SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-038
District Docket No. XIV-2007-0085E

IN THE MATTER OF	
WILLIAM H. OLIVER	
AN ATTORNEY AT LAW	

Decision

Argued: April 15, 2010

Decided: May 26, 2010

Maureen G. Bauman appeared on behalf of the Office of Attorney Ethics.

Paul E. Newell appeared on respondent's behalf.

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

This matter, presented by the OAE, was initially before us on a recommendation for an admonition filed by the District IX Ethics Committee ("DEC"), which we determined to treat as a recommendation for greater discipline. R. 1:20-15(f)(4). The

complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with the client), and RPC 1.15(b) (failure to promptly deliver funds that the client is entitled to receive). The OAE recommends the imposition of a reprimand. We determine that a censure is the more appropriate form of discipline.

Respondent was admitted to the New Jersey bar in 1972. He maintains an office for the practice of law in Neptune, Monmouth County, New Jersey.

In 1999, respondent received an admonition for failure to supervise a non-lawyer employee, a violation of RPC 5.3(a). Specifically, whenever emergent circumstances would arise, respondent would allow an office subordinate to execute certain portions of bankruptcy petitions, if respondent had already obtained preliminary information from the respective client and the client had signed the second page of the petition. This page is the document that all debtors must sign to verify the accuracy and truthfulness of the entire petition. In the Matter of William H. Oliver, Jr., DRB 98-475 (February 22, 1999).

In 2004, respondent received a second admonition, this time for failing to apprise a bankruptcy client of certain developments in her case, including the date of the sheriff's

sale of her house, which respondent had failed to record on his office diary. In mitigation, it was considered that such failure was the result of an oversight on respondent's part and that he took quick action to stay the sheriff's delivery of the deed to the mortgagee. In the Matter of William H. Oliver, Jr., DRB 04-211 (July 16, 2004).

The facts that gave rise to this matter are as follows:

In 2001, Tracy Ann Craig, the grievant, and her husband, Lydell Craig, retained respondent to represent them in connection with a Chapter 13 bankruptcy petition.

In the fall of 2006, Tracy contacted respondent, an experienced real estate lawyer, about her desire to sell their primary residence, located in Long Branch, New Jersey.

On September 5, 2006, the Craigs signed a contract of sale with Rosalie Battaglia, as buyer, listing a $250,000 sale price. Battaglia signed the contract on September 6, 2006. In evidence is another contract, also bearing a September 5, 2006 date and a $250,000 price, listing TK Real Estate Solutions, L.L.C. ("TK") as the buyer for the Craigs' property. TK was an entity owned by an individual named Artem Tepler. According to the hearing panel report, Tepler "was represented to be a real estate investor in the business of arranging the purchase of real estate by other investors from distressed sellers." The TK contract provided for

an all cash deal.

Parenthetically, there is no explanation in the record for the apparently simultaneous execution of two contracts for the purchase of the same property. A close review of both contracts shows that their handwritten provisions are identical, except for the name of the buyer and the method of payment (conventional loan for the Battaglia contract versus all cash for the TK contract). It is possible that the Battaglia contract, which had already been signed by the Craigs on September 5, 2006 and which, as seen below, was later cancelled, was subsequently utilized for the TK contract, that is, that Battaglia's name and the method of payment were "whited-out" and that TK's name and the all-cash provision were inserted in their place.

On the other hand, a statement of legal services that respondent filed with the bankruptcy court presiding over the Craigs' bankruptcy case has an entry indicating that he had reviewed both the Battaglia and the TK contracts on the same day, September 12, 2006. That entry seems to suggest that the contracts were executed simultaneously. At the ethics hearing, however, respondent explained to the hearing panel that he had charged a flat fee for the real estate transaction and that the time entries on his statement of legal services had been created merely to give the bankruptcy court an idea of the time that he

had spent on the matter. It is possible, thus, that the TK contract post-dated the Battaglia contract, but related back to the date of the Battaglia contract.

In any event, on October 10, 2006, the attorney for Battaglia, Alice Tarjan, informed respondent that Battaglia wished to cancel the contract.[1] Presumably, the Craigs agreed.

On respondent's motion, dated September 14, 2006, to which a copy of the TK contract was attached, the bankruptcy court signed an order, on October 12, 2006, authorizing the sale of the property for $250,000 ("upon the terms and conditions of the contract of sale"). The record is silent as to why respondent asked the court, on September 14, 2006, for permission to sell the property to TK if, at that time, the Battaglia contract was still in place. As indicated above, that contract was not cancelled until at least October 10, 2006, the date of Tarjan's letter to respondent.

Paragraph 3 of the court order provided that "[s]ufficient funds may be held in escrow by the Debtor's attorney [respondent] to pay real estate broker's commissions and attorney's fees for the Debtor's attorneys upon further order of

---

[1] The record does not explain why the reference line in Tarjan's letter named the transaction as "Battaglia to Ortiz," instead of "Craig to Battaglia."

this Court."

On October 12, 2006, the date of the court order, a third contract was executed, this time between the Craigs and Artem Tepler individually, calling for a reduced purchase price, $220,000. Although the contract called for an all cash deal, the closing statement listed Morgan Funding Corp. as the lender. Alice Tarjan, the same attorney who represented Battaglia, represented Tepler. According to respondent, this was the final contract of sale presented to him by the Craigs.

