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SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 07-040  
District Docket No. X-2004-0074E

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IN THE MATTER OF  
ALLAN DZWILEWSKI  
AN ATTORNEY AT LAW

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Decision

Argued: March 15, 2007

Decided: April 26, 2007

Robert E. Dunn appeared on behalf of the District X Ethics Committee.

Fredric Knapp appeared on behalf of respondent.

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

This matter came before us on a recommendation for discipline filed by the District X Ethics Committee (DEC). The complaint charged respondent with entering into a business

transaction with a client, a violation of RPC 1.8(a), and engaging in conduct involving misrepresentation, a violation of RPC 8.4(c). We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1973. He has no disciplinary history.

The presenter and respondent's counsel entered into a stipulation of facts dated August 21, 2006, the same date as the disciplinary hearing. We have gleaned the facts from that stipulation and the brief testimony offered at the hearing.

Respondent represented two closely-held family corporations, East Hooper Avenue Corporation and South Jersey Realty Corporation. Each corporation owned a parcel of vacant property as its sole asset. All of the shareholders were related by blood or marriage. The president of both corporations, James Favata, was respondent's father-in-law.

Favata retained William Clayton of Clayton & Clayton as the realtor for the sale of the properties. The East Hooper Avenue Corporation property sold for \$450,000, generating a six percent commission, or \$27,000, for Clayton & Clayton. Favata and Clayton agreed that Clayton would give Favata \$2,700 (ten percent of his \$27,000 real estate commission) as a "finder's

fee". Neither Favata nor Clayton disclosed this arrangement to the other shareholders or to respondent.

Although Clayton did not testify at the ethics hearing, the presenter related the substance of a conversation that he had with Clayton during the investigation of the grievance. According to the presenter, Clayton contacted the New Jersey State Insurance Commission to determine whether payment of a finder's fee to Favata was permissible. Clayton learned that the finder's fee was permitted, as long as it was paid from the realtor's commission. Because Favata was not a licensed realtor, Clayton issued the check to respondent, instructing him to endorse it to Favata.<sup>1</sup> Respondent testified that he received the check from Clayton with no explanation, other than instructions to give it to Favata. At the hearing before the DEC, the following exchange took place:

Panel Member: Did the respondent know of the purpose of the payment when he endorsed it to Mr. Favata?

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<sup>1</sup> According to N.J.S.A. 45:15-1, "[n]o person shall engage either directly or indirectly in the business of a real estate broker . . . without being licensed so to do as hereinafter provided." N.J.S.A. 45:15-4 exempts attorneys from that provision.

Respondent's Attorney: Never knew about it, never was told. I think there was a presumption that it was something like a finder's fee, it equated [to] 10% of the real estate commission . . . .

Panel Member: [Y]ou're saying when Clayton sent the letter to your client he had no idea it was just a letter with a check?

Respondent's Attorney: You can address Mr. Dzwilewski.

Panel Member: Do you recall how it came in sir?

Respondent: I believe it came in the mail without any specific instructions. As I recall and I looked later on I looked in the memo section of the check there was no indication of what it was for except just instructions to give it to Mr. Favata.

Panel Member: And you just went ahead and endorsed the check not knowing what it was for?

Respondent: Yes, I did.

Panel Member: That's your testimony?

Respondent: I didn't think perhaps fully through that but that's exactly what I did.

[T25-4 to T26-8].<sup>2</sup>

On March 1, 2003, the shareholders held their first meeting after the November 2002 sale of the East Hooper Avenue property.

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<sup>2</sup> T refers to the transcript of the August 21, 2006 DEC hearing.

One of the grievants, Pauline Jelken, attended that meeting as the daughter of shareholder Joan Centinaro.<sup>3</sup> The grievants tape-recorded the meeting, with respondent's knowledge. The tape-recording was admitted as an exhibit at the ethics hearing. The shareholders discussed several issues at the meeting, which became contentious and acrimonious. Before the meeting, Jelken had asked Clayton whether anyone other than his real estate agency had received money from the sale of the property. Clayton referred Jelken to respondent. Jelken specifically asked Clayton whether Favata had received any money from the sale of the property. Again, Clayton referred her to respondent.

During the meeting, Jelken asked respondent whether Favata had received a commission. Respondent replied that he had "no knowledge of any monies going to anyone" and that he had "no information" about that, that he "had nothing to do with it," that he had "no idea" why Clayton would suggest that Jelken ask respondent about it, and that he "wasn't involved." Moreover, when another shareholder twice confirmed respondent's statement that he had no knowledge about a payment to Favata, respondent replied "[t]hat is correct." Respondent tried to deflect

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<sup>3</sup> Jelken's brother, Sebastian Centinaro, is also a grievant.

