SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-199
District Docket No. VB-03-20E

IN THE MATTER OF	:
STEPHEN H. SKOLLER	:
AN ATTORNEY AT LAW	:

Decision

Argued: October 20, 2005

Decided: December 1, 2005

Frederick E. Gerson appeared on behalf of the District VB Ethics Committee.

Respondent waived appearance for oral argument.

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 two-year suspension filed by the District V-B Ethics Committee (DEC). Respondent was admitted to the New Jersey bar in 1983. At the relevant times, he practiced law in Maplewood, New Jersey. Respondent has no disciplinary history.

The first count of the ethics complaint alleged that respondent violated RPC 1.2(d) (counseling or assisting a client in conduct that the lawyer knows is illegal, criminal or

Manoff had practiced law in Florida since 1957. Although he never practiced before the Fourth District Court of Appeals, he had friends there who were judges and clerks. Based upon Manoff's understanding of Florida court of appeals administrative procedures, an administrative clerk there would not disclose the outcome of an appeal prior to the issuance of the court's decision.

The Fourth District Court of Appeals' decision in the Florida matter was issued on June 12, 2002. The appellate court rejected Skoller's appeal from the denial of her request for a continuance. On June 28, 2002, the Florida appellate court issued a mandate, which, according to Manoff, constitutes a declaration that the parties must comply with the decision, in the absence of a further appeal or a request for rehearing within the time permitted.

As stated previously, the closing was on June 14, 2002. At some point,[1] Manoff testified, the buyers' lawyer, W. Lane Miller, informed Manoff that he had an affidavit of title from Skoller stating that the Florida judgment had been overturned and vacated. Manoff told Miller that the statement was untrue, whereupon Miller forwarded the affidavit to Manoff.

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[1] Based on Miller's testimony, it is likely that this conversation took place in early September 2002.

Paragraph five of the affidavit stated, in pertinent part: "There are no pending lawsuits or judgments against me or other legal obligations which may be enforced against this Property." According to Manoff, this statement was a misrepresentation. In addition, Manoff testified, paragraph seven of the affidavit falsely asserted that the Florida judgment had been "vacated on appeal by the District Court of Appeal of the State of Florida, Fourth District." When Manoff asked Miller why he had not called him from the closing to inquire about the status of the judgment, Miller replied that respondent had so vigorously maintained that the judgment had been reversed and had so adamantly objected to the need for the escrow account (which was ultimately established) that the passion of respondent's position convinced Miller of the truthfulness of his representations.

Later, Manoff asked Miller to have the escrow funds released, but respondent refused to consent. Indeed, according to Manoff, respondent continued to refuse to release the funds even after Manoff had threatened to proceed with a sale of the property. Ultimately, Miller was required to file an order to show cause for the release of the escrow funds. Despite respondent's resistance, the motion was granted. On March 5, 2003, the Florida judgment was satisfied.

Miller testified that he represented the buyers in the transaction. The title to the South Orange property identified Skoller as the only owner.

According to Miller, a May 6, 2002 judgment search uncovered the Florida judgment, which actually totaled $36,636.90, including legal fees, costs of suit, and interest. Prior to the closing, Miller asked respondent about the judgment. Respondent stated that the entry was a mistake and that the matter would be resolved at the closing.

At the June 14, 2002 closing, according to Miller, respondent stated that the Florida judgment had been overturned by a Florida court. Respondent had no paperwork to support the claim, other than Skoller's affidavit of title. Concerned, Miller requested that an escrow account be established. According to Miller, after a heated exchange, respondent assented. The escrow agreement was handwritten and provided that $40,000 would be held in Miller's trust account "pending receipt from [respondent] of: (1) proof that the judgment against Arlene Skoller under DJ264594-2001 is discharged or satisfied; and (2) a certification is received whereby Arnold Skoller consents to the sale of the premises and waives any rights or claims with regard to same." In addition, paragraph

three of the agreement charged respondent with the "responsibility for satisfying these requirements."

Miller told the DEC that, after the closing, "time had passed," and that he "frankly, didn't think much about it" until his "client called up upset because he had gotten notice that the house was going to be exposed for sale for the judgment." The phone call took place in early September 2002. Miller testified that, from the date of the closing through the time of this conversation, he had no recollection of having heard from respondent or discussing the Florida judgment with him.

On August 28, 2002, Manoff sent Miller a fax that contained documentation establishing that the Florida judgment and the New Jersey levy were still open. The documentation included a copy of a proposed notice of sheriff's sale. Because Miller was on vacation at the time, he did not see the fax until early September, which is when he also received the telephone call from his clients.

On September 5, 2002, Miller faxed to respondent what appears to have been a proposed order to show cause. In the handwritten cover letter, Miller informed respondent that, based upon information he had received from Manoff, Skoller's affidavit of title was factually inaccurate, the judgment now

exceeded the amount in escrow, and respondent had not fulfilled his obligations under the terms of the escrow agreement.