Respondent testified that he was not involved in the contract negotiations, which, according to him, had occurred directly between the Craigs and the potential buyers. According to the DEC, nothing was presented to contradict respondent's representations. The DEC presumed that the contracts had been negotiated by the parties without respondent's assistance. The DEC's conclusion was "further supported by the fact that the purchaser gave the Craigs the $10,000 real estate deposit directly without first notifying either the respondent or the purchaser's attorney. (Exhibit 10)."

Respondent did not file another motion seeking the bankruptcy court's approval of this newly negotiated sale. According to respondent, on October 14, 2006, the Craigs had paid the bankruptcy trustee in full, thereby satisfying the

terms of the bankruptcy plan.[2] Respondent argued that, consequently, the house was no longer part of the bankruptcy estate, an event that, he said, removed the bankruptcy court's jurisdiction over the sale of the house and the allocation of its proceeds. Respondent further argued that, in a Chapter 13 case, court permission to sell a piece of real estate is not required because, once a plan is confirmed, the real estate "re-vests into the debtor" and the debtor "can settle without court permission." He stated that he had previously obtained the bankruptcy court's authorization to sell the Craigs' house to "make the title company happy" with what he called a "comfort order." He conceded, however, that he had not asked the title company if a court order was required in this instance.

On October 13, 2006, the Craigs gave respondent a power of attorney for the sale of their house. The Craigs were not going to be present at the closing because they were moving out of state. The closing was to take place by mail.

On November 10, 2006, respondent sent the closing documents (the deed, the affidavit of title, the seller's residency certification exemption, and the 1099 reporting service) to Tarjan, Tepler's attorney, in anticipation of the closing, which

---

[2] The Craigs did not obtain their discharge of debtor, however, until December 13, 2007, more than a year later.

had been scheduled for November 16, 2006.[3] Respondent instructed Tarjan to hold the documents in escrow, "pending confirmation of closing figures and receipt of seller's monies." Consistent with the new contract of sale, the deed prepared by respondent's paralegal, Laurie Saccani, reflected a $220,000 sale price. The deed was dated November 10, 2006. Saccani witnessed the Craigs' signing of the deed before the closing.

In a memorandum from Tepler to his attorney, Tarjan, dated October 17, 2006, Tepler instructed Tarjan on the figures that should be listed on the HUD statement:

> Here's how the whole deal will look on the hud [sic].
>
> The selling price is going to be 220k, they [the Craigs] already have a 10k deposit we gave straight to her [Tracy Craig] on Friday. So I'm financing 310k, yuli [sic] [Kotler]'s company will invoice the seller for the difference of 100k.[4]
>
> I'm including the HUD and the invoice for a property I did in rahway [sic] so you can see the way its [sic] done. Let me know if there's going to be a problem on your end closing like this, if yes, then I can use another attorney. If not, we should be ready to close in two weeks or less.
>
> [Ex.10 to Ex.P-4.]

---

[3] The hearing panel report mistakenly cited the closing date as October 16, 2006.

[4] Yuli Kotler was a business partner of Tepler.

Respondent had no recollection of having seen that memorandum prior to the ethics hearings.

On November 15, 2006, the day before the closing, the title company, Fidelity National Title Insurance Company, faxed a preliminary settlement statement ("the HUD statement") to respondent. Inexplicably, the preliminary HUD statement reflected a $310,000 price, rather than the $220,000 contract price.[5] Line 603 of the HUD statement listed $177,940.04 as cash due to the Craigs.

A final HUD statement was forwarded to respondent on the closing date, November 16, 2006, also reflecting a $310,000 price. Line 704 contained a "Contract Release Fee" of $100,000 to be paid by the Craigs to Kotler Real Estate Solutions. That payment plus other expenses reduced the cash due to seller from $177,940.04 to $76,097.42. The HUD statement also listed a second loan of $61,258 (line 205 - Amount Paid by or on Behalf of the Borrower). This loan is discussed below.

Two of respondent's then employees, paralegal Laurie Saccani

---

[5] The complaint alleges that, following the $220,000 agreement with Tepler, "Tepler and his partner Yuli Kotler changed the purchase price on the contract to $310,000 in order to get increased financing. They then provided this altered contract to their attorney, Alice Tarjan, Esq., who provided this contract to Fidelity National Title Insurance Company . . . ." There is no such contract in the record.

and secretary Patricia Martinsen, testified about the Craigs' closing. The DEC found their testimony credible. Saccani was primarily responsible for the handling of the Craigs' closing. She was responsible for drafting the November 10, 2006 "escrow" letter to Tarjan and the documents referenced therein.

Saccani testified that, because she was going to be on vacation on the closing date, November 16, 2006, she had sent the documents to Tarjan in advance of the closing date. She recalled that Tracy Craig had tried to do a lot of the closing work herself and would contact Tarjan directly, despite respondent's instructions to the contrary.

Saccani also recalled that Tracy had become upset by respondent's failure to return her several telephone calls. Saccani testified that, either immediately before the closing or right after the closing, Tracy had called the office asking to speak to respondent. Saccani had given respondent the messages and had asked him to call Tracy on several occasions, but did not know whether respondent had ever done so. Respondent did not recall having received the messages.

Before leaving for vacation, Saccani left written instructions about the closing for the office manager, Judy. Saccani understood that Martinsen would be handling the closing during her absence. Some of Saccani's instructions were that the

closing figures needed to be confirmed and that the $10,000 deposit had already been given to the Craigs.

