SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-407
District Docket No. XIV-99-033E

IN THE MATTER OF	
ALAN ZARK	
AN ATTORNEY AT LAW	

Decision

Argued: February 17, 2005

Decided: April 13, 2005

Nitza Blasini appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us on a recommendation for discipline filed by the District VI Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1976. He received an admonition in 2002 for failure to keep a client

advised about the status of the matter and failure to cooperate with the ethics investigation. In the Matter of Alan Zark, Docket No. DRB 01-421 (February 8, 2002). In 2005, he received another admonition for failure to keep a client reasonably informed about the status of a matter and to comply with reasonable requests for information. In the Matter of Alan Zark, Docket No. DRB 04-443 (February 18, 2005).[1]

The complaint charged respondent with violating RPC 1.15(b) (failure to promptly deliver funds to a third person) (count one) and RPC 1.15(a) (failure to safeguard funds), RPC 1.15(b), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) (count two).

The facts in this matter generally are not in dispute. In two separate real estate transactions, the Sullivan and Diettman matters, respondent refused to disburse fees to a mortgage broker, contending that his clients had never agreed to pay those fees and that the fees were "illegal." In addition, in the Diettman matter, the complaint alleged that respondent used a portion of the closing proceeds to pay a debt owed by the client

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[1]We considered the disciplinary matter leading to the imposition of the admonition at the same time that we considered this matter.

that was unrelated to the real estate transaction and that respondent certified that the real estate settlement form (Hud-1) was accurate, when it was not. At the ethics hearing, the presenter filed a motion to amend the complaint to allege in the Sullivan matter that, as in the Diettman matter, respondent had made misrepresentations on the Hud-1.

Count One – The Sullivan Matter

On April 16, 1998, respondent represented William and Maureen Sullivan, the buyers/borrowers, in a real estate transaction. The Sullivans had difficulty obtaining a mortgage due to income that could not be verified and a poor credit history. Respondent referred them to Francis Maguire, a retired Bayonne police officer who was affiliated with Preferred Funding Services ("Preferred"), a mortgage brokerage business located in Wrightstown, New Jersey. Francis Maguire maintained an office in close proximity to respondent's law office in Bayonne.

According to the Hud-1, the Sullivans were required to pay a "loan discount" of three percent, or $3,600, plus a "yield spread premium" of two percent, or $2,400, for a total of $6,000. They received a credit of $250 toward these fees. The loan discount and yield spread premium represented five points

(or five percent of the amount of the loan) payable to Preferred for arranging the loan. Three of the five points, or $3,600, were payable by the Sullivans and two points, or $2,400, were to be paid by their lender, Avstar Mortgage Corporation ("Avstar"). Although Avstar was required to pay $2,400 directly to Preferred, it included those funds with the mortgage proceeds wired into respondent's trust account.

After the closing, respondent did not remit the points to Preferred. When Kerry Maguire, Preferred's operations manager (and Francis Maguire's niece), contacted respondent to request payment of the points due to Preferred, respondent denied that he was obligated to pay the points, used profanity, and terminated the telephone call. On April 22, 1998, six days after the closing, Francis went to respondent's office to obtain payment of the points because he was planning a trip to Preferred's Wrightstown office the following day. According to Francis, respondent represented that only three points were due and issued a check for $3,600, along with a cover letter to Kerry stating that the check was in full payment of the mortgage broker fees.

On May 19, 1998, Preferred notified respondent by "fax" that it would file an ethics grievance against him if he did not

contact Preferred by the next day. In a reply dated May 19, 1998, respondent claimed that, at the closing, the Sullivans had denied signing any document obligating them to pay points to Preferred. Respondent requested a copy of that document, representing that, upon its receipt, he would disburse the fees to Preferred. The record contains no further communication from Preferred until more than two months later when, on July 23, 1998, Preferred again "faxed" to respondent a request for payment, listing the amount due for both the Sullivan and the Diettman closings. Although respondent asserted that he again requested copies of the documents by which Preferred notified his clients of its fees, the record does not contain a response to the July 23, 1998 letter. On August 4, 1998, Preferred filed a grievance against respondent.

