "Hi, Christy, Stuart [Kellner] is preparing them himself and I gave him your contact information." Although Kellner's office faxed the deed to respondent's office at 3:00 p.m., it was not used, presumably because, by that point, Kellner's suspension became known, and, therefore, he could not prepare the deed, and the closing could not go forward.[4]

As stated previously, throughout the period leading up to the closing, McCaffery frequently talked to Fabricatore about how to handle Kellner. Just before the closing, they searched the internet and learned that he had been suspended from the practice of law. Fabricatore called First American, the title insurer, and learned that Kellner was on its "watch list," which contained the names of attorneys with whom business was not to be conducted.

According to McCaffery, Fabricatore stated that First American would send a letter to the Sant Angelos, informing them that, although Kellner was suspended, respondent would be able to represent them. No such letter is in the record. There is,

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[4] Strieffler testified that he was unaware of any prohibition against an attorney or title agency receiving draft legal documents from a suspended attorney.

however, a release, signed by the Sant Angelos on June 10, 2013, the actual closing date, which reads, in pertinent part:

> We, the undersigned, do hereby authorize Cathleen J. Christie-Coneeny, Esquire, and/or A&S Title Agency, LLC, to request any and all documentation on our behalf for the sale/transfer of the referenced property.
>
> We also understand that Stuart A. Kellner is not now or throughout this process was a licensed attorney in the State of New Jersey. We understand that any advice Mr. Kellner may have given us, was as a Short Sale Specialist.
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> [Ex.P16.]

McCaffery testified that the point of the document was to "protect the whole transaction." She added that, after they learned that Kellner was suspended, respondent "really stepped in and helped make the transaction finish up." Indeed, Kellner was trying to let the deal "lapse," but respondent "talked to the bank and got the extension so that we would be able to close." Still, McCaffery testified, she and Peter did not retain respondent to represent them.

When respondent learned that Kellner was suspended, she reviewed the file, on June 5, 2013, to determine whether he had represented himself to be an attorney in that transaction. He had not. On that same date, she directed Fabricatore to contact the OAE about Kellner's eligibility to practice law. She remained in the room while Fabricatore talked to Strieffler.

According to respondent, Fabricatore explained the circumstances to Strieffler, including the delayed closing and the "hard time" Kellner was giving McCaffery. Strieffler confirmed that Kellner was suspended. When Fabricatore asked him "what are we supposed to do," in light of Kellner's status, Strieffler stated that the OAE could not tell them what to do about it.

Strieffler denied that the phone call with Fabricatore involved anything beyond her question about Kellner's eligibility. He was not made aware of the real estate transaction at that time. Fabricatore made no mention of the presence of Kellner's name on the HUD-1, that "they" were considering listing him as a short sale specialist rather than an attorney, or that he was to receive a $2,850 fee. She did not explain that "they were requesting" legal documents from Kellner, including the deed. She did not tell him that letters had been written to Kellner and that Kellner was actively involved in the transaction, either as a lawyer or a short sale specialist. If she had, Strieffler would have conveyed that information to ethics counsel immediately.

On cross-examination, Strieffler acknowledged that, despite his testimony that Fabricatore had told him nothing about the transaction, he told her that Kellner could not participate in

legal proceedings or real estate closings. Strieffler denied that Fabricatore's statements prompted him to make that statement, claiming that he knew that Kellner was a real estate lawyer. Strieffler did not ask Fabricatore why she wanted to know Kellner's status or whether she was aware of his involvement in a legal matter. According to Strieffler, it is common for individuals to call the OAE simply to determine an attorney's status.

Respondent testified that, after Fabricatore's telephone call with Strieffler, she called Kellner and informed him that there was "a problem" because he was suspended. She relayed the content of their conversation as follows:

> Yeah, I said we have a problem, you're suspended, you know. I'm not sure what to do or it's going to be a problem on closing. He said it's not a problem, I'm not the attorney on this file. Then he explained this is what I'm doing, I have experience with foreclosures and short sales, the sellers know that, I've never told them, they know I'm suspended, and they understand my role in this is they don't want anything to do with the bank, they just want to be able to get out of this without having a judgment, you know. I guess there was a lot, maybe I didn't get too much into it with him, but he said nothing I'm doing is unethical, you know, you can check with them.
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> [2T111-12 to 24.[5]]

[5] "2T" refers to the transcript of the November 5, 2015 DEC hearing.

Next, respondent called Kevin Cairns, counsel for the underwriter, and relayed the above conversation to him. When she had finished, Cairns said "oh, so he's acting as a short sale specialist," which according to Cairns, was permissible, notwithstanding Kellner's temporary suspension. Respondent testified that Kellner never used that title to refer to himself.