Martinsen handled the Craigs' closing in Saccani's absence. She saw the file for the first time on the day before the closing. She left a note for respondent, stating that the file was on Saccani's desk for his review. Respondent did not review the preliminary HUD statement, explaining that he would have looked at the final one.

Martinsen testified that, based on her conversations with Tracy Craig, she knew that Tracy was in possession of the HUD statement before it was forwarded to respondent's office.

According to Martinsen, on the November 16, 2006 closing date, she received numerous calls from Tracy, asking to speak with respondent. Tracy complained that the figures on the HUD statement were wrong. Martinsen told Tracy that respondent was not in the office yet.

Martinsen testified that, when respondent returned to the office on November 16, 2006, she told him that the figures on the HUD statement did not make any sense to her, that the purchase price was wrong, and that he needed to review the closing documents carefully. She told him that she "didn't understand a thing that was going on." Respondent replied that he would take a look at the figures. Because respondent had

another client in his office, Martinsen could not detail to him the problems with the HUD statement. She left him, however, four written notes, asking him to review the closing documents. Respondent never replied to her notes.

According to Martinsen, respondent later looked at the HUD statement and told her "it's fine, send it." When she asked him if he had "really look[ed] at it," he said "yeah. And I said it doesn't make sense," to which respondent replied, "[i]t's fine, send it." After respondent signed the HUD statement, she "faxed" it to the title company. She did not know if respondent had returned Tracy's telephone calls.

Respondent, in turn, testified that, except to verify the amount due to the Craigs, which "looked [like] . . . the approximate number," he had not carefully reviewed the HUD statement before signing it on behalf of the Craigs, under the power of attorney granted to him. He testified: "I looked at the HUD and it looked okay to me at that time. I didn't review it in depth. I should have, but I didn't. And I thought my staff had reviewed it in depth. And I signed off on it . . . ." He added, "[T]hat's why I hire staff to go over basic -- most of the numbers." He admitted that he had not reviewed the HUD statement "line by line:"

> I had read page one but I didn't look at the top line.

. . . .

> I mean, we were -- we had done a contract for $220,000, I had prepared a deed, I had both clients come into the office and sign the deed at different times for $220,000.
>
> I practiced law for 35 years. I have never -- and I'm dealing with another lawyer here, I'm not dealing with a pro se -- I have never in 35 years had a situation where someone would change the purchase price from $220,000 to $310,000. I mean, it was so off the wall.
>
> When my secretary pointed it out to me on Monday [after the closing] I couldn't believe that that had even happened.
>
> You know, it's just something that I wouldn't have noticed, when you have a paralegal doing the numbers for you. I mean, you pay the paralegal to do the numbers.
>
> [2T24-10 to 2T25-4.][6]

Respondent acknowledged, however, that he, as well as the buyer's attorney, was responsible for the detection of the inaccurate figures on the HUD statement.

Respondent testified that he did not notice the $310,000 purchase price and the $100,000 "contract release fee," was unaware of who had received this $100,000 fee, had not spoken to Tracy Craig prior to signing the HUD statement, and had learned

---

[6] "2T" refers to transcript of the DEC hearing on May 12, 2009.

about the "errors" in the HUD statement only when so informed by Saccani, upon her return from her vacation. He also stated that, in the course of hearings later conducted by the bankruptcy trustee, it had been established that "some secretary for the title company," who no longer works there, had altered the deed prepared by his office by changing the purchase price from $220,000 to $310,000. The altered deed shows that the typewritten words "$220,000.00 Two Hundred Twenty" were "whited-out" and that, in their place, someone handwrote "$310,000.00 Three Hundred Ten." Respondent testified that he had found out about the change on the deed six months later, through the bankruptcy trustee.

Respondent speculated that Tepler and "his group" had defrauded the lender by "phoney[ing] up a contract, phoney[ing] up [his] client's signature . . . [and] probably [getting] a phoney appraisal."

Despite respondent's testimony that his review of the HUD statement had been confined strictly to the line showing the amount due to the Craigs, the statement of legal services that he filed with the bankruptcy court reflects that he spent .2/hour, or twelve minutes, reviewing the HUD statement. Respondent explained that he had charged a $1,250 flat fee for the closing and that .2/hour merely represented what the cost for the service

would have been, had the fee been calculated on an hourly basis. Nevertheless, if respondent's representation to the court is accurate, his review of the HUD statement took twelve minutes.

As indicated above, the closing took place by mail. Saccani testified that, "[t]ypically Mr. Oliver doesn't like to go to the closings that are far away out of Monmouth County and we decided - - rather he decided that we were going to close in escrow and that was fine with the other side as well."

On November 17, 2006, the day after the closing, Tracy Craig contacted respondent to complain about the errors on the HUD statement and her non-receipt of the settlement funds. Respondent informed her that the funds had to be disbursed through his trust account. At that point, Tracy informed respondent that she was revoking the power of attorney given to him. Tracey requested that "any work done on our behalf be corresponded with me verbally or in writing."

Against respondent's instructions, Tarjan's office released the closing proceeds directly to the Craigs, on November 20, 2006. According to the complaint, "except for respondent's counsel fees, the Craigs do not dispute the amount received from the settlement."

According to Saccani, when she returned from her vacation, she noticed that the closing documents did not match the ones

prepared by her office. In particular, she saw that the purchase price had been changed from $220,000 to $310,000 and that there was an unexplained $100,000 payment contained on the HUD statement. She immediately brought these discrepancies to respondent's attention.