According to Miller, he mailed the order to show cause to the court for filing on September 23, 2002. The document was filed on September 26, 2002. In the meantime, on September 25, 2002, respondent wrote to Miller and informed him that Skoller had objected to the release of the escrowed funds, in the absence of a court order. The order to show cause was entered on October 1, 2002. On October 3, 2002, respondent wrote to Miller expressing surprise and disappointment with some of Miller's representations, which respondent detailed at length.

On November 18, 2002, final judgment was entered on the order to show cause. The judgment authorized Miller to release to Manoff the $40,000 in escrowed funds and ordered respondent and Skoller to pay Miller $1750, which was "to be utilized by [the buyers] to pay any additional monies due on such judgment and as necessary to obtain its release returning excess or remaining monies to defendants." The court also entered judgment against respondent and Skoller for the buyers' costs of suit against them. Ultimately, the $1750 was used to satisfy the Florida judgment, but only because the judgment-creditor agreed to forego additional monies due, as accrued interest had increased the judgment to approximately $42,000. Even so,

according to Miller, the $1750 was paid only after he had filed a motion to enforce the judgment. The monies were paid before the return date, and the motion was withdrawn.

On cross-examination by respondent, Miller acknowledged that respondent had never requested the release of the escrowed funds to him. Miller further acknowledged that respondent had requested that the escrowed funds be deposited in court, while the parties to the Florida judgment litigated the judgment-creditor's entitlement to them. However, on redirect, Miller pointed out that placing the monies in court for that purpose would not have prevented a sheriff's sale of what was now his client's property.

Respondent, for his part, testified that he had served on a district ethics committee from 1998 through 2000. From 1983 through 1986, he was an Essex County prosecutor. From 1986 through June 2000, he was a litigator with a number of law firms. In 2000, he became in-house counsel for a start-up business until February 2001, when he formed South Mountain Development Company, which engaged in real estate development and construction. Since then, respondent continued to practice law on a part-time basis.

Respondent detailed the factual history leading up to the entry of the Florida judgment. In 1996, his father, Arnold, who

lived in Florida with Skoller, sought bankruptcy protection individually. In January 1998, Arnold became totally disabled. Sometime thereafter, Arnold obtained a discharge from the bankruptcy court. During the pendency of the bankruptcy proceeding, separate counsel was hired to represent Skoller in an attempt to protect her assets.

After Arnold's bankruptcy discharge, his attorney (Jacobson) filed a complaint in Florida seeking legal fees from both Skoller and Arnold, even though Jacobson had represented only Arnold in the bankruptcy proceeding. By this time, respondent's parents had returned to New Jersey.

Skoller represented herself in the Florida action. According to respondent, the trial notice that Skoller received in April 2001 stated that the matter would be "listed on a trial call beginning the week of . . . May 25, 2001." Respondent explained that the notice listed a period of five or six weeks within which the trial could go forward. At that time, Skoller had just learned that her husband would be undergoing surgery "around May 29 or so." Accordingly, Skoller wrote to the court and requested that the trial "be scheduled for the end of the trial period" so that she could attend to her husband. The request was denied, and the actual trial date was scheduled for the day after Memorial Day. Inasmuch as Skoller's husband

underwent surgery at the same time, she did not appear, and default was entered against both of them. Even though the Florida appeals court described Skoller's request as one for a continuance, respondent rejected this characterization, claiming instead that Skoller had simply requested that the trial proceed at the end of the five- to six-week trial period.

According to respondent, it was not until early June 2002 (when respondent received the title binder) that he learned that the Florida judgment had been domesticated in New Jersey. Just before the closing, his mother-in-law died, which kept him from attending to his practice. Nevertheless, respondent claimed that he attempted to learn the status of the Florida judgment before the closing.

Although respondent called Skoller's appellate counsel, he had obtained leave to withdraw from the matter and would not return respondent's telephone calls. Therefore, respondent testified, just before the closing, he talked directly with the Florida court of appeals, at which time an administrative clerk told him that the matter had been reversed and would be remanded. Respondent added that, when he asked whether a decision, opinion, or order had been issued, he was told "no."

At the closing, respondent knew that the open judgment had "to be taken care of." He explained:

> I told Mr. Miller that I had not received anything further from the Court, that I had spoken to the title company that I generally used at the time to – because I did and do a fair amount of real estate practice, including closings, residential and commercial. And in my experience and practice, you cannot close if there is an open lien, encumbrance or judgment against the property without making provision for dealing with that open lien, encumbrance or judgment to the satisfaction of the title company. It's not just simply up to the individual attorney to make a call, but you're closing either for a lender or for a client using a title company you have to satisfy the title company. So I had no expectation at all that the title would close with that just being open as of record. It had to be taken care of. And, in this case, it would have to be taken care of by way of escrow, which I knew, which was why I reached out to find out what amounts the title companies generally look for. I knew it was some amount of the judgment plus a premium to account for time going forward until things were resolved if there was [sic] interest and things.
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> [T96-15 to T97-11.[2]]

According to respondent, he told Miller that the information about the Florida judgment was based upon the representation of a clerk and that the documentation was pending. Thus, the purpose of the escrow was to "protect" the judgment in the event that it had not been vacated. Moreover, respondent acknowledged, inasmuch as Skoller had purchased the

[2] "T" refers to the transcript of the October 27, 2004 DEC hearing.