Jelken's inquiry by asserting that the buyer's attorney is responsible for disbursing the closing funds, implying that any funds paid to Favata would have been paid at the closing.

Respondent admitted in the stipulation that, although he should have disclosed to the shareholders Clayton's payment to Favata, he failed to do so because he believed his duties were owed to Favata, as president of the corporation.

Although respondent acknowledged that he engaged in a conflict of interest by failing to disclose to the shareholders that Favata had received compensation from Clayton, he did not specifically admit that he engaged in conduct involving misrepresentation.

The DEC found that respondent violated RPC 1.8(a) and RPC 8.4(c).

As to the conflict of interest, the DEC determined that

[t]he business transaction here was the side deal between Mr. Favata and William Clayton to pay Mr. Favata a 10% finder's fee for the sale of property owned by the corporation of which Mr. Favata was president. Respondent was essential to the consummation of the deal because Mr. Favata did not have a real estate license. Mr. Clayton, accordingly, could not pay the finder's fee to Mr. Favata directly.

The parties stipulated that Respondent had no knowledge of the side deal at the time it

was made and there is no evidence to the contrary. Respondent testified that when he received the check in November 2002, endorsed it in blank and transmitted it to Mr. Favata, he still did not know that it was payment of the finder's fee. The panel does not find his testimony completely credible. Respondent has been practicing law for 33 years, and there is nothing in the record to show that he is anything other than a competent, experienced lawyer. It is not credible that a competent, experienced lawyer would receive a check made out to him and blindly endorse it for the benefit of a third-party without knowing its purpose. Especially since the payment was being made to an officer and shareholder of a corporation that the Respondent represented, it is submitted Respondent's [sic] was obliged by RPC 1.8(a) to affirmatively inquire into the purpose of Mr. Clayton's request that Respondent endorse the check made out to him to Mr. Favata. (citations omitted).

The DEC further found that respondent's failure to reply truthfully to Jelken's inquiry about Clayton's payment to Favata violated RPC 8.4(c).

The DEC considered as mitigating factors respondent's previously unblemished thirty-three year legal career, his cooperation with the ethics investigation, and his admission that he had engaged in a conflict of interest. The DEC considered two aggravating factors:

The first is that it appears to the panel that the Respondent has not fully disclosed

his knowledge of the transaction he participated in - that is, the endorsement in blank of Mr. Clayton's check to him to his father-in-law, Mr. Favata. As noted above, *supra*, at par. 14-17, Respondent's testimony on this point does not seem to credibly relate the whole of Respondent's knowledge about this transaction.

The second aggravating factor that the panel finds significant is th[e] nature of the misconduct, namely, (a) Respondent's dishonesty in participating in the side deal of Mr. Favata and Mr. Clayton and, (b) his dishonesty at the shareholders meeting. The panel has listened to the tape, and what is striking is Respondent does not deny knowledge of the side deal once, but several times, in response to questioning from several shareholders. Moreover, he adds to this denial by deflecting all inquiry to Mr. Clayton, not once, but several times.

Presumably, the DEC was troubled by respondent's lack of credibility at the hearing, and his persistence in denying, at the shareholders' meeting, knowledge about the check from Clayton to Favata.

Although the presenter and respondent's counsel agreed that an admonition is the appropriate level of discipline, and although the grievants did not object, the DEC recommended a reprimand.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical



is supported by clear and convincing evidence. We cannot agree, however, with the DEC's finding that respondent violated RPC

1.8(a). That rule provides:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client . . . .

Here, respondent acted as a conduit for Clayton's payment of a portion of his real estate commission to Favata. Respondent's endorsement and transmission of Clayton's check to Favata did not constitute a "business transaction," as contemplated by the rule. RPC 1.8(a) has been held to apply to the following situations: the formation of a business partnership between an attorney and a client (In re Reiss, 101 N.J. 475, 486-487 (1986); In re Miller, 100 N.J. 537, 543 (1985)); a loan from a client to an attorney (In re Frost, 171 N.J. 308, 321 (2002); (In re DiLieto, 142 N.J. 492, 498 (1995)); and an attorney's purchase of property from a client (In re Doyle, 146 N.J. 629, 641 (1996); In re Humen, 123 N.J. 289, 296 (1991)).

In our view, respondent's actions did not amount to a business transaction with a client.