After her conversation with Cairns, respondent researched the short sale specialist position and learned that an attorney may act in that role so long as the attorney does not violate an ethics rule. Respondent's research included the review of case law, the RPCs, ethics opinions, including those of the Committee on the Unauthorized Practice of Law, and general online information about short sale specialists.

Respondent's knowledge of Kellner's behavior, prior to the closing, was based on McCaffery's reports to Fabricatore, who then told respondent. Specifically, Fabricatore told respondent that Kellner had been giving McCaffery "a hard time," wasn't returning her phone calls, and was leading her to believe that he would not appear for the closing or give her what was required to make it happen. Kellner even went so far as to threaten to "kill the deal."

Respondent acknowledged that, when she learned that Kellner was suspended, she could have tried to stop the transaction. If she did that, however, McCaffery, her friend, would have lost the money she had invested in the house, which would have gone into foreclosure. Respondent did not want that to happen. Moreover, McCaffery could have sued her for the money she lost if there were no legitimate reason to call off the deal. Although respondent did not want to pay Kellner, she "didn't see any legal way not to."

Respondent testified that she prepared the deed because Kellner was suspended, and "we needed a deed."

The final HUD-1 contained the settlement agent's signature, which was little more than a scribble. Strieffler testified that that signature bore no resemblance to respondent's. He did not know who signed the HUD-1. The investigation uncovered no evidence that respondent had signed the HUD-1.

According to the HUD-1, the transaction included the following charges:

Title Services and Lender's Title Insurance	$1,353.00
Settlement or Closing Fee	200.00
Agent's Portion of Title Insurance Premium	521.60
Underwriter's Portion of Title Insurance Premium	242.20
Attorney's Fee to Cathleen J. Christie-Coneeny, Esq.	750.00

Of these amounts, $1,138.60 was disbursed to A & S; $150 was disbursed to Fabricatore; $242.20 was disbursed to First

American; and $950 was disbursed to respondent, representing the $750 attorney fee and $200 closing fee.

McCaffery testified that, due to her relationship with Fabricatore, Fabricatore reduced the $521.60 charge to a $150 flat fee. The closing fee, which was ordinarily $375, was discounted to $200. McCaffery did not realize that a fee to respondent had been charged until after the grievance was filed against her, a year later.

Respondent deposited the $950 check in the business account. She claimed that the characterization of the $750 as an attorney fee was a mistake. Like McCaffery, she did not know that the fee had been charged until the OAE notified her of the grievance in early June 2014. Indeed, when respondent questioned Fabricatore about the charge, she denied that a fee was charged.

Respondent explained that the $750 was not an attorney fee. Rather, the disbursement represented reimbursement for the "$2,000 worth of work that came out of my pocket to pay my staff for the time that they spent doing this." Instead of charging Peter that amount, however, respondent claimed that she and McCaffery had agreed that A & S would charge no more than $750. Thus, the $750 was not an attorney fee. Respondent agreed that, of the $950 paid, $750 was returned to McCaffery, a year later.

Respondent testified that the title charges ($1,138.60) represented reimbursement for amounts paid to others, such as "searchers, all that stuff." None of those funds were disbursed to A & S.

As stated previously, McCaffery reported Kellner to the OAE on June 26, 2013. She did so after discussing what had happened with some lawyers for whom she worked at the time. Respondent did not ask her to do so.

On May 29, 2014, the OAE notified respondent that a grievance had been filed against her. On June 4, 2014, respondent requested the details of the allegations against her. On June 5, 2014, the OAE informed her that the grievance involved a conflict of interest between her and the McCafferys and her acquiescence in Kellner's participation in the Bernardsville transaction, knowing that he was suspended from the practice of law. In its June 5 letter, the OAE requested that respondent produce the following:

> Any and all documents, records, checks, phone records, emails, financial statements, retainer agreements, or any other item which is relevant and responsive to the . . . [OAE's] letters of May 29, 2014 and June 5, 2014.
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> [Ex.P3.]

On June 13, 2014, respondent faxed a letter to the OAE, addressing the allegations against her. Despite the OAE's

request for the documents identified above, Strieffler testified that she provided only a single letter, dated ten days earlier, from A & S "manager," Christy S. Fabricatore, to the OAE. Respondent did not provide the documents requested by the OAE, even though, as the OAE later learned, there were records of phone calls and electronic communications in her possession that were responsive to the OAE's request.