On September 22, 1998, Avstar contacted Chicago Title Insurance Company ("Chicago Title"), asking for assistance in obtaining payment of the fees from respondent to Preferred. After a series of correspondence between respondent and Chicago Title in which respondent stated that he had never received a copy of any document obligating his clients to pay the points to Preferred, respondent sent the following letter, dated October 28, 1998, to Chicago Title:

> This letter is in response to yours of October 9, 1998 with which you provided a copy of a document entitled "mortgage broker application disclosure" dated July 25, 1997. I was able to meet with Mr. Sullivan this afternoon and review his entire file of paperwork on this closing. In addition, I showed him this form dated July 25, 1997.
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> Mr. Sullivan now recalls signing this document, although he was never given a copy of same. As a result, it is apparent that I was misinformed by my client, and the proper authorization was given to pay the full five points to the mortgage broker.
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> Had either Avstar or Preferred Funding provided a copy of the July 25, 1997 document to me I would have had no objections to releasing the funds in payment of points at time of closing of title and will do so now.
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> [Ex.R-16.]

Despite respondent's representation that he would pay the fees to Preferred, he did not. On November 3, 1998, almost seven months after the closing and three months after the filing of the grievance, Avstar, the lender, asked respondent to pay $2,400 to Preferred for the Sullivan fees. Enclosed with Avstar's letter was a copy of the same form that Chicago Title had provided to respondent on October 9, 1998.

At some point, Fidelity National Title ("Fidelity") paid the points due from Avstar to Preferred. On November 8, 1999, about one and one-half years after the closing, and more than one year after respondent assured Chicago Title that he would

pay the points, respondent reimbursed Fidelity the sum of $2,150 (the two points of $2,400 less the $250 credit).

Also on November 8, 1999, respondent issued a check to Vested Title, Inc. ("Vested") for $1,135 in payment of the title insurance fee that was due at the closing. Respondent testified that, on April 17, 1998, he disbursed the closing proceeds, including a check for $1,135 to Vested for the title insurance. He claimed that Vested lost the April 17, 1998 check and that nineteen months later, on November 8, 1999, he issued a replacement check. Although the record contains a copy of the November 8, 1999 check to Vested, it does not contain a copy of the April 17, 1998 check.

For his part, respondent claimed that, at the closing, the Sullivans disputed having notice of, or consenting to, the payment of points to Preferred and expressed dissatisfaction with the increased interest rate of the mortgage loan. Respondent telephoned Avstar during the closing, but was unable to obtain an explanation for these items. According to respondent, the Sullivans instructed him not to pay the points. Despite these instructions, on April 22, 1998, respondent gave Francis Maguire a $3,600 check payable to Preferred. Respondent testified that he issued the check because Francis Maguire

demanded payment and threatened and intimidated him. Respondent conceded that, at the time that he paid $3,600 to Preferred, he did not have his clients' authorization to do so. He further conceded that, in his answer to the formal ethics complaint, he did not mention that he had been intimidated by Francis.

As mentioned above, even after respondent assured Chicago Title that he would remit Preferred's fee, he failed to do so. Respondent asserted that he failed to remit the fee because, after the ethics grievance was filed against him, he believed that he needed permission from disciplinary authorities before he could take any action in the case. He did not, however, indicate that he has asked the Office of Attorney Ethics ("OAE") or the DEC for any guidance. Moreover, the ethics grievance had been filed before he represented to Chicago Title that he would remit Preferred's fee.

Respondent further contended that the number of points charged by Preferred was "illegal," as was Preferred's failure to provide written notice of the closing costs. He filed a motion with the DEC to dismiss the ethics complaint, arguing that Preferred's failure to comply with banking laws and regulations precluded it from charging any fee and that

Preferred used the attorney disciplinary process to coerce payment of its illegal fee.

Respondent also argued in the motion that the complaint should be dismissed on the basis that the OAE did not have jurisdiction because the original grievance was filed with the DEC, the DEC investigator never filed a report, and there was no authority for the OAE to assume responsibility for the investigation. The DEC investigator referred the matter to the OAE to investigate potential knowing misappropriation charges. The investigator asserted that, after she made several requests to respondent for relevant trust account records, he assured her that he would produce them, but failed to do so. As seen below, the DEC denied respondent's motion to dismiss the complaint.