We find, however, that respondent's conduct violated RPC 8.4(c). N.J.S.A. 45:15-1 prohibited Clayton from directly paying Favata a percentage of his commission because Favata was not a licensed realtor. Respondent permitted Clayton to achieve indirectly the result that he could not accomplish directly. Respondent acted as an intermediary to facilitate a fee arrangement that was prohibited by statute, an act of dishonesty that violated RPC 8.4(c).<sup>4</sup>

Although respondent alleged that he did not know the purpose of the check, the DEC found respondent's testimony on this point not credible. We pay heed to that determination. The DEC had the opportunity to observe respondent's demeanor and was, therefore, in a better position to assess his credibility. We defer to the DEC 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).

Even were we to accept respondent's testimony that he did not have knowledge about the purpose of the check, we find that

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<sup>4</sup> Although RPC 1.2(d) prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows is illegal, criminal, or fraudulent, in this case, the corporation, not Favata, was the client. That RPC, therefore, is not applicable here.

respondent's actions amounted to the equivalent of "willful blindness." See, In re Skevin, 104 N.J. 476, 486 (1986) (willful blindness defined as "a situation where the party is aware of the highly probable existence of a material fact but does not satisfy himself that it does not in fact exist. . . . The proposition that willful blindness satisfies for a requirement of knowledge is established in our cases [citations omitted]"). At a minimum, respondent had a duty to ask Clayton why the check was made payable to respondent. Instead, according to respondent, he merely endorsed a check, payable to himself, and forwarded it to Favata.

We note, parenthetically, that respondent's belief that he could have received the realtor's fee is mistaken, notwithstanding the attorney exemption contained in N.J.S.A. 45:15-4. In In re Roth, 120 N.J. 665, 674 (1990), the Court asserted that "an attorney whose actions as a broker are undertaken pursuant to the "attorney" exemption to the licensing law, N.J.S.A. 45:15-4, may perform brokerage services that are only incidental to the normal practice of law, which cannot be the basis for a claim of compensation as a broker." Respondent, thus, was not entitled to receive a portion of the real estate

commission because he had not provided sufficient services to have earned the fee.

Respondent also violated RPC 8.4(c) in other respects. At the shareholder's meeting, the grievant, Pauline Jelken, asked respondent whether Favata had received any part of the real estate commission paid to Clayton. Respondent replied that he had "no information" about that, that he "had nothing to do with it," that he had "no idea," and that he "wasn't involved." He suggested that Jelken ask Clayton about the commission. At this time, because he was instrumental in the transfer of funds from Clayton to Favata, respondent was aware that Favata had received a portion of the commission. Respondent not only made misrepresentations, but tried to mislead the shareholders by asserting that the buyer's attorney is responsible for disbursing funds at the closing. Although that was a true statement, respondent knew that the payment to Favata was not accomplished at the closing and he knew that he, not the buyer's attorney, had facilitated the payment. Respondent, thus, violated RPC 8.4(c) by misrepresenting that he had no knowledge about Favata's receipt of the finder's fee.

Generally, attorneys guilty of misrepresentation receive reprimands. It is well-settled that "intentionally misrepresenting

the status of lawsuits warrants public reprimand." In re Kasdan, 115 N.J. 472, 488 (1989). Even when attorneys violate other RPCs in addition to RPC 8.4(c), reprimands are often imposed, as long as the attorneys have not defaulted and do not have an ethics history. See, e.g., In re Weiworka, 179 N.J. 225 (2004) (reprimand for attorney who took no action in the client's behalf, did not inform the client about the status of the matter and the expiration of the statute of limitations, and misled the client that a complaint had been filed) and In re Onorevole, 170 N.J. 64 (2001) (reprimand for attorney who grossly neglected a matter, failed to act with diligence, failed to reasonably communicate with the client, and made misrepresentations about the status of the case).

Here, respondent was guilty not only of misrepresentation but also assisting Favata in illegal conduct. We considered, in mitigation, respondent's prior unblemished career of thirty-three years and his admission of wrongdoing. In aggravation, respondent repeatedly denied knowledge of Favata's receipt of a portion of the real estate commission, and, at the DEC hearing, was less than forthcoming about his knowledge of that transaction.

Balancing the aggravating and mitigating factors, we determine that a reprimand is sufficient discipline in this matter.

Member Frost recused herself.

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  
William J. O'Shaughnessy, Chair

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

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SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Allan Dzwilewski  
Docket No. DRB 07-040

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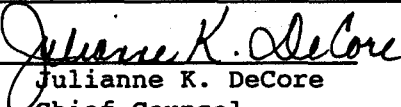
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Argued: March 15, 2007

Decided: April 26, 2007

Disposition: Reprimand

Members	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
O'Shaughnessy		X			
Pashman		X			
Baugh		X			
Boylan		X			
Frost					X
Lolla		X			
Neuwirth		X			
Stanton		X			
Wissinger		X			
Total:		8			1

  
Julianne K. DeCore  
Chief Counsel