South Orange home in her name alone, "Miller was concerned about respondent's father's relinquishing or waiving whatever rights he might or might not have with respect to the house in connection with this closing." Thus, he stated, the escrow agreement addressed the open judgment and Arnold's waiver and relinquishment of any rights to the property. Respondent denied that the escrow agreement was preceded by a heated conversation, as asserted by Miller.

Respondent testified that, a week or two following the closing, he learned that the Florida judgment had, in fact, been affirmed. Although it was apparent then that Skoller's affidavit of title was not true, respondent did not call Miller to "set him straight" because Miller had the escrow, and respondent "was, frankly, still dealing with the issues in [his] house." Respondent admitted that he "did not simply reach out for" Miller or call him.

Once it was confirmed that the judgment would not be vacated, Skoller decided not to take any further action to overturn the decision. Nevertheless, respondent allegedly believed that Skoller could challenge in New Jersey the enforceability of the Florida judgment against either the house or the proceeds from its sale. This, respondent claimed, formed

the basis of Skoller's opposition to Miller's order to show cause.

Even though it became apparent that Skoller's representations in the affidavit of title were not correct, he resisted the release of the escrowed funds because he believed that Skoller had defenses to the payment of the monies. Thus, he testified, if the escrowed funds were placed into court, the buyers would be removed from the dispute. Respondent did not explain how the buyers would be removed. When asked whether his resistance to the order to show cause was not a violation of the escrow agreement, respondent testified:

> I would disagree only to this extent, only to the extent that the agreement in the escrow was not to waive whatever rights or remedies I thought that my client might have with respect to those funds. I'd never asked for those funds to be released to me or my client. I never sought them to be released to us. Never asked that. Never occurred to me to ask that. I realized there was a dispute as to those funds. I opted to move Mr. Miller's client out of the line of fire of that dispute.
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> [T108-2 to 12.]

Respondent agreed that Miller relied upon his representations in the escrow agreement, when the settlement took place. Nevertheless, he steadfastly refused to concede, however, that if the assertions in the affidavit proved false,

he was required to turn over the escrow funds to Miller. Respondent explained:

> Again, I apologize. I think that the intent of the escrow agreement, in my experience, like escrows in these circumstances, is to protect the party taking title. But not necessarily at the same time to relinquish rights, remedies or claims that another party might have with respect to those escrowed funds unless it's specifically provided that I waive all claims to those funds and just deal with them as you will going forward, which we did not do. It was created at a time when I thought I was just waiting for paperwork.
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> [T110-7 to 17.]

Respondent absolutely rejected the position that the intent of the escrow agreement was to provide security for the satisfaction of the judgment.

Documentary evidence established additional facts. Specifically, as of June 25, 2002, respondent was aware of the Florida Court of Appeals' June 12, 2002 decision. On that date, respondent wrote a letter to Manoff representing that he had reviewed the decision and discussed the matter with Skoller. In the same letter, respondent stated that his mother had directed him to file "immediately" a motion for rehearing, which he stated he was "now completing." Yet, on June 28, 2002, the Florida appellate court issued its mandate, which confirmed that respondent had taken no steps to seek a rehearing. Finally,

respondent tendered to Manoff a $15,000 settlement offer on behalf of his parents and made no mention of the sale of their home nearly two weeks earlier.

The DEC chair expressed concern over three issues. First, Skoller had executed an affidavit of title representing that the Florida judgment had been vacated when, in fact, it had not been vacated. Second, when respondent learned that the affidavit was false, he did not inform Miller. Third, respondent did not tell Manoff that Skoller had sold her New Jersey home.

Respondent conceded at the hearing that the withholding of the above information was not a sufficient level of candor. Moreover, respondent acknowledged that section five of the affidavit of title falsely asserted that no judgment was pending against Skoller that could be enforced against the property.

The DEC found that the Florida appellate court affirmed the judgment in an opinion filed June 12, 2002, two days before the closing of title. The DEC further found that, prior to the closing, Miller had become aware of the judgment through the title search. However, the DEC noted, when Miller asked respondent about the judgment, respondent replied that it was a mistake that would be resolved at the closing. Skoller did not appear at the closing, but respondent submitted an affidavit of title in which she represented falsely that the Florida judgment

had been vacated on appeal. The DEC further noted that it was undisputed that the representation was false, inasmuch as the Florida judgment had been affirmed on June 12, 2002.