On November 22, 2006, six days after the closing, respondent sent a letter to Tarjan, drafted by Saccani, complaining that Tarjan was in violation of his November 10, 2006 "'ESCROW' letter" by failing to hold in escrow the closing documents until their respective offices' receipt of "seller's monies and our legal fees." He requested that Tarjan "provide documentation as to how you arrived at a $310,000.00 purchase price, and a $100,000.00 contract release fee (unsigned by our clients or myself) when the contract calls for a $220,000.00 purchase price." He also pointed out to Tarjan that the $10,000 deposit had been deducted twice on the HUD statement and that, as a result, another $10,000 was due to the Craigs. He demanded that Tarjan prepare a new HUD statement with the correct purchase price and remit an additional $10,000 to the Craigs. A copy of the letter was sent to the Craigs and to the title company. The Craigs did not complain that respondent had sent a letter on their behalf without consulting with them and, essentially, in continuation of the representation.

Saccani testified that, after that letter, she heard nothing from Tarjan's office. According to Saccani, "they wouldn't speak to [her]." Respondent, too, did not get a response from Tarjan's office.

Saccani also informed the title company representative that the recording of the documents would pose a problem because of the discrepancy between the two deeds. She told the representative that the documents had to be corrected.

According to the complaint, "the buyer [Tepler] . . . refused to change the HUD settlement statement contending that it accurately reflects the parties' agreement and accurately reflects the distribution of the settlement proceeds." In his answer, respondent confirmed that Tepler had refused to amend the HUD statement. The Craigs did receive, though, an additional $10,000 on December 4, 2006.

In a post-closing letter to the bankruptcy judge, Tracy Craig claimed that she and her husband had not agreed to a $310,000 sale price, as shown on the HUD statement, but to a $220,000 sale price, as evidenced by the contract that they had signed with Tepler. She complained to the judge that respondent was not returning her phone calls to explain that discrepancy. She wrote:

> The day before the closing I received a HUD with a selling price of $310,000 and a

> realtor payment of $100,000 to Kotler Real-estate. I called to ask my attorney questions, but he would not return my calls. I wanted to find out why the HUD states that I sold the property for $310,000 when my spouse and I signed a contract for $220,000. I never signed a contract to pay any realtor $100,000. I have not received my closing documents from my attorney, or the fully executed HUD signed by both parties (my attorney and the buyer).
>
> . . . .
>
> I have tried since November to contact my attorney with no returned calls or response.
>
> [Ex.24 to Ex.P-4.]

At the hearing below, the DEC explored the issue of respondent's receipt of a $1,250 fee for the closing and a $1,010.84 fee for the bankruptcy matter. As mentioned previously, on October 12, 2006, on a ruling on respondent's motion for permission to sell the house, the bankruptcy judge had ordered that "[s]ufficient funds . . . be held in escrow by the Debtor's [the Craigs] attorney to pay real estate broker's commissions and attorney's fees for the Debtor's attorneys upon further order of this Court." On May 22, 2007, respondent filed with the bankruptcy court a certification in support of his application for the approval of his $1,250 fee for the real estate matter, a fee that he had collected six months before. The bankruptcy trustee opposed the application, on the basis that respondent had never provided him with a correct HUD

statement, had not "filed the approved application for realtor fees in the amount of $100,000," and had not "effectively and adequately" represented the Craigs at the closing.

On June 12, 2007, the bankruptcy court entered an order approving a $1,010.84 fee for respondent's work in the bankruptcy case. The order is silent about the $1,250 fee for the closing. Respondent's position was that the court's silence meant the absence of a ruling, as opposed to a denial of the fee, inasmuch as, in his view, the court had no jurisdiction over non-estate assets. According to respondent, this was a confirmed Chapter 13 plan and, under the statute, confirmation of a plan vests all property of the estate in the debtor. Asked by the hearing panel why, then, he had made a fee application to a court that, in his opinion, did not have jurisdiction to rule on the fee, respondent replied that he had done so as a "matter of course." He told the hearing panel that, in this situation, too, the resulting order was nothing but a "comfort order."

Following the court's order, Tracy Craig called respondent on seven occasions asking for the $1,250, to no avail. Respondent acknowledged having received her messages. On July 12, 2007, one month after the court order, the trustee instructed respondent to return the $1,250 to the Craigs, because it had not been approved by the court. Respondent did not do so. The trustee

made two additional, unsuccessful requests, the last one on September 17, 2007.

Respondent did not object, in writing, to the trustee's demands for the return of the $1,250 fee. He claimed that he had orally conveyed his position to the trustee.

On October 9, 2007, respondent finally returned the $1,250 to the Craigs, after receiving a call from the Office of Attorney Ethics ("OAE"). He told the hearing panel that he had refunded the fee because "it wasn't worth the aggravation."

The complaint charged respondent with gross neglect, lack of diligence, failure to communicate with the clients, and failure to promptly deliver funds that his clients were entitled to receive, violations of RPC 1.1(a), RPC 1.3, RPC 1.4(b), and RPC 1.15(b), respectively.