In respondent's June 13, 2014 letter, she stated, in pertinent part:

> As I stated, I reviewed the file and spoke to Christy and Erin to get the details of the transaction. In particular we discussed the fees on the HUD. I was unaware that an attorney fee was charged but Christy stated that as the bank required the buyers be represented she had to put a fee on the HUD but the fees were returned to the McCaffery's [sic]. She also showed me the invoice from the title bill showing that Erin was not charged for the title. I believed the fee was returned at closing but I was unable to confirm that through my records. I immediately called Erin and she said although she was not charged for the title, she did not receive the attorney fee back and did not think she should. I apologized and made arrangements to get the funds back to them. Even without any ethical issue, I would not have charged her for the help I provided.
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> [Ex.P4.]

Respondent testified that the purpose of her June 13, 2014 letter to the OAE was to explain the circumstances surrounding the

charging of the fee on the HUD-1 and the refund. At the time she had spoken to ethics counsel, she believed that the fee had been returned because that is what Fabricatore had told her.

On June 18, 2014, the OAE scheduled a demand interview for June 24, 2014, and requested that, at that time, respondent produce all documents and files with respect to the Bernardsville transaction and all "written or electronic communications" with McCaffery from May 2013 to the present.

The interview took place on June 25, 2014. Respondent appeared with a copy of a canceled check, in the amount of $750, issued by A & S to Peter McCaffery on June 13, 2014, just twelve days earlier and more than a year after the closing.

Strieffler testified that, during the interview, respondent denied that she had communicated with McCaffery electronically. When she was confronted with copies of the text messages, she acknowledged sending them. Thus, according to Strieffler, her initial claim was not true.

Respondent testified that she denied, at her interview, that she had electronic communications with McCaffery because she thought the request encompassed only e-mails. If she had understood that the OAE was asking for text messages, she would have said that she could produce only her phone because she could not "give you texts like [McCaffery] can."

Although the misrepresentation charge against respondent included the identification of Kellner as "short sale specialist" on the HUD-1, the bulk of the charge was based on the refund of the $750 to Peter. As stated in respondent's June 13, 2014 written reply to the grievance, after she had received the OAE's May 29, 2014 letter, she called Deputy Ethics Counsel Jason D. Saunders, who explained the allegations to her, which she did not understand. Thus, she requested a more specific description, which was set forth in the OAE's June 5, 2014 letter. Presumably, sometime after respondent's telephone conversation with Saunders, she texted McCaffery.

McCaffery testified that respondent stated in her text that she had been contacted by the OAE, that she was unaware that a fee had been charged, that it should not have been charged, and that she wanted to return it to the McCafferys. McCaffery identified the copies of the text messages between respondent and her. She read the following from one of respondent's early texts:

> I do need you to write a letter. Or let me. And hes [sic] right. If I got paid I apparently was acting unethical [sic] because I own the title company. I told the ethics board the fee was on the hud [sic] but it was returned to you after the closing. If not I will be guilty of a violation. Christy said it was returned. I do not remember any of that. So I would need a letter from you saying you did all your negotiations and Christy did the closing. I was never officially on the hud but it was returned to you after the closing. If

> not I will be guilty of a violation. Christy said it was returned. I do not remember any of that. So I would need a letter from you saying you did all your negotiations and Christy did the closing. I was never officially retained but I did help out. And you did not pay me. And obviously if you were charged and didn't get it back I would take care of it.
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> [Ex.P4/222-223.]

McCaffery testified that, when respondent first contacted her, she was willing to help, because respondent had stepped in and assisted when Kellner was disqualified. Nevertheless, at the time, McCaffery did not believe it would be appropriate to write such a letter because the money had not been returned to her and, therefore, a statement to the contrary would be false. Accordingly, McCaffery replied that, although she and Peter would be happy to write a letter, they were charged a $750 attorney fee but had received only $150, which was a title insurance discount. At that point, respondent learned that Fabricatore had been mistaken when she told respondent that the $750 fee had been refunded. Respondent replied:

> Ok then please let me give that to you before I ask you to do anything for me. You were supposed to get it anyway and I feel bad [sic] that this is how Peter found out you never did. Im [sic] so sorry. I can't even tell you how much it means that you're willing to help me out.
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> [Ex.P10/224.]

Meanwhile, on June 3, 2014, Fabricatore sent an e-mail to McCaffery stating that "Cathy drafted a ltr." McCaffery identified the draft letter, which was from Peter to Saunders, also dated June 3, 2014,[6] which stated in part:

> I was contacted today by my attorney, Ms. Coneeny, and advised that there is currently an investigation regarding her representation of me for my purchase of 4 Prospect Street, Bernardsville, New Jersey. As such, please include my statement in your file.
>
> . . . .
>
> Unfortunately, the deal became complicated and I felt I needed an attorney and friend, to help me and protect me. I was always aware she owned the title company but I did not want any other attorney to help me. I trust Ms. Coneeny.
>
> While the Title Company handled the closing, Ms. Coneeny protected my legal interests and everything went smoothly after that. Ms. Conenny also returned her legal fee to me after closing and only charged the Sellers' a legal fee, which they agreed to because their attorney was not allowed to prepare any of the documents as Ms. Coneeny found out he was not licensed.
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> [Ex.P14,1A.]

