On March 7, 2002, pursuant to due notice, Panel C of the Grievance Commission conducted a disciplinary hearing open to the public according to Maine Bar Rule 7.1(e)(2) concerning alleged professional misconduct by Respondent, Paul K. Marshall, Esq. as described in a Petition dated January 22, 2002. Petitioner was represented by Geoffrey S. Welsh, Assistant Bar Counsel. Respondent appeared pro se. The record in this matter includes the pleadings, testimony from witnesses, Tina Taylor and Paul K. Marshall, Esq., and exhibits offered and admitted into evidence by both parties.

FINDINGS OF FACT

1. The Respondent, Paul K. Marshall, Esq. of Kingfield, County of Franklin, State of Maine was at all times relevant hereto an attorney duly admitted to and engaging in the practice of law in the State of Maine and subject to the Maine Bar Rules.

3. During October, 1997 and thereafter, Mr. Marshall and the adjuster for Commercial Union Insurance Company (CU) corresponded with regard to Ms. Taylor’s automobile accident case. On September 14, 1998, Mr. Marshall wrote to CU enclosing a copy of her medical bills and records and stated that he estimated the present settlement value of her first P.I. case to be a specific well into the six figures.

4. During this time, Mr. Marshall was also the President, Director and Secretary/Treasurer of Trident Ventures, Inc., a Maine Corporation that owned land in Franklin County, Maine. His wife and son were the other directors. The stockholders of Trident at the time were his children, having earlier received a transfer of Marshall’s stock. This land had been purchased by Trident Ventures, Inc. for purposes of development and was on the market for sale. Ms. Taylor’s husband, Clifford, owned a parcel of land that he had previously purchased from Trident Ventures, Inc. This purchase occurred prior to Mr. Marshall’s representation of Ms. Taylor. Ms. Taylor became interested in purchasing the adjacent parcel of land after discussing it with her husband and walking the land. She was aware and under the impression that Mr. Marshall, her attorney in the personal injury case, was the owner of the land that was for sale. She then approached Mr. Marshall and inquired
about buying a parcel of land. Marshall said that the land was for sale and quoted a purchase price. On or about September 15, 1998 Ms. Taylor entered into a “Land Installment Contract” (the land contract) with Trident Ventures, Inc. (Trident) in which Trident agreed to sell to Ms. Taylor the 17 acre parcel of land for $17,000.

5. Attorney Marshall prepared the land contract. At the time he prepared the land contract he was acting both in the capacity as attorney for Ms. Taylor in her personal injury case, and as attorney for Trident and as Trident’s President.

6. Under the terms of the land contract Ms. Taylor agreed to pay Trident the $17,000 in the following manner:

   a) $5,000 either at the time Ms. Taylor and Trident executed the land contract or when she received the check in that amount from State Farm Insurance Company (State Farm) and

   b) $12,000 when Ms. Taylor received the expected settlement proceeds from her first P.I. case in which Mr. Marshall was her attorney.

Upon default in payment of any installment and failure to cure, the entire balance would become due and payable, and Seller would have the right to sell the real estate with the

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1 Although titled “Land Installment Contract,” the land contract did not conform to the provisions of 33 M.R.S.A. Section 481.
proceeds to be applied to the remaining principal balance and expenses of sale. The balance would be paid to the buyer.

The land contract was amended on October 1, 1998, reducing the down payment to $4,500 and increasing the principal balance due to $12,500.

7. According to Ms. Taylor, when she met with Mr. Marshall concerning the land he told her that he owned the land and would give her a good deal on the land. They discussed the terms, which she understood to be a $5,000 down payment and that when the personal injury case settled, she would pay off the rest. According to Ms. Taylor, Mr. Marshall said that if the case settlement didn’t come out right, “we would talk about that later”. Her impression was that Marshall owned the land and that Trident was a real estate entity for him to sell the land. He did not tell her the connection between Trident and him or that he was an officer or director of Trident. Marshall never explained to her the terms of the installment contract, and said that he was losing money on the sale. He did not explain any conflict of interest that he might have in representing her and being involved in the sale as an officer or director of Trident. At the time she had the meeting with Mr. Marshall about the purchase of the land, Ms. Taylor indicated that she was satisfied that it was a fair price and a good price based on conversations she had with her husband about the land.