The DEC found that respondent negligently handled the real estate closing, in that "he failed to properly review the HUD statement, he failed to pick up on obvious errors, ie [sic] the incorrect purchase price and the questionable 'contract release fee' and he failed to notice that the amount of cash to sellers was incorrect." The DEC did not find, however, that such conduct amounted to either gross neglect or lack of diligence:

> However, within a reasonable amount of time, [respondent] caught his errors and made reasonable attempts to correct the error and secure his clients with the proper amount of

> sales proceeds which they in fact received. While these actions or inactions were negligent they did not rise to a level of gross negligence and we find the respondent not guilty of gross neglect in violation of RPC 1.1(a). Without having the testimony by the grievant [Tracy Craig] it was unclear as to the extent of work she did without the knowledge and consent of the respondent or the extent of her knowledge as to the reasons why the HUD and deed were changed at the last minute to reflect a higher sales price and $100,000 contract release fee. For these same reasons we did not find clear and convincing evidence that respondent's actions arose [sic] to a level of lack of diligence and find him not guilty of violating RPC 1.3.
>
> [HPR¶30.][7]

The DEC also found no violation of RPC 1.4(b):

> Mr. and Mrs. Craig refused to testify at the hearing and no other proofs were offered which were sufficient enough to prove by clear and convincing evidence that the respondent failed to communicate with them. We therefore find the respondent not guilty of failing to communicate with his client in violation of RPC 1.15(b) [sic].
>
> [HPR¶31.]

The only violation that the DEC found was of RPC 1.15(b), by respondent's failure to promptly return the $1,250 fee to the Craigs:

> In May of 2007, the respondent made another application to the court specifically seeking approval to retain the fees he had already collected as his fee for the real

[7] "HPR" refers to the hearing panel report.

> estate closing. That motion was not granted and an order was entered on June 12, 2007. While the order did not specifically indicate that the monies had to be returned, the intent of the court was clear that respondent's request to seek approval of the fees was denied and he should have immediately refunded the fees. The respondent was contacted several times by the standing trustee and the client demanding the return of the fees. If there was some ambiguity regarding the order, the respondent should have sought clarification. Instead, the respondent's description of the [bankruptcy court]'s order as a "comfort order" and not enforceable as a basis to withhold his client's funds was unbelievable and we find that the presenter has proven by clear and convincing evidence that the respondent failed to return client's funds in violation of RPC 1.15(b).
>
> [HPR¶32.]

The DEC also found that respondent did not have the court's permission to proceed with the sale of the Craigs' house, because the terms of the contract had changed. In other words, the DEC faulted respondent for not having filed a new motion seeking the court's approval of the sale. The court order that authorized the sale had been premised on a higher price, $250,000, and on TK's acting as buyer, rather than Tepler individually. The DEC did not, however, cite any RPC as having been violated as a result of this conduct (neither did the complaint charge such a violation).

The DEC made an additional observation:

> It should also be noted that immediately following the hearing, a letter was forwarded to [the presenter] and [respondent's counsel] requesting additional information before the panel made any conclusions. Specifically, the panel wanted records confirming who the "contract release fee" was issued to and information as to if [respondent] was made aware of the increase in the contract price prior to the closing. Citing due process concerns, both attorneys responded that they did not want to furnish the requested documents without re-opening the hearing subjecting the parties to cross examination if necessary.
>
> [HPR¶33.]

Apparently, the DEC was either unwilling or unable to re-open the hearing, as the panel report makes no further mention of this issue.

According to the panel report, "[t]he panel learned that discipline had been imposed on the respondent on two prior occasions and carefully weighed that history before making a final recommendation [for an admonition]."

Following a de novo review of the record, we find clear and convincing evidence that respondent's conduct was unethical. We will first address whether respondent violated the RPCs cited in the complaint and then turn our attention to the unanswered questions raised by the record.

As indicated above, the DEC dismissed all charges, except that of a violation of RPC 1.15(b), for respondent's failure to

promptly return the $1,250 fee to the Craigs. We agree with the DEC's conclusion that respondent violated that rule. As found by the DEC, respondent did not clearly and convincingly prove that the bankruptcy court had no jurisdiction over the real estate fee.

As the record shows, on September 14, 2006, respondent filed a motion with the bankruptcy court, seeking approval for the sale of the Craigs' house. Attached to respondent's motion was a copy of the TK contract for $250,000. On October 12, 2006, the bankruptcy court entered an order authorizing the sale "upon the terms and conditions of the contract." Paragraph 3 of the order provided that "[s]ufficient funds may be held in escrow by the Debtor's attorney [respondent] to pay real estate broker's commissions and attorney's fees for the Debtor's attorneys upon further order of this Court." [Emphasis added]. Clearly, then, respondent could not have taken his $1,250 without the court's authorization. He did so, however. Six months later, he filed an application with the bankruptcy court, seeking its approval of the $1,250 fee. The trustee objected. The court order that ensued authorized only the payment of $1,010.84 for respondent's work in the bankruptcy case.

In July 2007, the trustee directed respondent to return the $1,250 to the Craigs. He did not. His position was that the

court order was unenforceable because the court did not have jurisdiction over the real estate fee at that point. Respondent argued that, in a Chapter 13 proceeding, once a plan is confirmed (and it had been, he claimed), the real estate "re-vests" into the debtor. He contended that he had made the fee application to the court simply "as a matter of course."