The DEC restated respondent's testimony that he called the Florida court within the week prior to closing, and that "an unnamed clerk (not a law clerk but an administrative clerk)" told him the opposite, that is, that the judgment had been vacated. The DEC rejected that testimony as incredible, based upon the DEC hearing panel's knowledge of appellate procedure in New Jersey and the testimony of Manoff with respect to Florida appellate practice. Because Manoff's description of Florida practice and procedure was consistent with New Jersey practice and procedure, the DEC accepted Manoff's testimony, rather than respondent's.

In addition, the DEC found that respondent's actions after the closing were "consistent with an intent to misrepresent the true facts, rather than candid disclosure." The DEC believed that respondent's conduct supported the finding that his objective was "to try to avoid, as much as possible, payment of the Florida judgment." Specifically, even though respondent learned within one week of the closing that the judgment had been affirmed, he made no effort to so inform Miller and, when Miller learned of the still-extant lien in September 2002,

respondent refused to consent to the release of the escrowed funds and even went so far as to oppose the order to show cause.

Based upon these findings, the DEC determined that clear and convincing evidence established the following: (1) the affidavit of title was not prepared and delivered in good faith; (2) respondent's failure to inform Miller that the Florida judgment had been affirmed constituted a continuing misrepresentation; (3) respondent's failure to consent to the release of the escrow monies amounted to a violation of the "clear intent" of the agreement; (4) respondent's purported reliance upon an "unnamed clerk [was] a slim reed upon which to base a sworn statement" that was, in fact, never made because respondent failed to comply with the DEC's request that he obtain copies of phone records, which would support his claim that the call was made.

The DEC concluded that respondent violated RPC 1.2(d) when he presented Skoller's false affidavit at the closing; RPC 3.4 when, after the closing, he learned that the judgment had not been vacated but failed to inform Miller;[3] RPC 4.1(a) when he refused to consent to the release of the escrowed monies after

[3] Although the DEC concluded that respondent violated RPC 3.4, the violation was never charged, and the DEC found only violations of RPC 1.2(d), RPC 4.1(a), and RPC 8.4(d). Nevertheless, as seen below, the DEC erred when it concluded that respondent violated RPC 3.4, inasmuch as the rule applies to matters in litigation.

he learned that the judgment had been affirmed, forced the buyers to file an order to show cause, and then continued to refuse to consent to the release of the escrowed funds unless there was a court order; and violated RPC 8.4(d) in that "[i]t was unjust to put the innocent purchasers in the position they were in and that is exactly the type of misconduct that damages all lawyers' reputations. Respondent may try to rationalize this misconduct as 'tough lawyering,' but his misconduct can not be seen to rise to even that level."

The DEC considered as mitigation respondent's service as a county prosecutor and a DEC member, as well as his long legal career in private practice without any prior incidents (presumably referring to the absence of a disciplinary history). The DEC also acknowledged that respondent's mother-in-law died during the week of closing.

The DEC considered as aggravation that respondent's practice primarily involved real estate work, noting that "the manner in which he handled the transaction involving the sale of his mother's home does not inspire trust in the way in which he might handle the interests of parties to a real estate transaction." Moreover, the DEC reiterated its conviction that respondent "was not candid or honest in testifying about the alleged phone call to Florida or his motives in failing to

correct the affidavit of title when it became clear that the statements therein were false."

The DEC recommended a two-year suspension.

Following a de novo review of the record, we find that, with exceptions, the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence. Although we are unable to agree with the DEC's finding that respondent violated RPC 1.2(d) and RPC 4.1(a), the DEC properly concluded that he violated RPC 8.4(d). In addition to this single violation, however, we find that respondent also violated RPC 1.15(b), RPC 3.1, and RPC 8.4(c).

Counseling or Assisting a Client in Illegal Conduct (RPC 1.2(d))

The complaint's charge that respondent violated RPC 1.2(d) was based upon the misrepresentations that he made to Miller and in Skoller's affidavit of title. The complaint alleged that, by making these misrepresentations, respondent assisted Skoller "in her efforts to sell a lien-encumbered property and obtain the full amount of the sale's proceeds despite the lien."

RPC 1.2(d) provides, in relevant part: "A lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are

expressly prohibited by law. . . ." In this case, respondent, as Skoller's lawyer, clearly understood that the representations in paragraphs five and seven of Skoller's affidavit of title were not true and, therefore, fraudulent. However, absent from the record is any evidence that Skoller knew that the representations were false. Thus, notwithstanding respondent's knowledge that the affidavit contained falsehoods, the absence of any evidence of Skoller's mens rea and, therefore, any knowledge on her part that the statements in the affidavits were false suggests that respondent did not violate RPC 1.2(d). Indeed, he could not have assisted his mother in conduct that was illegal or fraudulent if she did not know that her conduct was illegal or fraudulent. See, e.g., In re Lowell, 178 N.J. 111 (2003) (three-year suspension for multiple ethics violations, including RPC 1.2(d), imposed upon attorney with no disciplinary history); In re Blunt, 174 N.J. 294 (2002) (attorney with no disciplinary history reprimanded for violation of RPC 1.2(d)). In those cases, the clients were fully aware that what was being done by them and their attorneys was wrong. In this case, there is no such evidence, although there may have been a suspicion. It was respondent who initiated the plan for the affidavit. There is no clear and convincing evidence that his mother knew that the judgment had not been vacated and,

therefore, that the representations in her affidavit were false.