Count Two – The Diettman Matter

The facts in the Diettman matter are very similar to those in the Sullivan matter. Respondent represented Otto and Ann Diettman in the refinance of their residence on May 1, 1998. Because the Diettmans had difficulty obtaining credit, respondent referred them to Francis Maguire, and Preferred obtained a mortgage for them through Avstar. According to the Hud-1, the Diettmans were required to pay a loan discount of

three points, or $2,340, and Avstar was required to pay a "yield spread premium" of two percent, or $1,560, for a total of $3,900 in points payable to Preferred.

Again, respondent failed to disburse fees to Preferred, who eventually received payment from Fidelity. On November 8, 1999, the same date that respondent reimbursed Fidelity for the Sullivan fees, he issued a $3,900 check to Fidelity as reimbursement for the Diettman fees. A mortgage broker application disclosure form dated January 13, 1998, and purportedly signed by the Diettmans, provided that the maximum number of points payable by the borrowers and the lender was three points each.

Respondent asserted that, at the closing, the Diettmans denied having consented to pay points to Preferred, and instructed him not to disburse those fees. They also complained that the interest rate on the loan was higher than the rate that had been promised to them.

Otto Diettman testified that, at the loan closing, he told respondent that the signatures on the mortgage broker disclosure form were not his or his wife's. He stated that, although respondent advised him to terminate the closing, he needed the loan and had no choice but to proceed with the mortgage closing.

After respondent told Diettman that "he was in trouble with the Ethics Committee," Diettman instructed respondent to pay the points to Preferred.

In a September 19, 1998 reply to the ethics grievance, respondent stated that, upon the instruction of Vested Title, he sent a $3,900 check "under protest" to Avstar for the Diettman fees. Although the record contains check number 2217, dated June 10, 1998, payable to Avstar in the amount of $3,900, and containing the words "paid under protest," that check is marked "void." As noted above, the points were paid by Fidelity and reimbursed by respondent on November 8, 1999, about one and one-half years after the closing.

The presenter alleged other improprieties in connection with the Diettman closing. Avstar's closing instructions directed respondent to disburse the loan proceeds in accordance with the terms of the Hud-1 and provided that any deviation from those terms required prior approval from Avstar. Although the closing took place on May 1, 1998, respondent did not disburse any funds until May 12, 1998. According to respondent, in refinance loans, borrowers have a three-day right of rescission, requiring closing agents to delay disbursement for three days, in case the borrower cancels the loan.

The complaint alleged that respondent, without the lender's authority, diverted a portion of the closing proceeds to pay a debt owed by Otto Diettman to Eastern Oil of New Jersey, Inc. ("Eastern Oil"). In February 1998, Diettman settled litigation filed against a corporation for a debt that he and his partners had personally guaranteed to Eastern Oil. Diettman's share of the debt was $28,333.33. Although the other partners promptly paid their shares of the settlement, Diettman did not.

On May 20, 1998, nineteen days after the closing, respondent sent a $28,333.33 check to Nathan Beck, Eastern Oil's attorney.[2] Respondent, however, instructed Beck not to negotiate the check because he did not have sufficient funds in his trust account for the check to be honored. According to Beck, respondent told him that "he had had a real estate transaction involving Mr. Diettman and the transaction had not been completed, and therefore, he did not have funds in his trust account to cover that check." In addition, in an April 14, 1998 letter to respondent, Beck confirmed respondent's representation

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[2]At the time of these events, Beck, who testified at the hearing, was the DEC chair. Although the better practice would have been for this matter to have been transferred to another committee, the record does not reveal the presence of any favoritism or impartiality.

that Diettman would soon pay his share of the settlement with funds received from the refinance of property.[3] On June 10 and June 29, 1998, respondent issued checks to Beck in the amounts of $18,000 and $10,333.33, respectively, at which time Beck returned the May 20, 1998 check to respondent.

The OAE, thus, alleged that respondent used a portion of the refinance proceeds to fund the Eastern Oil settlement, contrary to Avstar's closing instructions. The OAE auditor testified that, because the Diettmans did not give respondent sufficient funds to cover the Eastern Oil debt, funds from the refinance proceeds were used to satisfy that debt. Under the terms of the mortgage loan, the Diettmans borrowed $78,000 and were required to bring $23,445.33 to the closing. On May 12, 1998, the Diettmans gave respondent $30,477.97, or about $7,000 more than was required. On May 27, 1998, the Diettmans gave respondent $5,000, increasing to approximately $12,000 the additional funds beyond the amount required. On June 23, 1998, respondent issued an $18,000 check to Eastern Oil. At that time, the balance in respondent's trust account to the Diettmans'