The DEC found that "no credible evidence was provided by the respondent to support his argument that [the bankruptcy judge's] orders were unenforceable." We agree. Respondent did not prove, by clear and convincing evidence, that court approval was not required for both the sale of the house -- based on the final contract, listing Tepler as the buyer and a reduced purchase price of $220,000 -- and the real estate fee. The documents that he offered in evidence, excerpts from papers filed in other bankruptcy cases that he handled and a copy of section 1327 of the bankruptcy code, did not clearly and convincingly demonstrate that his position was correct, that is, that the bankruptcy court no longer had jurisdiction over the Craigs' house and the real estate fee derived from its sale.[8]

11 U.S.C. §1327(b) (the bankruptcy code) provides that, "[e]xcept as otherwise provided in the plan or the order

---

[8] Respondent did not file a brief with us.

confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." What constitutes "property of the estate" is not a settled issue in the bankruptcy courts:

> In determining what is "property of the estate" for the purpose of applying the automatic stay in chapter 13 cases, courts provide three distinct interpretations of the relevant provisions of the Bankruptcy Code [the "Code"]. Judge Eugene Wedoff [a judge of the Unites States Bankruptcy Court for the Northern District of Illinois] [footnote omitted] has labeled these approaches "estate termination," "estate transformation," and "estate preservation."
>
> . . . .
>
> The estate termination approach theorizes that as all property has vested in the debtor upon confirmation, there is no longer property of the estate and, thus, the estate comes to an end [footnote omitted]. Since the estate has come to an end, any property acquired post-confirmation will not be deemed property of the estate, but rather property of the debtor.
>
> . . . .
>
> Because the debtor already has possession of the property while it is "property of the estate," courts have interpreted the word "vest", as used in section 1327(b), to mean that fixing of a right to title in the debtor, as opposed to a mere possessory interest. Therefore, if all "property of the estate" has vested in the debtor upon confirmation of the plan, it follows that the estate ceases to exist and anything acquired following confirmation becomes property of the debtor, not property

> of the estate. Since the estate has ceased to exist, all property, whether acquired before or after confirmation, lacks the protection of the automatic stay of section 362 and is subject to credit attack.
>
> . . . .
>
> Under the estate transformation approach, section 1327(b) vests most, if not all, of the "property of the estate" in the debtor; however, the estate continues to exist to the extent necessary for satisfaction of the payment plan [footnote omitted].
>
> . . . .
>
> Under the estate preservation approach, confirmation of the debtor's plan does not result in the termination of the estate. Relying entirely upon section 1306, the estate preservation theory provides that the estate continues until the occurrence of one of three events: case closure, dismissal, or conversion to a case under another chapter of the Code. Unlike estate termination and estate transformation, all acquisitions under estate preservation, whether property or earnings, are included in the estate notwithstanding the confirmation [footnote omitted]. To avoid rendering the vesting provision of section 1327(b) superfluous, courts adopting the estate preservation approach interpret vesting to mean "fixing the debtor's right to possess and deal with estate property after confirmation" [footnote omitted].
>
> [7 Am. Bankr. Inst. L. Rev. 213.]

Although the above demonstrates that the courts are divided on the meaning of the word "vest" contained in section 1327(b) of the code, we find that, even under the approach urged by

respondent, estate termination, he was obligated to obtain the bankruptcy court's consent to the sale and to the collection of his closing fee. Having obtained a court order for the sale of the Craigs' property and having been informed that, after the court authorized the sale for $250,000, a new contract provided for a $30,000 reduction in the purchase price, respondent had an obligation to apprise the court of this circumstance and to determine whether the court still approved of the sale on the new terms. $30,000 was a substantial reduction in the purchase price. Perhaps the court might not have authorized the sale for $220,000, instead of $250,000.

At a minimum, if respondent believed that, as matter of law, the bankruptcy orders were unenforceable, then he should have made a motion to vacate them. What he could not do was to ignore a court order that was in place, a court order that he himself had sought.

We find, thus, that respondent was not entitled to remove the $1,250 fee from the closing proceeds and that, as a result, his failure to comply with the trustee's demands for the return of the fee violated RPC 1.15(b). We also find that his failure to obtain the court's permission to sell the Craigs' house to Tepler, instead of TK, and for $220,000, instead of $250,000, constituted an aggravating factor, as did his taking of the

$1,250 fee, in the face of a court order that approved the sale of the house "upon the terms and conditions of the contract of sale" (the TK contract) and directed that sufficient monies from the closing be held in escrow for the payment of his fee, "upon further order of this Court."[9]

We further find, contrary to the DEC's conclusion, that respondent violated RPC 1.1(a) (gross neglect) and RPC 1.4(b) (failure to communicate with the client). As to the latter, Saccani, whose testimony the DEC found credible, recalled that Tracy had become upset about respondent's failure to return her phone calls. Saccani testified that, either right before or right after the closing, Tracy had called the office and had asked to speak with respondent. Saccani had given respondent the messages, which respondent did not recall receiving. Tracy complained to the bankruptcy judge that, since November 2006, she had been trying to reach respondent to discuss the $310,000 price and the $100,000 "contract release fee," to no avail. Moreover, respondent admitted, in his answer, that he had not returned Tracy Craig's telephone calls made between September 6 and October 8, 2007, or provided the Craigs with an explanation

---

[9] Respondent's failure to obtain the court's approval for both the sale to Tepler and for the removal of his real estate fee would have supported a charge that he violated RPC 8.4(d) (conduct prejudicial to the administration of justice), a charge that is not part of the complaint.

for his failure to return the $1,250 real estate fee to them, as directed by the bankruptcy trustee. Respondent's excuse was that, by that time, the Craigs had already revoked their power of attorney, thereby terminating the representation.

The Craigs, however, did not revoke the power of attorney until November 17, 2006, during Tracy's phone conversation with respondent. According to Saccani, Tracy had called respondent before the closing, which took place on November 16, 2006. Moreover, contrary to respondent's assertion, the Craigs did not terminate the representation at that time. They simply revoked the power of attorney given to him and asked him not to act on their behalf without first consulting with them.