The next day, McCaffery received the following e-mail from Fabricatore:

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[6] Given the date of the e-mail and the draft letter, it is more likely that the text messages between respondent and McCaffery occurred no later than June 3, 2014.

> Use this ltr (one I sent yesterday) . . . also, I think maybe you should do a ltr cause I think they need to see how screwed up Stuart was being & your [sic] the one that had to deal w/him more than anyone!!!!!
>
> I am drafting a ltr from me, Im [sic] gonna send it to you for your review in a bit. Thanks Erin!!!!
>
> -Christy
>
> [Ex.P14,2.]

Based on Fabricatore's statement that "Cathy drafted a ltr," McCaffery believed that respondent had drafted the proposed letter for Peter's signature. She testified that she and Peter never signed the letter because it contained a lie. Specifically, no fee had been returned to the McCafferys after the closing. The fee was not returned until "[a]fter this letter."

Despite respondent's acknowledgement that she had asked McCaffery for a letter, respondent denied that she had drafted the unsigned June 3, 2014 letter from Peter to Saunders, that she had directed it to be written, or that she had even seen it.

Respondent acknowledged that she had conversations with McCaffery during the course of the OAE's investigation, which were the subject of the text messages. She acknowledged that she asked McCaffery to talk to ethics counsel and tell him what had happened. She also asked her to write a letter. The messages

were exchanged before respondent had written her June letter and before she met with the OAE in June 2014. They also took place before she learned that the fee had not been refunded. She learned that from McCaffery.

The OAE took issue with respondent's claim that she "was never officially" on the HUD-1. Strieffler testified that respondent was listed on the HUD-1, and she was paid an attorney fee. Thus, her statement to McCaffery was not true. Further, the disbursement sheet for the transaction reflected that she was paid an attorney fee. Moreover, the e-mails exchanged between respondent and McCaffery demonstrated that respondent was involved "in some way" in the transaction. In addition, respondent signed letters, as counsel for Peter and Erin McCaffery, in connection with the transaction.

Strieffler testified that attorneys have an obligation to report the misconduct of another attorney. During respondent's interview, she stated that she was responsible for the conduct of her title company. She acknowledged, however, that A & S issued a check to Kellner at the closing for his representation of the sellers in the transaction, even though she knew, at the time, that he was suspended.

Respondent testified that she did not make a formal report to the OAE because "you guys had the information" and, further,

"[y]ou already said you were investigating him." Rather, the call to the OAE was for the sole purpose of seeking guidance. She explained:

> It was three days of a very complex transaction, and I called everybody I could think of. We called you and you didn't help. I'm going to call you back and say let me try again? Maybe this time you'll help me? I did everything I thought I could do. I called other attorneys who have this kind of experience and expertise, and what else, you want me -- now —
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> Q. You said the second part of your statement is that Ms. McCaffery reported the matter to the Office of Attorney Ethics two weeks later.
>
> A. Yes, she did.
>
> Q. Had she not done so, you would agree that you would have reported it, right?
>
> A. I would have followed up.
>
> Q. Okay.
>
> A. Now, because I said -- well, based on my research, he didn't violate anything.
>
> Q. Then why would you —
>
> A. I would have followed up just to see if I did the right thing.
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> [2T75-2 to 22.]

Respondent clarified that she would not have reported Kellner for acting as a short sale specialist, as she believed that to be permissible. Rather, she would have reported him based on his

treatment of McCaffery. If McCaffery had not reported Kellner to the OAE, respondent would have.

According to Strieffler, Kellner engaged in the practice of unauthorized law by "engag[ing] the sellers" for representation, by negotiating with the bank and the buyers, and by preparing the deed and affidavit, which he intended to have filed. Moreover, when Fabricatore asked Kellner who should be paid for the title examination, document preparation, and attorney fees, either he or someone from his office replied "Stuart A. Kellner."

Strieffler testified that, during the OAE's investigation, he never spoke to the sellers, and he had no documents reflecting their agreement with Kellner and the role that Kellner was to fulfill in the Sant Angelo-to-McCaffery transaction.

As stated previously, the DEC found that respondent violated RPC 1.7(a)(2) and (b)(3), RPC 8.4(c), and RPC 8.4(d). The DEC recommended the imposition of a reprimand for these violations.