8. According to Mr. Marshall he is not sure whether or not he discussed his relationship with Trident to Ms. Taylor as he did not consider himself to be the owner of the land at the time of the purchase. He testified that he structured the land contract as he did...
because the facts of this matter did not fit within the statutory definition of a land installment contract and that she was unable to make five or more subsequent payments as required by 33 M.R.S.A. §481. Accordingly he fashioned a land contract that he believed could meet her financial situation given what he believed to be the likelihood of a settlement in the personal injury case. According to Mr. Marshall, at that time he advised Ms. Taylor to seek independent advice of counsel and told her that she had the right to take the contract to another lawyer and he suggested that she do so. At that point she took a draft of the document with her and he thinks that she discussed it with her husband. Mr. Marshall acknowledges that he did not discuss with Ms. Taylor what would happen if she couldn’t settle her personal injury case. At hearing, when asked what he would have done if she had changed her mind about the transaction, and wanted her down payment back, he stated he probably would have cancelled the deal. He claims she never asked for her money back, or asked to be let out of the deal.

It is undisputed that Ms. Taylor did not consent in writing to waive any conflict that Mr. Marshall might have with respect to the transaction.

9. On December 14, 1998 Ms. Taylor retained Mr. Marshall to represent her in another motor vehicle accident, (the second P.I. case) that she had been involved in on December 1st. On or about March 15, 1999 the adjuster for Commercial Union
wrote to Mr. Marshall concerning Ms. Taylor’s first P.I. case and offered to settle the case for $15,000, substantially below the demand initially made by Mr. Marshall. Mr. Marshall notes that his demand was originally very high because he believed that there was a causal connection between the accident and a subsequent medical condition of Ms. Taylor. As it turned out, after further investigation, Mr. Marshall became convinced that there was no connection.

10. At the end of June, 1999 Ms. Taylor and Clifford desired to purchase a saw mill and went to the Androscoggin Valley Council of Governments (AVCOG) for a loan. Ms. Taylor and Clifford Taylor represented themselves in the negotiations with AVCOG. AVCOG notified Mr. Marshall in writing that AVCOG was requiring a mortgage on the 17 acre parcel that was under contract with Trident, and needed an assignable interest in the personal injury settlement insurance proceeds in the amount of $12,000 until the case settled. AVCOG asked Mr. Marshall to draw up the documents. Mr. Marshall prepared and witnessed the requested documents.

11. In July 1999 CU sent a settlement check in the amount of $20,250 to Mr. Marshall as a proposed settlement of the underlying claim in the first P.I. case. Mr. Marshall testified that upon receipt of the settlement draft he discussed the proposed offer of settlement with Ms. Taylor and advised her to reject the offer. He claims that Ms. Taylor concurred and that he then marked the draft “void” in her presence. Ms. Taylor claims that she never saw the check until February 12, 2000, when she went to Marshall’s office to
retrieve her file (as she had apparently been talking to another lawyer about her legal matters). At that time she claims a check marked “void” fell out of the file onto the floor. She claimed that before this time she asked Mr. Marshall whether the insurance company had made any offer and he had told her no. At that time, she claims he explained that he had voided the check because he did not think it was enough money. She testified that if she knew there was an offer of $20,250 in July, 1999 she would have taken that money. Although Ms. Taylor says that he did not relate to her offers that were put forth by Commercial Union, Ms. Taylor did admit that she recalled talking to Mr. Marshall about a $15,000 offer and that he said it was not enough and that she agreed. According to Mr. Marshall, Ms. Taylor was in his office often and he kept her informed as to the progress of her case.

12. On February 12, 2000, Ms. Taylor asked Mr. Marshall for her money back. He told her she would have to write to the President of Trident. She also wanted to get the P.I. file back so that she could give it to Attorney Ronald Cullenberg who she had consulted about the case.