As to the calls between September 6 and October 8, 2007, although respondent is correct that, by that time, the Craigs were no longer clients, as his former clients they were at least entitled to an explanation for his position that he was not obligated to refund the fee collected in a matter in which he had represented them. Paragraph (b) of RPC 1.4 requires an attorney to comply with a client's reasonable requests for information. A fair interpretation of the rule would seem to require that obligation to apply to former clients as well, at least to the extent that the sought information is about the matter handled by the attorney and that the inquiry is not too

distant in time, as in this case. Unlike the DEC, we find that respondent violated RPC 1.4(b).

In addition, we are unable to agree with the DEC's conclusion that respondent's conduct in connection with the closing did not amount to gross neglect.

One day before the closing and on the closing date as well, the title company faxed a HUD statement to respondent, first a preliminary form and then the final one. Both statements reflected a $310,000 purchase price, instead of $220,000, as listed in the final contract between the Craigs and Tepler, which respondent acknowledged receiving. In addition, the HUD statement provided for an unexplained $100,000 payment to a company owned by Yuli Kotler, a business partner of Tepler. Said payment was to be made out of seller's proceeds.

Respondent did not question the $310,000 price contained in the HUD statement or the payment of $100,000 to Tepler's business partner. He claimed that he had not reviewed the HUD statement, except to verify the amount of cash due to the Craigs. His position is that he relied on his paralegals for in-depth reviews of closing statements.

Clearly, respondent's failure to examine each and every entry on the HUD statement to ensure their accuracy constituted gross neglect on his part. This was all the more reprehensible

because his secretary, Martinsen, whose testimony the DEC found credible, had alerted him that the figures were askew and that he needed to review the closing documents. On the date of the closing, November 16, 2006, Martinsen had received several phone calls from Tracy Craig, asking to speak with respondent, who was not in the office at the time. Tracy, who had received a copy of the HUD statement the day before the closing, had questions about the figures contained in the statement. According to Martinsen, at the end of the day, respondent had signed the HUD statement and had told her to fax it to Tarjan. The closing proceeded with the inaccurate HUD statement, including a double deduction for the $10,000 deposit, or a $10,000 shortfall in the amount that the Craigs were entitled to receive. Respondent testified that, only after his paralegal had returned from her vacation had he been made aware of the wrong -- or false -- information contained in the HUD statement.

Respondent's failure to ensure the propriety of the figures shown on the closing statement facilitated the completion of a fraudulent transaction. Moreover, his duty to scrutinize every entry on the HUD statement, as the lawyer for the Craigs, was heightened by his role as attorney-in-fact for the Craigs. As the person standing in the Craigs' shoes, respondent was responsible for verifying the propriety and accuracy of his

clients' payments and receipts. Undeniably, his conduct was grossly negligent -- reckless even.

Moreover, as the presenter pointed out, by signing the HUD statement on behalf of the Craigs, respondent attested that the statement was a true and accurate statement of all receipts and disbursements made on account of the Craigs.

We find it somewhat troubling that the record did not put to rest questions that inevitably arise as to whether respondent did, in fact, notice the figures' discrepancy on the HUD statement. Unquestionably, the record raises serious questions about the legitimacy of the financing in this transaction. The purchase price was $220,000; the HUD statement listed an inflated purchase price of $310,000 (artificially inflated purchase prices are designed to obtain 100% or higher financing); and the HUD statement showed that the amount of the new loan was $248,000, or 113% financing of the $220,000 purchase price. Moreover, Tepler's memorandum to his lawyer, Tarjan, makes it clear that the $310,000 represented an inflated price. In that memorandum, Tepler told Tarjan:

> Here's how the whole deal will look on the hud [sic].
>
> The selling price is going to be 220k, they [the Craigs] already have a 10k deposit we gave straight to her [Tracy Craig] on Friday. So I'm financing 310k, yuli [sic] [Kotler]'s company will invoice the seller

for the difference of 100k.

> I'm including the HUD and the invoice for a property I did in rahway [sic] so you can see the way its [sic] done. Let me know if there's going to be a problem on your end closing like this, if yes, then I can use another attorney. If not, we should be ready to close in two weeks or less.

Unquestionably, Tarjan was aware of the fraudulent aspect of the mortgage financing. Was respondent? He testified that he had not seen the above memorandum until the ethics hearings. If his testimony is credible, it is possible that he had no actual knowledge of the fraud that was about to take place. At a minimum, however, his acknowledged failure to review the HUD statement in detail assisted the wrongdoers in accomplishing their unlawful purposes.