Citing In re Opinion 682 of the Advisory Committee on Professional Ethics, 147 N.J. 360, 369 (1997), the DEC found that respondent, who owned A & S, engaged in a conflict of interest by representing Peter in the transaction. The DEC rejected respondent's denial that she had represented Peter, noting that she had written two letters on his behalf stating the contrary. The DEC acknowledged that respondent was "not completely to blame for

confusion about [Peter]'s status" since McCaffery testified clearly that she did not seek legal representation from respondent "until problems arose with Kellner" and, further, that McCaffery and respondent were friendly, which may have justified the absence of a formal retainer agreement. Yet, the HUD-1 reflected a $750 attorney fee to respondent, which was paid to her, along with an additional $200.

The DEC questioned respondent's credibility with respect to her claim that, despite the representations on the HUD-1, the $1,164.50 charge to A & S for the closing was reduced to $750 and that McCaffery received discounts, rebates, and a refund. The fact remained that respondent was paid a $200 settlement fee and a $200 document preparation fee. That the $400 was a small amount was of no consequence because "the dual-role alone creates an appearance of impropriety."

The DEC found that respondent violated RPC 8.4(c) when, after McCaffery had informed her, in a June 2014 text message, that they had not been refunded the $750, she drafted a letter for Peter's signature, which stated that respondent did not represent him and that the money had been refunded after the closing. The DEC described the phrase "after closing" as a "half-truth," which was prejudicial to the investigation, because the money was not

returned to the McCafferys until a year after the closing and, then, only after the OAE had filed a grievance against respondent.

The DEC rejected respondent's attempt to blame Fabricatore for the mistake in listing the fee on the HUD-1 and the delay in returning the money. According to the DEC, respondent had a duty to supervise her staff and to conduct a proper review of the file. Her failure to do so, choosing instead to delegate to Fabricatore the compilation of the file that was to be sent to the OAE, created the confusion, which also would not have occurred if she had reconciled her trust account or reviewed the file prior to turning it over to the OAE. The DEC then said:

> It is true that evidence of the Respondent's mistakes create [sic] enough doubt to prevent a finding of dishonesty, fraud or deceit by clear and convincing evidence under RPC 8.4. However, her conduct in making statements to the OAE without even a cursory review of her records constitutes a negligent misrepresentation violating the RPC, as does her effort to have the McCaffery's [sic] submit the proposed letter.
>
> [HPR20.[7]]

In respect of the other charges, the DEC found that the record lacked clear and convincing evidence that respondent assisted Kellner in the unauthorized practice of law. According to the DEC, "while Kellner was clearly unprofessional and

[7] "HPR" refers to the March 20, 2016 hearing report.

perhaps guileful, there is no evidence that he actually practiced law in this transaction and thus Respondent could not assist him with it." First, respondent's knowledge that Kellner was unauthorized to practice law did not establish that he was practicing law. Second, according to the DEC, Kellner did not practice law with respect to the transaction, and the title "short sale specialist" meant nothing to the DEC.

Further, there was no clear and convincing evidence that the public was harmed by respondent's actions. In this regard, the DEC noted that, but for respondent's involvement, the deal might not have closed, resulting in financial harm to the McCafferys, who would have lost the house and the funds they had expended in complying with their mortgage company's demands.

For these reasons, the DEC concluded that respondent did not violate RPC 5.5(a)(2), RPC 8.4(a), RPC 8.4(b), or RPC 8.4(d).

The DEC also rejected the OAE's assertion that respondent had failed to report Kellner's misconduct to the OAE, a violation of RPC 8.3(a), because she instructed Fabricatore to notify the OAE on June 5, 2013. In a misinterpretation of the Rule, the DEC noted that, by calling the matter to the OAE's

attention, respondent demonstrated her honesty and fitness as a lawyer.[8]

The DEC rejected the allegation that respondent violated RPC 8.4(b) by tampering with a witness because she was never arrested for, charged with, or convicted of that crime.

The DEC found that respondent violated RPC 8.4(d) because her statement that the attorney fee was refunded "after closing," while technically accurate, represented "a half-truth," which was "prejudicial to the investigation," because it was not returned until a year after the 2013 closing. Further, respondent's confusion about the timing of the refund, in addition to her claim that she was "not officially on the HUD," was the result of her failure to reconcile her attorney accounts, her "failure to conduct proper file review," which the DEC found was prejudicial to the administration of justice, and her failure to properly supervise Fabricatore upon delegating the duty to review the file to her. Yet, the statements were "negligent misrepresentation[s]," not intentional.

The DEC found that respondent did not violate RPC 8.1(a), which prohibits an attorney from knowingly making a false

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[8] RPC 8.3(a)'s reference to the honesty and fitness of the lawyer refers to the lawyer who should be reported, not to the lawyer who is obligated to make the report.

statement of material fact to disciplinary authorities, because she was "negligently mistaken" in her belief that the OAE's demand for electronic communications did not include text messages. Further, she did not fail to correct a misapprehension on the part of the OAE on this issue because "she wrote the letter to the OAE expressly acknowledging her mistakes during the investigation when the issue of the texts arose." She did not knowingly fail to turn over the text messages. Rather, the requests were imprecise.

The DEC recommended the imposition of a reprimand for respondent's violation of RPC 1.7(a)(2) and (b)(3) and RPC 8.4(c).

Following a de novo review of the record, we find that the DEC's determination that respondent's conduct was unethical is not fully supported by clear and convincing evidence. Accordingly, for the reasons set forth below, we determined to dismiss all charges brought against her.

ASSISTING KELLNER IN THE UNAUTHORIZED PRACTICE OF LAW AND FAILING TO REPORT KELLNER TO THE OAE

Count One of the complaint charged respondent with assisting Kellner in the unauthorized practice of law, a violation of RPC 5.5(a)(2), RPC 8.4(a), and RPC 8.4(d). She also was charged with having violated RPC 8.4(b), because the

unauthorized practice of law is a crime, N.J.S.A. 2C:21-22, and, by assisting Kellner in doing that, respondent acted as an accomplice, as defined by N.J.S.A. 2C:2-6. Finally, respondent was charged with having violated RPC 8.4(d) on the ground that she knowingly violated the Court's order temporarily suspending Kellner by permitting him to engage in the unauthorized practice of law after she learned of the suspension.

We determined to dismiss these charges because respondent did not assist Kellner in the unauthorized practice of law. Kellner was suspended from the time he undertook the representation of the sellers until the June 10, 2013 closing. Respondent, however, did not learn of his status until June 5, 2013. Moreover, prior to that date, respondent was not involved in the legal issues underlying the transaction, be it the negotiation of the purchase price with the sellers or the loan approval from the bank. Respondent simply sent two letters to Kellner, as a favor to McCaffery, which were of no significance with respect to the actual practice of law.

By the time respondent learned that Kellner was suspended, she did what she could to prevent him from practicing law. She prepared the deed and affidavit of title, which would have been Kellner's duty had he been acting as the sellers' attorney.

The above facts demonstrate that, when Kellner was acting as an attorney for the sellers, respondent was not involved. Moreover, when she wrote the letters to Kellner, she did not know that he was suspended. Thus, she did not assist respondent in the unauthorized practice of law.

According to the complaint, the identification of Kellner on the HUD-1 as a short sale specialist "was a fiction created to facilitate the closing of the real estate transaction notwithstanding the suspension." Even if the title were a "fiction," it was not created so that Kellner could practice law. It was created so that the transaction could go forward and that he could be paid for the work that he had performed for the sellers, in whatever capacity, with respect to the transaction. Although respondent knew that Kellner would be paid for activities that, in our view, arguably constituted the unauthorized practice of law, the disbursement of the funds to him, after the fact, is not the same as assisting him in the unethical conduct, which had taken place before she knew he was suspended and with respect to which she was not involved. Indeed, after respondent learned of Kellner's suspension, she prevented him from practicing law when she prepared the deed and affidavits of title, which was her solution in light of what she claimed to be no guidance from the OAE.

Finally, in Count Three, respondent was charged with failing to notify the OAE "prior to closing the transaction," that Kellner was engaging in the unauthorized practice of law. The evidence pertaining to respondent's failure to report Kellner to the OAE, when she learned of his suspension on June 5, 2013, is contradictory. On the one hand, Strieffler testified that, when Fabricatore called the OAE, she only asked him if Kellner was eligible to practice law, and mentioned nothing of the transaction. Respondent, on the other hand, testified that Fabricatore told Strieffler "everything" and that, when Fabricatore asked him for guidance, Strieffler replied that the OAE could not provide it. Fabricatore was not called to testify.

The DEC appears to have accepted respondent's testimony on the issue, although it did not explain its reason for doing so. Fabricatore's testimony was crucial to the determination of whether Strieffler's or respondent's testimony should be accepted as clear and convincing evidence. As our review is de novo, and Fabricatore did not testify, the OAE failed to establish the charge by clear and convincing evidence.

For these reasons, we determined to dismiss all charges relating to respondent's alleged assistance to Kellner in his unauthorized practice of law.

CONFLICT OF INTEREST

Count two of the complaint charged respondent with having engaged in a conflict of interest by representing the buyer who procured title insurance through A & S, which was respondent's company, a violation of RPC 1.7(a)(2) and (b)(3). We determined to dismiss this charge as well.