Furthermore, although Skoller subsequently learned that the judgment had been affirmed, but ultimately decided to take no further action, there is no evidence with respect to whether she encouraged respondent to continue to withhold the information from Miller or whether she knew that resistance to the payment of the monies was not a legally-defensible option. Thus, there is no proof, as the complaint alleged, that Skoller attempted to sell her "lien-encumbered property and obtain the full amount of the sale's proceeds despite the lien." Accordingly, respondent cannot be found to have violated RPC 1.2(d) for what transpired after the closing. This, however, does not mean that respondent's conduct in connection with the affidavit was not unethical. Rather, we conclude that this conduct violated RPC 8.4(c).[4]

RPC 8.4(c) expressly states that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Without doubt, the affidavit of title misrepresented that there was no lawsuit or judgment pending against Skoller and that there were no

[4] The complaint did not charge respondent with having violated RPC 8.4(c). However, the factual allegations therein gave respondent sufficient notice of the allegedly improper conduct and the potential finding of a violation of that rule. In addition, the issue was fully litigated below. Therefore, we find that respondent violated that rule.

"other legal obligations" that could be enforced against her home. Although respondent claimed that the affidavit of title was based upon the representations of a clerk in Florida, the DEC rejected his testimony about the telephone conversation on the ground that it was not credible.

We defer to the DEC's finding inasmuch as it had the opportunity to observe the demeanor of the witnesses and, therefore, was in a better position to assess their credibility. As the Supreme Court has observed, a court will defer to a tribunal's findings with respect to those intangible aspects of the case not transmitted by the written record, such as witness credibility. Dolson v. Anastasia, 55 N.J. 2, 7 (1969). Here, the DEC presided over the case, observed the witnesses, and heard them testify. Accordingly, it had "a better perspective" than do we "in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988).

There is no reason for us to disagree with the DEC's finding that the telephone conversation never took place. First, it is almost incomprehensible that an employee in the clerk's office would have communicated the outcome of an appeal prior to the issuance of the court's decision or order. Second, the information purportedly offered by the clerk was wrong. Third, in the course of this disciplinary matter, respondent was

offered the opportunity to obtain telephone records for the purpose of establishing that he had at least made a call to the office, but he failed to take advantage of it. Indeed, at the DEC hearing, respondent volunteered that he already had unilaterally requested copies of his telephone records from his long-distance carrier and that he was waiting for them to arrive. Moreover, respondent requested that the DEC "hold the record open" so that he could submit the bills for the DEC's consideration. Even though the DEC chair gave every indication at the hearing that the DEC would subpoena the same records, he also stated that he expected respondent to submit the copies that he obtained. Yet, respondent produced none.

In sum, we conclude that respondent violated RPC 8.4(c) when he submitted an affidavit of title based upon false information that he allegedly obtained via a telephone call that never took place. Respondent also violated RPC 8.4(c) when, prior to and during the closing, he told Miller that the judgment was either a mistake or had been vacated. Indeed, to the contrary, the judgment was affirmed two days before the closing. Therefore, respondent lied to Miller when he made these statements to him before and at the closing. Moreover, respondent violated RPC 8.4(c) when he learned "a week or so after the closing" that the judgment had been affirmed, but

failed to inform Miller. Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984) (sometimes "silence can be no less a misrepresentation than words"). Thus, for about two-and-a-half months, Miller was left to believe and rely upon respondent's false representations that clearing the title was just a matter of paperwork.

False Statement of Material Fact to a Third Person (RPC 4.1(a)(1))

RPC 4.1(a)(1) provides, in pertinent part: "In representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client" (emphasis supplied). The complaint vaguely asserts that respondent violated this rule when he "knowingly made a false statement to counsel for the [buyers] and/or failed to disclose the true status of the appeal in Florida at the closing." There is no evidence that, by his conduct, respondent was assisting his mother in a criminal or fraudulent act that she sought to commit. To be sure, respondent violated RPC 8.4(c), as seen above, when he did not inform Miller of material facts, but not RPC 4.1(a)(1). Thus, we dismiss that charge.

Conduct Prejudicial to the Administration of Justice (RPC 8.4(d))

According to the complaint, respondent violated RPC 8.4(d) "in handling the closing." The DEC's reasoning for its determination that respondent violated the rule is rather imprecise. The DEC took issue with the buyers' having been placed "in the position they were in." Nevertheless, we find that respondent violated the rule in several other ways.