In addition to the inflated purchase price, a significant problem with the HUD statement was the inclusion of a $100,000 payment by the Craigs to Tepler's business partner, Yuli Kotler. The only logical inference is that this payment was trumped up. Consider the following: The figures contained in the HUD statement were inflated by $100,000; in reality, Tepler was paying $220,000 for the property. In order to obtain 100% or greater financing, however, Tepler inflated the purchase price to $310,000 and obtained 113% financing from the lender. The true amount that Tepler needed to close was approximately

$223,000: $210,000 ($220,000 minus the $10,000 deposit already given to the Craigs) plus roughly $13,000 in closing costs. He obtained a $248,000 loan, or eighty percent of the purported $310,000 price (lenders typically lend eighty percent of the value of the property). He, therefore, had an actual surplus of $25,000 ($248,000 minus $223,000). Because, however, the purchase price was inflated by $100,000, he needed to come up with an additional $75,000, on top of the $25,000, to artificially "fund" the inflated purchase price. Enter the $61,250 "second loan," which, coupled with the $3,750 cash amount that Tepler had to bring at closing (line 303 of the HUD statement) and the $10,000 deposit that is improperly recorded on the seller's side of the HUD statement as not having been given (line 201), made up the $75,000 shortfall. Who kept the $25,000 surplus (Tepler? Yuli?)? It is not obvious.[10]

What is obvious is that this transaction was a fraud on the lender, to whom it was represented that the sale price was $310,000 when, in fact, it was $220,000. The lender then financed 113% of the sale price. It is possible, even probable,

---

[10] A title company (and Fidelity National is one the largest in the country) is obligated to issue checks in strict compliance with what is on the HUD statement. The checks issued in this instance would have shed light on who received what from the inflated figures of this transaction.

that the lender, Morgan Funding Corp., knew about the inflated price but did not care, because, typically, lenders sell their loans to other lenders. In that case, the new lender would be the one defrauded, believing that a property that allegedly justified a $248,000 mortgage loan was worth at least $310,000, when, in fact, it was worth a lot less, as evidenced by the $220,000 purchase price.[11]

What discipline, then, should respondent receive for having grossly neglected the Craigs' transaction (indeed, having acted recklessly), having failed to adequately communicate with the Craigs, and having failed to comply with the trustee's several demands for the return of the real estate fee, conduct that was aggravated by his failure to obtain the court's permission for the sale to Tepler and at a reduced price, collection of the fee without the bankruptcy court's permission, facilitation of a fraudulent transaction, obvious abdication of his responsibilities to his real estate staff, careless disregard

---

[11] At the beginning of the first ethics hearing, the OAE presenter told the hearing panel that there might have been a mortgage fraud in this case, but that such determination was neither for the panel nor for the OAE to make. We note, however, that, if an investigation were to reveal respondent's active involvement in the fraud, then obviously that conduct would be the concern of the disciplinary authorities. In any event, for undisclosed reasons, the OAE decided not to charge respondent with collusion in or awareness of the mortgage fraud scheme. Although we are not privy to those reasons, deference must be paid to the OAE's decision in this regard.

for his client's welfare and bankruptcy court orders, and two prior admonitions (one for allowing an employee to sign portions of bankruptcy petitions)?

An attorney who acted recklessly in a real estate transaction received a censure. In re Alsobrook, 186 N.J. 65 (2006). There, the attorney completed a real estate closing and disbursed the closing funds without obtaining the signature of one of the parties' on the deed, relying on the other party's assurance that the signature would be obtained. The attorney then disbursed the proceeds due to sellers only to the party who had signed the deed, although aware of the non-signing party's interest in the property. The attorney's conduct constituted a breach of her fiduciary duty to her clients (the buyers), the title company, and the lender. In addition, the attorney could not account for discrepancies in the charges on the closing statement. Harsh consequences befell the attorney's clients, inasmuch as the sale fell through because of the absence of a proper deed. The attorney's conduct was found to have been "marked by appalling recklessness." In the Matter of Athena Alsobrook, DRB 05-237 (December 21, 2005). The attorney was found guilty of having violated RPC 1.1(a) and RPC 1.15(b).

Alsobrook's conduct in completing a closing without a proper deed might be viewed as more reckless than respondent's

failure to review the HUD statement in detail. In the end, Alsobrook's clients were unable to buy the property. Fortuitously, in this instance, the Craigs ended up receiving all the monies to which they were entitled.

It might seem that respondent should receive less than a censure, the discipline imposed in Alsobrook. But respondent's cavalier attitude toward this closing, in particular, and the handling of other closings in his office, in general, cannot justify a lesser form of discipline. Although it is proper -- and the regular practice -- for paralegals to prepare HUD statements or to review HUD statements prepared by the other party, the attorney bears the ultimate responsibility for reviewing their contents to ensure that they accurately reflect the receipts and disbursements pertaining to the transaction. Instead, respondent relied extensively on the work of paralegals, expecting them to perform the thorough review that was his responsibility to conduct. His cavalier attitude toward his real estate clients was obvious, as demonstrated by his dislike to attend closings in locations other than near his office; his quick willingness to conduct closings by mail; his improper delegation of some of his duties to office staff; and, in this instance, the unconscionable failure to conduct an especially careful review of the HUD statement, having been

alerted by Martinsen that the client had called about problems with the figures and that Martinsen, too, could not reconcile them with the known terms of the transaction.

Other factors, too, cannot justify less than a censure. Respondent collected a fee without the court's permission; failed to comply with the trustee's demands for the return of the fee; failed to seek the court's permission for the sale to Tepler and for a lower price; enabled a fraudulent transaction to take place; and has two admonitions on his ethics record. We, therefore, determine that a censure is appropriate in this case.

Member Stanton voted for a three-month suspension, finding that respondent's conduct in general and, in particular, his enabling a fraudulent transaction to take place merits more than a censure. Member Wissinger did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of William H. Oliver, Jr.
Docket No. DRB 10-038

Argued: April 15, 2010

Decided: May 26, 2010

Disposition: Censure

Members	Three-month Suspension	Censure	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh		X				
Clark		X				
Doremus		X				
Stanton	X					
Wissinger						X
Yamner		X				
Zmirich		X				
Total:	1	7				1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel