

**GERALD B. BERG**  
**Public Reprimand No. 2019-10**  
**Order (public reprimand) entered by the Board on July 3, 2019.**  
**AMENDED SUMMARY<sup>1</sup>**

The respondent received a public reprimand for his simultaneous representation of a seller and buyer in a residential real estate transaction. The respondent failed to adequately explain the conflict and obtain the informed consent of the buyer.

On June 1, 2018, the respondent represented both the seller and the buyer in a non-standard residential real estate closing transaction. The seller provided the financing to the borrower and thus the respondent simultaneously represented the lender and the borrower and acted as settlement agent.

It was not reasonable for the respondent to believe that he could provide competent and diligent representation to each affected client. At the closing, the buyer executed a number of documents setting forth unusual terms and conditions that favored the seller. The terms of the loan would not have been included in any loan transaction from any recognized lending institution.

On the day of the closing, the respondent requested that the buyer review and execute a conflict letter (the letter). The letter disclosed, among other matters, that the respondent had represented the seller for years in his real estate business. The letter correctly stated that the parties had previously agreed to the financial terms of the transaction without the intervention of the respondent. In the letter, the respondent represented that he was acting as a “scrivener.” The letter acknowledged that the buyer was made aware of the potential conflicts, but did not describe what those potential conflicts might be or what disadvantages there might be to the multiple representation, including that an independent attorney would likely have recommended against consummating the transaction upon the proposed terms.

The buyer was not told orally, by the letter or otherwise, that the terms of the transaction as provided in the deed and escrow agreement were unusual, that she was potentially waiving consumer rights provided in state law and that some of the terms of the transaction may not be enforceable as contrary to state statutes and regulations providing protections for mortgagors of mortgages secured by residential property. The buyer did not receive the diligent representation that she would have received if represented by independent competent counsel.

The respondent’s simultaneous representation of the buyer and the seller who were also the borrower and the lender in the same real estate closing transaction, where the respondent could not have reasonably believed that he could competently and diligently represent both sides, and his effort to limit his role to that of a scrivener, was conduct in violation of Mass. R. Prof. C. 1.3 and 1.7(a). In addition, the respondent failed to adequately explain the conflict and obtain the informed consent of the buyer, in violation of Mass. R. Prof. C. 1.3, 1.4(a) and 1.7(b)(4).

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<sup>1</sup> Compiled by the Board of Bar Overseers based on the record of proceedings before the board.

There were no factors in aggravation. The respondent had no prior discipline. In mitigation, there was no ultimate harm. A little more than two months after the closing, the buyer was able to refinance with a conventional lender upon reasonable terms. After the transaction, the buyer retained counsel who, in November 2018, sent a demand letter to the respondent and to the seller, alleging that the transaction was unfair to the buyer. The respondent notified his malpractice carrier and the demand was settled with the respondent and the seller within weeks. In addition, the respondent played no role in the buyer's decision to initially enter into the transaction with the seller.

This matter came before the Board on a petition for discipline and stipulation of the parties waiving hearing and requesting that the matter be resolved by imposition of a public reprimand conditioned on the respondent's attending a CLE program recommended by bar counsel. On June 10, 2019, the Board voted to accept the stipulation of the parties and impose a public reprimand.