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[3]Although the letter was identified as R-12 at the hearing, it either was not introduced into evidence or was inadvertently omitted from the record.

credit was $4,603.29, when he should have held $10,652 to satisfy the closing disbursements. Therefore, there was a shortage of $6,048.71. According to the ledger reconstructed by the OAE auditor, as of June 23, 1998, when respondent issued the $18,000 check to satisfy part of the Eastern Oil debt, the Diettmans had provided $35,477.96. Because, however, the Hud-1 required them to bring $23,445.33 to the closing, respondent had only $12,032.63 on the Diettmans' behalf that could be used for purposes unrelated to the closing. Despite having only $12,032.63 of his clients' funds, respondent issued an $18,000 check to Eastern Oil.

Respondent denied having used any of the loan proceeds to pay the Eastern Oil debt. In his answer to the complaint, respondent stated that the Diettmans failed to bring sufficient funds to the closing; that, because the loan was a refinance, they had three additional days to produce the funds; and that, although they assured him that they would do so, they did not. Respondent testified that, after he made some of the disbursements, he learned that the Diettmans could not produce all of the necessary funds. Respondent asserted that he was required to make an immediate payment of $41,542.60 to a firm known as Hudson Heating because it had obtained a judgment and a

levy against the Diettmans' rental income from the subject property. Respondent claimed that, if Hudson Heating's attorney had executed the levy, the refinance loan would have been in default.

According to respondent, he made as many of the disbursements as he could, and used only additional funds produced by the Diettmans on various occasions, not the loan proceeds, to satisfy the Eastern Oil debt. When asked why he recorded the Eastern Oil transactions on the refinance ledger, instead of a separate account, respondent contended that, if he had not paid the debt, it would have constituted a lien on the property, which would have caused a default in the mortgage. In respondent's view, thus, the two matters were related. He also alleged that the Diettmans had provided additional funds that he placed into a separate account and that he had used these funds, in addition to those in his trust account, to satisfy the Eastern Oil debt. Respondent, however, failed to produce any records of the separate bank account.

In addition, although the Hud-1 indicated that respondent had paid $5,363 to the City of Jersey City to satisfy a water and sewer lien, and although Avstar's closing instructions required respondent to make that payment, respondent failed to

do so. As a result of respondent's failure to satisfy the lien, interest accrued until April 12, 1999, when Fidelity discharged the lien with a payment of $8,161.51. On November 8, 1999, when respondent reimbursed Fidelity for the broker's fees, he also repaid Fidelity for the lien.

Finally, on November 12, 1999, respondent issued a $650 check to Vested for the title insurance. Although respondent testified that he had issued a check to Vested shortly after the closing, in an April 28, 1999 letter to Fidelity, respondent asserted that he had retained the funds for Vested in his trust account. Respondent created a $496.22 shortage in the Diettman trust account when he issued the check to Vested.

For his part, respondent testified that, when the Diettmans bought the property in 1995, a water and sewer bill remained unpaid and continued to increase, without the Diettmans' knowledge. When Diettman learned about the lien, he discovered that it had been purchased by Gregory Judge, a person with whom Diettman had a business relationship. Judge agreed to accept heating installation and repair services from Diettman, rather than money, to satisfy the lien. According to respondent, when Judge received payment from Fidelity, he reimbursed the funds to

Diettman, who had already satisfied the lien via the barter arrangement.

Although respondent denied any wrongdoing in these matters, he presented evidence of personal difficulties that may have affected his judgment. After undergoing gall bladder surgery in December 1997, respondent returned to his law practice in January 1998, at which time his wife filed a divorce complaint. In September 1, 1998, respondent was served with a domestic violence complaint and was removed from the marital home. Because respondent maintained many of his client files, as well as his trust account records, at his home, he was deprived of access to those records.

On October 8, 1998, respondent returned home to find that his wife had removed herself, the parties' daughter, and almost all of their possessions from the marital home. Several days later, respondent learned that DNA testing revealed that he was not the biological father of their daughter. Respondent began drinking and staying away from his law office, eventually consulting his physician, who referred him to Dr. David G. Miller, a psychiatrist. In November 1998, Dr. Miller diagnosed respondent with anxiety and depression, and prescribed Zoloft, an antidepressant, and Lorazepam, an anti-anxiety medication.