13. In early February 2000, Ms. Taylor consulted with Attorney Ron Cullenberg concerning a domestic matter and about her two personal injury cases which Marshall had been handling. Upon being made aware of Mr. Cullenberg’s involvement, Mr. Marshall was reluctant and had questions concerning the ethics of turning over the file to Mr. Cullenberg under the circumstances then presented. After being advised by the Board of Overseers that he should turn over the files, he attempted to make contact with Mr.
Cullenberg, but was informed that he no longer represented Ms. Taylor (he later mailed the file to Ms. Taylor).

14. Around this same time Mr. Marshall was informed that Ms. Taylor had settled her first personal injury claim directly with CU. It was Mr. Marshall’s understanding that Ms. Taylor had settled her case directly with the insurance company for $24,000, which included a payoff of State Farm’s medical payments lien of $3,750 netting $20,250 to Ms. Taylor.

15. On April 25, 2000 Trident Ventures, Inc., under the signature of Paul K. Marshall, President, sent a letter to Ms. Taylor in which Mr. Marshall stated that it had come to his attention that Ms. Taylor had settled her personal injury claim relating to a motor vehicle accident directly with the insurance carrier and that upon such settlement, she was to have paid the sum of $12,500 to Trident Ventures as the balance due on the land installment contract executed on September 15th with an addendum executed October 1, 1998. Mr. Marshall as President of Trident Ventures made formal demand on Ms. Tina Taylor in that letter for payment set forth in an enclosed Notice of Default and Right to Cure and Intention to Sell. The Notice of Default and Right to Cure and Intention to Sell was signed by Paul K. Marshall, President of Trident Ventures and stated that Ms. Taylor had broken her real estate installment contract with Trident Ventures, advised her that she was late in making payments, demanded prompt payment under the terms of the contract in the amount of $12,500 and stated that if she did not pay the total amount due by the
last date for payment, Trident Ventures might exercise its rights against her under law, including the sale of the land. On May 17, 2000 Trident Ventures under the signature of Marshall wrote another letter to Ms. Tina Taylor stating that he had received a telephone message from her and indicating that if she is ready, willing and able to pay the balance due on the contract in exchange for a certified check in the amount of $12,500, she would received a warranty deed to the property in question.

16. According to Mr. Marshall, Ms. Taylor never paid the $12,500, and Trident Ventures retained the $4,500 down payment pursuant to the terms of the land contract. The land subject to the land contract (as well as the remaining acreage owned by Trident, totaling 43 acres) has been sold by Trident for $30,000.

CONCLUSIONS:

This matter implicates the conflict provisions of the Maine Bar Rules 3.4 (b), (c), (e) and (f). We determine that at the time Mr. Marshall was the attorney for Ms. Taylor regarding her personal injury claim, he was the President, Secretary/Treasurer, Director, past shareholder, and acted as the attorney for Trident in the sale of the land to his client. He prepared the land contract and set forth the terms under which the sale would proceed. Ms. Taylor was not represented by separate counsel at the time. Mr. Marshall did not obtain the informed consent of his client, Ms. Taylor to his representation of Trident, as required by 3.4 (c)(2). He also had a fiduciary and other legal obligation to Trident which required that he obtain the informed consent of Ms. Taylor relating to his continued representation of her. See Maine Bar Rule
3.4(e).

For purposes of reviewing the applicability of Maine Bar Rule 3.4(f), we must take into consideration the nature of the relationship between Mr. Marshall and Trident, particularly in view of his stated belief that he had no relationship that created a conflict of interest situation.