To be sure, an attorney representing the purchaser of real estate who obtains title insurance from the attorney's title insurance company engages in an impermissible conflict of interest. See, In re Mott, 186 N.J. 367 (2006); In the Matter of Joel A. Mott, III, DRB 05-318 (February 22, 2006) (slip op. at 8) (citing N.J. Advisory Comm. On Prof'l Ethics Opinion 495, 109 N.J.L.J. 329 (1982), which prohibits an attorney who has an interest in a title insurance agency from representing a buyer who obtains title insurance from that agency).[9] This kind of representation was known as the "Ocean City practice, which usually involved an attorney who, at the behest of a realtor, drafts an agreement of sale for, and at no charge to, a buyer of

[9] We note, too, that respondent's law office and title agency shared the same street address, a violation of N.J. Advisory Comm. On Prof'l Ethics Opinion 532, 107 N.J.L.J. 544 (1984) (requiring an attorney who creates another business to keep the business and the law firm "entirely separate"). Because respondent was not charged with a violation in this regard, we refrain from finding one.

residential real estate." In the Matter of Robert W. Laveson, DRB 06-029 (June 7, 2006) (slip op. at 4). See also In re Poling, 184 N.J. 297 (2005); and In re Gilman, 184 N.J. 298 (2005).

In most cases, the contract was prepared at no charge to the buyer because the buyer was required to purchase title insurance from the company in which the attorney held an interest. Laveson, supra, DRB 06-029 at 4-5. Both the attorney and the realtor benefited from the Ocean City practice. Although not paid for the legal work, the attorney benefited through his or her title insurance company's receipt of the title insurance premium. Id. at 5. The realtor benefited because the contract did not require a three-day attorney review period; therefore, the parties were bound by the terms of the contract immediately upon its execution. Ibid.

In this case, respondent did not engage in the Ocean City practice. She had nothing to do with the negotiation, execution, or review of the agreement of sale. More importantly, she did not receive the title business through a realtor who steered McCaffery to A & S. Rather, McCaffery, an independent contractor who worked in the title business, chose to have A & S handle the transaction. Indeed, respondent performed no legal services for

McCaffery at any time. The two letters written by respondent do not alter this conclusion.

Although respondent identified herself as counsel for Peter in the March 2013 letter to Kellner, she was not. As both she and McCaffery made clear, respondent wrote that letter, as well as the letter in April 2013, as a favor for McCaffery. McCaffery was having difficulty communicating with Kellner, who, when he did communicate with her, was not very cooperative.[10]

"'One is engaged in the practice of law whenever legal knowledge, training, skill, and ability are required.'" In re Jackman, 165 N.J. 580, 586 (2000) (quoting State v. Rogers, 308 N.J. Super. 59, 69-70 (App. Div.), certif. denied, 156 N.J. 385 (1998)). Nothing stated in either letter was required to be uttered by an attorney. Thus, the content of the letters does not establish that, in writing them, respondent was acting as Peter's lawyer. Ibid.

The presence of the attorney fee charge on the HUD-1 and the payment of the fee to respondent, whether or not they were mistakes, also do not change the conclusion that respondent did not represent Peter in the transaction. Although she stepped in,

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[10] Although respondent's representation to Kellner that she represented Peter was not true, she was not charged with RPC 8.4(c) based on that claim.

at the eleventh hour, and drafted the deed and affidavit of title, so that the transaction could proceed, the conveyance of those documents is the responsibility of the seller, not the buyer. In re Agrait, 207 N.J. 33 (2011) (censure imposed on attorney who represented the buyer and the seller in a real estate transaction, without making full disclosure and obtaining written waivers; specifically, attorney represented the buyer, but then prepared an affidavit of title and a deed on behalf of the seller in exchange for $250; attorney also represented the seller in subsequent litigation instituted against her by the buyer after he discovered a pre-existing lien on the property; violations of RPC 1.7(a) and (b) and RPC 1.9(a)). Thus, in preparing the deed and affidavit of title, respondent would have been representing the sellers, not Peter.

Finally, because respondent did not represent Peter, the buyer, she did not violate N.J. Advisory Comm. On Prof'l Ethics Opinion 682, 143 N.J.L.J. 454 (1996) (prohibiting an attorney from participating in a bar-related title insurance company owned and managed by lawyers, who do not receive compensation for their services, but do retain a portion of the title insurance premium as part of their fee for representing the buyer).

In short, the record lacked clear and convincing evidence that respondent represented Peter in the transaction. Therefore, she did not engage in a conflict of interest, and we determined to dismiss the charge.

MISCONDUCT FOLLOWING THE CLOSING

The complaint alleged that respondent made several misrepresentations. She allegedly misrepresented on the HUD-1 that Kellner was a short sale specialist. This allegation is not supported by clear and convincing evidence, however.