Respondent's practice, which had been decreasing when his marital difficulties arose, ceased. Respondent referred his clients to other attorneys, retaining only uncontested landlord-tenant cases. In January 1999, respondent decided to stop taking Zoloft and, by March or April 1999, resumed his law practice. According to respondent, he has no residual effects from "that temporary situation" and is fully competent to practice law.

Respondent asserted that his personal difficulties during this time were responsible for the acrimony between himself and the OAE auditor during the February 24, 1999 audit. At the audit, respondent failed to provide requested documents, became abusive, and used profanity, prompting the auditor to terminate the audit.

The DEC found that respondent violated RPC 1.15(b) in the Sullivan matter by failing to promptly pay the points due to Preferred. In the Diettman matter, the DEC found that respondent again violated RPC 1.15(b) by failing to promptly pay the points due to Preferred; RPC 1.15(a) by using the loan proceeds to pay the debt to Eastern Oil, which was unrelated to the refinance transaction; and RPC 8.4(c) by certifying on the Hud-1 that he had disbursed the closing funds as directed by the lender, when he had not. Although the complaint did not charge respondent

with having violated RPC 8.1(b), the DEC found that he failed to cooperate with the investigation and the OAE audit. The DEC recommended an admonition for the Sullivan matter and a reprimand for the Diettman matter, finding that respondent's failure to cooperate with the investigation and the audit did not warrant additional discipline, in light of the extreme emotional distress that he suffered.

The DEC denied respondent's motion to dismiss the complaint and the presenter's motion to amend the Sullivan complaint to charge respondent with a violation of RPC 8.4(c), based on his misrepresentation on the Sullivan Hud-1 that he had disbursed the closing proceeds in accordance with the lender's instructions.

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.

In the Sullivan matter, after the real estate closing, respondent failed to promptly disburse the fees due to Preferred, the mortgage broker. Respondent asserted that neither he nor his clients had been advised about the fees in advance of the closing, that his clients had not consented to pay those fees, and that Preferred had engaged in illegal activity by

failing to comply with banking laws and regulations. He claimed that, during the closing, he unsuccessfully attempted to contact Preferred and Avstar, the lender, to make inquiry about the fees due to Preferred. Thereafter, when Preferred pressed him for its fees, respondent requested a copy of the form by which his clients were notified of, and consented to, the fees. Despite repeated requests, Preferred did not submit this document to respondent.

Although respondent's position perhaps was valid up to this point, it became unreasonable thereafter. On October 9, 1998, almost six months after the closing, Chicago Title sent to respondent a copy of the mortgage broker application disclosure dated July 25, 1997 and signed by the Sullivans. Avstar had requested assistance from Chicago Title in obtaining payment of Preferred's fees. In an October 28, 1998 letter to Chicago Title, respondent acknowledged receipt of the form, conceded that the Sullivans recalled signing the document and that he had been misinformed by his clients, and indicated that he would disburse the fees to Preferred. About one week later, Avstar sent to respondent another copy of the mortgage broker application disclosure.

Despite respondent's receipt of the document and despite his representation to Chicago Title, respondent failed to send the funds to Preferred. Although he claimed that he was awaiting guidance from disciplinary authorities before paying the fee to Preferred, the ethics grievance pre-dated his representation to Chicago Title that he would remit the fee. Moreover, respondent never requested advice from the OAE or the DEC. At some point, Fidelity paid Preferred's fees. On November 8, 1999, almost nineteen months after the closing and more than one year after his letter to Chicago Title, respondent finally reimbursed Fidelity for the fees.

The closing instructions required respondent to disburse points of $3,600 of the Sullivans' funds and a yield spread premium of $2,150 ($2,400 less a $250 credit) from Avstar to Preferred. Although Avstar was responsible for paying the premium directly to Preferred, it included those funds in the amount wired to respondent's trust account. Those funds, however, were payable by Avstar, not the Sullivans. After respondent issued $3,600 to Francis Maguire only six days after the closing (allegedly because respondent was intimidated), the only fees due to Preferred were payable from Avstar's, not the Sullivans', funds. Respondent's protestations, therefore, that

his clients had not authorized him to disburse the funds to Preferred were irrelevant. The funds belonged to Avstar, which directed respondent on several occasions to disburse them to Preferred.