Although, at the time of the transaction, Mr. Marshall did not own stock in the corporation (he had transferred his shares to his children), he was, for all intents and purposes, the alter ego of the entity, making all decisions and executing documents on its behalf without consultation with others. These decisions would include whether to agree to return Ms. Taylor’s down payment and cancel the deal, or whether to enforce the terms of the land contract (as he chose to do in this case). He was the President, Secretary/Treasurer and Clerk of this closely held corporation. He was an original shareholder of the corporation, whose sole purpose was real estate investment, and whose sole investment was the land in Franklin County. Ms. Taylor reasonably believed that he owned the land personally, and he never dispelled that understanding through careful explanation. The enforcement and outcome of the land transaction was substantially related to the prosecution and outcome of the personal injury claim. Both the course and outcome of both were controlled to a substantial degree by Mr. Marshall in his dual role as attorney for Ms. Taylor and his close personal and fiduciary relationship to Trident, and its current shareholders (who were his children). Accordingly, we conclude that there was a substantial risk that his financial or significant personal relationship with Trident would materially and adversely affect his representation of Mr. Taylor, requiring informed written consent. Maine Bar Rule 3.4(f)(1). This consent was not obtained. Maine Bar Rule 3.4(f)(2) deals with situations in which an attorney knowingly enters into “any
business relationship with a client.” Although Mr. Marshall was not a shareholder of Trident, as noted previously, he was, for all purposes the alter ego of Trident with regard to the sale of the land to his client. She reasonably believed that he was the owner of the land. As such, he knowingly entered into a business relationship with Ms. Taylor. We believe he also acquired a pecuniary interest adverse to the client by retaining and exercising control over the land in question and her deposit. Rule 3.4(f)(2) prohibits an attorney from knowingly entering into any business transaction with a client (or acquiring a property or pecuniary
interest adverse to a client) unless specific provisions of the Rule are complied with. Mr. Marshall did not comply with this Rule in several respects. First, he did not fully disclose and transmit to the client the terms of the agreement in a manner which should have reasonably been understood by the client. Indeed a very important term of the agreement – what happens in the event there is no recovery or insufficient recovery in the underlying personal injury claim – was not addressed at all. Further we do not believe that the transaction and terms of the land contract were fair and reasonable to the client. The agreement did not conform to statutory requirements regarding land installment agreements, and its terms, and potentially its enforceability, were left uncertain. Ms. Taylor believed that there would be a provision in the agreement addressing return of her deposit if she decided not to pursue the purchase. As noted previously, the agreement did not address at all the possibility of insufficient recovery of the personal injury claim or her changing attorneys to represent her in such claims. These questions were not addressed in the agreement, but were inconclusively left to the future discretion of Mr. Marshall. Finally, it is undisputed that Ms. Taylor did not consent in writing thereto, as required by the Maine Bar Rule 3.4 (f)(i)(C).  

2 (A) The transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted to the client in manner and terms which should have reasonably been understood by the client.  
(B) The client is advised and given a reasonable opportunity to seek independent professional advice of counsel of the client’s choice on the transaction; and  
(C) The client consents in writing thereto.  

3 We are unable to determine whether or not Mr. Marshall in fact advised and gave his client a reasonable opportunity to seek independent professional advice of counsel due to the conflicting testimony in this regard. He said he did. She said he did not. Because Mr. Marshall testified that he believed that he was not entering into a business transaction with a client, and did not believe he had a conflict of interest, it is unclear what his reason was to have done so.
For the foregoing reasons, we conclude that Ms. Marshall violated the provisions of Maine Bar Rule 3.4 (c) (2), (e) and (f). We do not find that Mr. Marshall’s manner of handling the underlying personal injury claims of Mr. Taylor constituted violations of Maine Bar Rule 3.6.

DISPOSITION:

We cannot, under the circumstances of this case, find the violations to be minor. Mr. Marshall retained the discretion as to whether or not to return his client’s deposit or to enforce the agreement. When she asked for return of her deposit, he did not return it. When she settled the case herself after attempting to retrieve her file from Mr. Marshall, he sent her a notice of default on the land agreement, and unilaterally retained her deposit and sold the land. As a result, Ms. Taylor lost $4,500. Mr. Marshall’s violations resulted in harm to his client. On the other hand, Mr. Marshall has no prior disciplinary history, and we believe he probably was initially motivated by an interest in structuring an arrangement for Ms. Taylor to be able, financially, to purchase property she desired at a fair price. He probably felt that the case would settle for an amount sufficient to enable her to complete the purchase, but did not thoroughly consider or provide in the agreement for the possibilities that it would not, or that his client would seek to change counsel. Therefore we do not believe, as suggested by Bar Counsel, that this matter warrants a finding of probable cause for suspension or disbarment. The most appropriate disposition in this matter is a reprimand.
Accordingly, Mr. Marshall is reprimanded for his violations of Maine Bar Rule 3.4, as set forth above.

Dated:

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Alan G. Stone, Esq.

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Barbara Raimondi, Esq.

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Carol M. Rea