When an attorney engages in conduct that is prejudicial to the administration of justice, the attorney violates RPC 8.4(d). In this case, respondent impeded the administration of justice when his conduct put into motion several events that adversely affected the buyers and led to the filing of several pleadings with the courts. First, respondent told the initial lie (that is, that the judgment had been vacated); second, respondent's lie induced Miller to enter into the escrow agreement; and third, when it became apparent that there was no longer a need to maintain the funds in escrow, respondent refused to consent to their release. This conduct on respondent's part forced the buyers to seek recourse in court, where respondent opposed their order to show cause.

The baselessness of respondent's opposition to the release of the escrow funds and the order to show cause was borne out by the court's final judgment. In addition to granting outright

the buyers' request for relief, the court also required respondent to pay the buyers' legal fees incurred in seeking and obtaining that relief. Moreover, even a cursory analysis of respondent's position reveals its disingenuity.

Once the Florida appellate court affirmed the judgment, there was no dispute between Skoller and the buyers with respect to the funds. Indeed, there was no longer a dispute between Skoller and Jacobson. However, if there were such a dispute, that issue was capable of litigation between Skoller and Jacobson without the necessity of an escrow account. If Skoller had prevailed, she could have recovered the $40,000 directly from Jacobson.

There was no reason for the buyers to be caught in the middle and be adversely affected by the "dispute" between Skoller and Jacobson, when they paid the full price for the house. Moreover, were the escrowed monies placed into court, as respondent would have had it, the sheriff still could have sold the buyers' home. The existence of the court fund would not have prevented that from taking place.

Respondent's refusal to limit the scope of the judgment dispute to Skoller and Jacobson caused unnecessary anguish to the innocent buyers and taxed the administration of justice by forcing the buyers to seek the court's assistance in resolving a

conflict that unfairly involved them. There is a point when an attorney's zealousness and advocacy cross the line to the side of unethical conduct. Respondent went over that boundary many times. In the process, he hindered the administration of justice by causing the court's resources to be unnecessarily taxed.

Other Violations (RPC 1.15(b) and RPC 3.1)

Respondent committed other violations that were not charged in the complaint. RPC 1.15(b) requires a lawyer to "promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." In this case, and notwithstanding the purported telephone conversation with the clerk in Florida, once respondent learned that the Florida judgment was affirmed, he knew that Jacobson was entitled to the escrowed funds. Although the $40,000 was placed in Miller's trust account, not respondent's, respondent effectively controlled the release of the funds held in Miller's account by virtue of the fact that his consent was necessary for the monies to be released.

Although the agreement did not expressly state that, if it turned out that the judgment was still outstanding, the funds would be released to pay it off, that was the only logical

interpretation of the agreement and obviously Miller's understanding. Why else would Miller have insisted that the amount of the judgment be set aside and maintained in escrow? Indeed, the court's decision on Miller's order to show cause confirmed that the agreement contemplated the use of the funds to satisfy the judgment.

Respondent's argument that, when he consented to the escrow, he did not intend to relinquish Skoller's rights to the funds is disingenuous. The intent of the agreement was clear: to protect the buyers' right to clear title by providing for either proof that the judgment had been vacated or sufficient monies for its satisfaction. The record affords no other conclusion but that this was Miller's understanding and that respondent led him to believe that this was respondent's understanding as well. Otherwise, Miller would not have agreed to proceed with the closing, as he would have breached his fiduciary duty to the buyers, to the lender, and to the title company, all of whom expected the property to be unencumbered by prior liens.

Because Miller's responsibility and allegiance were to the buyers, not to Skoller, he could not have consented to an "empty" escrow agreement that, in the end, protected only Skoller's interests. Thus, the only logical conclusion is that

respondent's understanding of the purpose of the agreement was aligned with Miller's – at least at the outset – and that respondent later concocted an ill-begotten motive to withhold his consent to the use of the funds for their intended purpose. Therefore, by unreasonably refusing to consent to the release of the monies to parties who were entitled to them and breaching the terms of the escrow agreement, respondent violated RPC 1.15(b).

Respondent also violated RPC 3.1 when he opposed the buyers' order to show cause without any reasonable basis. RPC 3.1 prohibits a lawyer from defending a proceeding or asserting or controverting "an issue therein unless the lawyer knows or reasonably believes that there is a basis for doing so that is not frivolous. . . ." Although the complaint did not charge a violation of RPC 3.1, the issue was fully litigated below with no objection from respondent, and the record developed there contains clear and convincing evidence of the violation. Therefore, we deem the complaint amended to conform to the proofs. R. 4:9-2; In re Logan, 70 N.J. 222, 232 (1976).

There remains the quantum of discipline to be imposed upon respondent for his violations of RPC 1.15(b), RPC 3.1, RPC 8.4(c), and RPC 8.4(d). In cases involving attorneys who fail to properly deliver funds to clients or third persons (RPC

1.15(b)), admonitions or reprimands are usually imposed. In the Matter of Douglas F. Ortelere, Docket No. 03-377 (DRB February 11, 2004) (attorney admonished for failure to promptly deliver balance of settlement proceeds to client after her medical bills were paid); In the Matter of E. Steven Lustig, Docket No. 02-053 (DRB April 19, 2002) (admonition imposed upon attorney who, for three-and-a-half years, held $4800 in his trust account, which he was supposed to use to pay a client's outstanding hospital bill); In re Dorian, 176 N.J. 124 (2003) (reprimand imposed upon attorney who failed to use escrowed funds to satisfy medical liens and failed to cooperate with disciplinary authorities); and In re Tutt, 163 N.J. 562 (2000) (in default matter, attorney reprimanded for failure to promptly deliver funds to an estate's beneficiary, lack of diligence, failure to communicate with clients, and failure to cooperate with disciplinary authorities).