Not only did respondent fail to promptly deliver funds to a third person, a violation of RPC 1.15(b), but he also violated an escrow agreement with his clients. According to respondent, the Sullivans directed him not to pay Preferred's fees. Respondent agreed to hold the funds in escrow until he could ascertain whether the Sullivans had signed a document consenting to the fees. Yet, only six days later, respondent, admittedly without his clients' authorization, disbursed $3,600 to Preferred. Because, however, respondent was not charged with this violation and did not have notice of, or an opportunity to defend against, this charge, we refrain from finding that he violated an escrow agreement.

In the Diettman matter, too, respondent failed to promptly deliver funds to a third person by not promptly remitting the fees to Preferred. As in the Sullivan matter, respondent claimed that his clients had not been notified of, or consented to, Preferred's mortgage brokerage fees and had instructed him not to pay them. Diettman denied signing the mortgage broker

disclosure form containing his and his wife's purported signatures. Nevertheless, at the closing, the Diettmans rejected respondent's advice to cancel the refinance and proceeded with the transaction. Although respondent claimed that, in June 1998, he sent to Avstar a check for Preferred's fees marked "paid under protest," Avstar never received that check. Once again, Fidelity paid the fees and respondent reimbursed Fidelity approximately eighteen months after the closing. After respondent's clients chose to proceed with the closing, respondent was obligated to disburse the funds in accordance with the closing instructions. His failure to promptly disburse the fees to Preferred, thus, violated RPC 1.15(b).

Respondent also violated RPC 1.15(a) by using the loan proceeds to partially fund the Eastern Oil payments. Despite his clients' assurances that they had sufficient funds for the closing, they did not. They failed to produce the necessary costs at the closing, or within the three-day rescission period. Instead of canceling the transaction, respondent began making disbursements, even though his clients had not provided all of the funds. The terms of the refinance required the Diettmans to bring $23,445.33 to the closing on May 1, 1998. Although they failed to do so at that time, on May 12 and May 27, 1998, the

Diettmans provided respondent with $30,477.97 and $5,000, respectively, for a total of $35,477.97, or approximately $12,000 more than required for the closing. On June 23, 1998, respondent issued an $18,000 check to Eastern Oil. He was required to safeguard the $23,445.33 for closing disbursements. The Diettmans had provided only an additional $12,000. Respondent, thus, used a portion (about $6,000) of the loan proceeds to fund the Eastern Oil payment.

Moreover, the record contains evidence that respondent was aware that he invaded the loan proceeds to pay the Eastern Oil debt. Beck, the attorney for Eastern Oil, testified that respondent had represented to him that Diettman would pay his share of the settlement with funds received from a mortgage refinance. Beck also stated that, when respondent informed him that he did not have sufficient funds in his trust account to honor the check that he had written, respondent explained that the real estate transaction had not been completed. Furthermore, respondent recorded the Eastern Oil payments on the ledger for the refinance transaction. Respondent, therefore, violated RPC 1.15(a) by failing to safeguard the mortgage proceeds.

Respondent violated RPC 1.15(b) again when he failed to satisfy the water and sewer lien after the closing. Although

respondent asserted that Diettman had arranged to provide services to the lienholder instead of a monetary payment, the record disclosed that interest continued to accrue, increasing the debt by several thousand dollars. If the lien had been satisfied via a barter arrangement, interest would not have continued to accrue. Respondent also failed to promptly pay Vested Title for the title insurance, not satisfying that bill until eighteen months after the closing.

An attorney who acts as a closing agent owes a fiduciary duty to the lender, as well as to his own client.

> In other words, while the sellers may be incidentally benefited by the payment of existing liens, the buyers' attorney owes to his clients the duty of removing all clouds of title. Similarly, by accepting the "letters of instructions" from the lending bank prior to the closing title, the buyers' attorney agrees to ensure that all liens on the mortgaged property are expeditiously removed to fulfill the bank's expectations that its mortgage will be a first lien on the property. As stated previously, albeit in a distinct context, an attorney's professional obligation may reach persons who have reason to rely on him even though they are not clients.
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> [In re Kasdan, 115 N.J. 472, 486-87 (1989.]

Here, respondent's fiduciary obligation extended beyond his own clients to reach Avstar and Preferred, entities that were entitled to rely on him. Respondent, thus, breached his duty as

closing agent by failing to comply with Avstar's closing instructions.