The title "short sale specialist" was not respondent's invention. When Cairns suggested it to her, based on her representation of the facts and the services Kellner, who was operating under a power of attorney, had performed, respondent did not accept the suggestion at face value. She researched the issue and, rightly or wrongly, concluded that Kellner could be identified on the HUD-1 as a short sale specialist and that he could be paid a fee because he had performed services that could be performed by someone in that position.

We find confusing the evidence pertaining to respondent's misrepresentations regarding the $750, that is, her claim to the OAE that she "immediately made sure they were refunded the amount charged on the HUD," and her instruction to McCaffery to

write a letter to the OAE stating that she had not been paid in connection with the representation.

The OAE's claim that respondent's June 13, 2014 letter asserted that she had refunded the $750 to the McCafferys "immediately after the closing" is not supported by the record. A careful review of the letter establishes only that respondent stated that she "immediately made sure [the McCafferys] were refunded the amount charged on the HUD." Nowhere did respondent state that she refunded the money "immediately after the closing." If anything, the letter suggests that respondent provided the refund "immediately" after learning that Peter had been charged a fee. As stated previously, the check was issued to Peter on June 13, 2014, the date of respondent's letter to the OAE.

The text messages do not support the OAE's claim. It is clear that respondent learned that Peter had been charged an attorney fee only during the late May/early June text message exchange with McCaffery, as respondent clearly stated:

> Ok then please let me give that to you before I ask you to do anything for me. You were supposed to get it anyway and I feel bad that this is how I found out you never did. Im [sic] so sorry. I can't even tell you how much it means that you're willing to help me out.
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> [Ex.P4/224.]

Thus, it is clear that respondent learned, through the messages, that the fee had not been returned. This disproves even the suggestion that she told the OAE in the letter that she returned the fee immediately after closing. The RPC 8.4(c) charge cannot be sustained on these grounds. For the same reasons, the RPC 8.1(a) and (b) charges cannot be sustained.

Similarly, the allegation that respondent violated the above RPCs, by requesting in the initial text, that McCaffery write a letter to the OAE stating that respondent was not paid in connection with the representation, falls. Respondent testified quite clearly that the $750 did not represent a fee, but, instead, represented reimbursement for A & S's costs.

The OAE supports its claim that respondent's statement was false by relying on the HUD-1 and the disbursement form, which showed the $950 payment to respondent. This falls as well.

Respondent was not present at the closing. She did not sign the HUD-1. Even if she were negligent in not reviewing the HUD-1, such negligence is insufficient to establish that she knowingly made a misrepresentation to anyone on the subject.

In short, although respondent may have acted negligently or carelessly, by making statements without first checking the HUD-1, she did not make misrepresentations. A violation of RPC 8.4(c) requires intent. See, e.g., In the Matter of Ty

Hyderally, DRB 11-016 (July 12, 2011) (case dismissed for lack of clear and convincing evidence that the attorney had knowingly violated R. 1:39-6(b), which prohibits the improper use of the New Jersey Board of Attorney Certification emblem; attorney's website, which was created by a nonlawyer who wanted it to look "attractive and appealing," contained the emblem, even though attorney was not a certified civil trial lawyer; attorney was unaware of the emblem's placement on the website and, upon being told of its presence, he had it removed immediately; the emblem was not on his letterhead or business cards, and he did not tell anyone that he was a certified civil trial attorney); In re Uffelman, 200 N.J. 260 (2009) (noting that a misrepresentation is always intentional "and does not occur simply because an attorney is mistaken or his statement is later proved false, due to changed circumstances"); and In the Matter of Karen E. Ruchalski, DRB 06-062 (June 26, 2006) (case remanded where the attorney did not know that her statements in reply to a grievance were inaccurate but, nevertheless, stipulated that she had made misrepresentations; the attorney had not intended to make the misrepresentations and did not stipulate intent).

Here, respondent's only intention, with respect to the transaction, was to assist McCaffery in making sure that the matter went to closing and that the McCafferys paid only the

expenses incurred by A & S in making that happen. There is simply no evidence that she intended to misrepresent anything to the OAE during the investigation.

To conclude, we determined to dismiss all charges instituted against respondent in this disciplinary action. Member Zmirich voted to impose an admonition, concluding that respondent violated RPC 1.7(a)(2), by preparing the deed and affidavit of title on behalf of the sellers after she had written two letters on behalf of Peter, the buyer, in which she identified herself as his lawyer.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Cathleen J. Christie
Docket No. DRB 16-171

Argued: October 20, 2016

Decided: February 15, 2017

Disposition: Dismiss

Members	Dismiss	Admonition	Did not Participate
Frost	X		
Baugh	X		
Boyer	X		
Clark	X		
Gallipoli	X		
Hoberman	X		
Rivera	X		
Singer	X		
Zmirich		X	
Total:	8	1	

Ellen A. Brodsky
Chief Counsel