Similarly, with respect to violations of RPC 3.1 (frivolous claims and contentions), discipline usually takes the form of an admonition or a reprimand. In the Matter of Alan Wasserman, Docket No. 94-228 (DRB October 5, 1994) (attorney admonished for filing a frivolous lawsuit against his former clients to recover legal fees, and, after litigation was dismissed, filed another frivolous lawsuit against the former clients' insurance company

to recover the same fees); In re Silverman, 179 N.J. 364 (2004) (reprimand imposed upon attorney who filed a frivolous suit against his client to recover legal fees that she did not owe; aggravating factors considered).

An attorney who generates a false affidavit of title is subject to discipline that generally ranges from a reprimand to a one-year suspension. In re Reichstein, 172 N.J. 647 (2002) (retired attorney who had practiced for forty-two years with an unblemished record was reprimanded for making false and misleading statements to opposing counsel during settlement negotiations, a violation of RPC 3.4(b), and drafting a false affidavit of title for the client's signature, a violation of RPC 8.4(c); we noted that, but for attorney's impending retirement, a three-month suspension would have been imposed); In re Brandon-Perez, 149 N.J. 25 (1997) (six-month suspension imposed upon attorney who was "well-versed in real estate practices and procedures" when, in the course of refinancing four existing mortgages on her office building, she falsely represented in an affidavit of title that the monies obtained through the refinancing would be used to pay off all mortgages, but only paid off two of them; aggravating factors included the attorney's failure to notify the bank that she had not paid off the other loans until after she had defaulted on the bank's

loan, that the bank was never made whole, and that she had been disciplined before; the attorney was previously suspended for three months for recordkeeping deficiencies that led to the negligent misappropriation of more than $20,000 in client funds); In re Epstein, 143 N.J. 332 (1996) (given the totality of the misconduct, one-year suspension imposed upon attorney with no disciplinary history when, in the course of refinancing the first mortgage on her home, she falsely stated in an affidavit title that there were no other liens or encumbrances despite an unrecorded second mortgage on the home; the attorney also engaged in misconduct when she obtained the second mortgage from a client in a transaction with respect to which the terms were not fully disclosed and not considered fair and reasonable).

Engaging in conduct prejudicial to the administration of justice warrants either a reprimand or a short-term suspension. In re Moorman, 175 N.J. 154 (2003) (three-month suspension imposed on attorney, who, in one of two client matters, violated RPC 8.4(d) when he filed a grievance against a judge for the purpose of pressuring the judge to take action on behalf of the attorney's son and then, after it was dismissed, threatened to revive the complaint in order to intimidate the judge); see

also, In re Mella, 153 N.J. 35 (1998); In re Kubiak, 162 N.J. 543 (2000).

Respondent's conduct demonstrated an arrogance and recalcitrance that are almost incomprehensible, given the number of years he has practiced, as well as his experience as a district ethics committee member. All of the violations that respondent committed were part of an elaborate and prolonged attempt on his part to deny Jacobson, the judgment-creditor, his due. First, respondent engaged in a continuing pattern of deception whereby he misrepresented before and at the closing that the Florida judgment had been vacated on appeal. Second, respondent continued the pattern when, shortly after the closing, he became definitively aware of the Florida appellate court's decision upholding the judgment, but never informed Miller. Third, when the buyers and counsel for Jacobson learned that the Florida judgment had, in fact, been affirmed on appeal, respondent, who could no longer rely upon his misrepresentations, switched gears and embarked upon a course of contumacious, improper conduct.

In this regard, respondent initially refused to consent to the release of the escrow funds to Miller. Instead, he suggested that the funds be deposited into court while Skoller and Jacobson litigated if the judgment was enforceable in New

Jersey. The hubris of this "proposal" is reflected in the absence of either (a) Skoller's request for reconsideration from the Florida court of appeals or further appeal to the state Supreme Court or (b) the institution of litigation in New Jersey concerning the enforceability of the judgment, which had been domesticated here almost a year earlier. When Miller rejected respondent's "offer," an undaunted respondent continued to withhold consent to the release of the funds and forced the buyers to file an order to show cause. Respondent opposed the application, which necessitated a hearing. Ultimately, final judgment was entered in the buyers' favor, albeit eight months after the Florida judgment had been affirmed and the closing took place. The lack of merit in respondent's opposition to the application was reflected in that part of the judgment requiring respondent and his mother to pay the buyers' legal fees and to pay all interest that had accumulated on the judgment. Even then, the buyers had to file a motion to recover their legal fees, which respondent and his mother were clearly ordered to pay. Finally, the judgment was not satisfied until February 2003.