Finally, respondent's certification on the Diettman Hud-1 that he had disbursed the funds as reflected on that document constituted a misrepresentation, a violation of RPC 8.4(c).

Although respondent also misrepresented the disbursements made on the Sullivan Hud-1, because he had not been charged with this violation in that matter, the DEC properly denied the OAE's motion to amend the complaint to add a violation of RPC 8.4(c).

The DEC also found a violation of RPC 8.1(b). Because, however, respondent was not charged with failure to cooperate with disciplinary authorities, we decline to find that he violated that RPC.

In sum, in two matters, respondent failed to promptly disburse funds to third persons, and in one of those matters, he failed to safeguard funds and misrepresented, on closing documents, the disbursements made in connection with that transaction.

An admonition or a reprimand is usually imposed for conduct similar to respondent's, absent a misrepresentation. Admonitions were imposed in In the Matter of Kevin S. Quinlan, Docket No. DRB 03-228 (2003) (admonition imposed on attorney who breached an escrow agreement by releasing funds without his client's

authorization and failed to communicate with a client); and In the Matter of E. Steven Lustig, Docket No. DRB 02-053 (2002) (admonition for attorney who retained funds in his trust account for three and one-half years that were designated for payment of a hospital bill; the attorney also practiced law while ineligible and failed to maintain proper records).

In the following cases, reprimands were determined to be the appropriate level of discipline: In re Jodha, 174 N.J. 407 (2002) (reprimand for attorney who did not pay the title insurance premium, pay the real estate taxes, refund escrow funds to his client or record the deed until nine to twenty months after the closing; the attorney also failed to correct accounting deficiencies noted during a 1998 random audit by the OAE); In re Gronlund, 171 N.J. 30 (2002) (reprimand for attorney who represented a client in a claim for a riparian grant from the State of New Jersey in connection with the sale of real property; at the closing, $6,200 of the sale proceeds were placed in escrow, pending receipt of the riparian grant; the attorney failed to act diligently and to file the claim for a period of nine months; he also failed to keep his clients informed about the status of the matter; the attorney had received a prior reprimand for lack of diligence and failure to communicate with the client); and In re Regojo, 170 N.J. 67

(2001) (reprimand for attorney who failed to promptly pay funds from a real estate closing to various third parties, including fees for inheritance tax liens, property taxes, realty transfer tax, and sewer, exterminator, and surveyor bills; failed to properly maintain the required trust account records; and negligently misappropriated client's trust funds).

Here, in addition to failing to disburse and safeguard funds, respondent certified that he had disbursed funds in accordance with the Hud-1 when he had not, a violation of RPC 8.4(c). Even with the addition of RPC 8.4(c) violations to misconduct similar to respondent's, reprimands have been imposed. See e.g., In re Agrait, 171 N.J. 1 (2002) (reprimand for attorney who failed to correct an error on real estate closing documents showing that his clients had paid a $16,000 deposit when they had not, concealed his clients' second mortgage, and failed to verify and collect the deposit); In re Silverberg, 142 N.J. 428 (1995) (reprimand for attorney who failed to amend inaccurate real estate closing documents, and was guilty of gross neglect and a lack of diligence).

Despite respondent's ethics history, the presence of compelling mitigating factors persuades us that, for the totality of respondent's conduct, a reprimand is sufficient discipline. During these events, respondent's personal life was

in upheaval and he was receiving medical treatment, including an anti-depressant and anti-anxiety medication. Although respondent failed to honor his fiduciary duty as closing agent, he was motivated by a desire to protect his clients' interests, not by self-gain. We caution respondent, however, that in real estate transactions, closing agents are obligated to comply with lenders' instructions, and that they have fiduciary duties, not only to their clients, but to the lenders who have entrusted them with funds.

We, thus, determine that a reprimand adequately addresses the nature of respondent's conduct in this matter. Member Ruth Jean Lolla did not participate.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

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 Alan Zark
Docket No. DRB 04-407

Argued: February 17, 2005

Decided: April 12, 2005

Disposition: Reprimand

Members	Suspension	Reprimand	Censure	Disqualified	Did not participate
Maudsley		X			
O'Shaughnessy		X			
Boylan		X			
Holmes		X			
Lolla					X
Pashman		X			
Schwartz		X			
Stanton		X			
Wissinger		X			
Total:		8			1

Julianne K. DeCore
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Chief Counsel