We have considered, however, that Jacobson's judgment ultimately was satisfied (although he forewent some additional, accumulated interest), and that the buyers presumably obtained

clear title to their home at no expense to them (inasmuch as respondent was ordered to pay their fees). In our view, thus, the two-year suspension recommended by the DEC is excessive discipline. Moreover, the cases upon which the DEC relied in suggesting the two-year suspension involve more serious misconduct and are, therefore, not applicable here.

In In re Weston, 118 N.J. 477, 478 (1990), the attorney was suspended for two years after he forged a client's signature on an affidavit of title and a deed and misrepresented to the buyer's attorney that the documents were genuine. In addition, when the buyer's attorney questioned the authenticity of the signature, the attorney insisted that it was genuine until the buyer finally engaged a handwriting expert, who confirmed the forgery. Id. at 480. Here, there was no forgery.

In re LaVigne, 146 N.J. 590 (1996), also is distinguishable. That case involved multiple violations on the part of the attorney (including more than one conflict of interest) who was involved in a complex, multi-party, multi-property real estate transaction, including the preparation and submission of false affidavits of title. Id. at 601. Yet, the attorney there clearly acted out of self-interest in the matter with the goal of obtaining one of the properties that was a part of the transaction. Id. at 602. His misconduct resulted in

what the special master and we found to be "great distress and enormous economic injury" as to which "no amount of reparation may ever be sufficient to redress the harm visited on them." Id. at 603. Such is not the case here. The buyers' title was eventually cleared, and they were made whole in their efforts to obtain that result. Moreover, respondent's conduct was limited to one residential real estate transaction.

While a two-year suspension is too severe in this case, a term of suspension is clearly warranted. Yet, a three-month suspension would be insufficient, given the continuing pattern of misrepresentations on respondent's part, as well as his other acts of misconduct, all of which were designed to prevent, or at least delay, Jacobson's collection upon the judgment. In other words, respondent sought to prejudice justice itself (that is, by denying Jacobson his due) through misrepresentations and litigation. See In re Dykstra, 181 N.J. 345 (2004) (three-month suspension, rather than reprimand, imposed upon attorney who engaged in a pattern of misrepresentations in a real estate transaction; the suspension was predicated on the attorney's "ill-motives" and disciplinary history: a three-month suspension and an admonition); In re Casey, 170 N.J. 6 (2001) (three-month suspension imposed upon attorney with no disciplinary history who displayed gross neglect, pattern of

neglect, failure to communicate, failure to expedite litigation, and pattern of misrepresentations in four client matters; reprimand not appropriate form of discipline, given the "pattern of misrepresentation" and the "absence of proof of recovery from alcoholism"). These cases establish that, for respondent's pattern of misrepresentations alone, a three-month suspension is required. Here, however, there are other serious violations to consider, including conduct prejudicial to the administration of justice, failure to consent to the release of funds to which Jacobson was entitled, and opposition to Miller's order to show cause without any reasonable basis. Moreover, several factors aggravate respondent's misconduct.

Specifically, as an experienced real estate attorney, respondent must have recognized that, regardless of the merits of his mother's defenses to the enforcement of the judgment in New Jersey, the transfer of the escrowed funds into court would not have prevented the sheriff's sale from proceeding. In addition, respondent (1) failed to acknowledge any wrongdoing, particularly with respect to his refusal to agree to the release of the escrowed funds and (2) showed no remorse or contrition for the unnecessary alarm and anxiety that he caused to the buyers, who, because of his misconduct, faced the possibility of having their house sold at a public auction.

On the other hand, respondent's behavior was not without mitigation: his judgment may have been clouded by the representation of his mother and his belief that she had been wronged by the Florida courts; at the time of the closing, he was under the strain and stress of the impending death of his mother-in-law; and he enjoyed an unblemished legal career of some twenty years prior to these incidents.

After taking into account the totality of respondent's conduct and balancing the mitigating and aggravating circumstances, we determine that a one-year suspension is the appropriate measure of discipline for this respondent.

Member Wissinger voted to impose a two-year suspension. Members Boylan and Neuwirth did not participate.

We further require respondent to reimburse the Disciplinary Oversight Committee for the costs incurred in connection with the prosecution of this matter.

Disciplinary Review Board
Mary J. Maudsley, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Stephen H. Skoller
Docket No. DRB 05-199

Argued: October 20, 2005

Decided: December 1, 2005

Disposition: One-year suspension

Members	One-year suspension	Two-year suspension	Dismiss	Disqualified	Did not participate
Maudsley	X				
O'Shaughnessy	X				
Boylan					X
Holmes	X				
Lolla	X				
Neuwirth					X
Pashman	X				
Stanton	X				
Wissinger		X			
Total:	6	1			2

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel