SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-099
District Docket No. IIB-03-002E

IN THE MATTER OF	
PAUL A. DYKSTRA	
AN ATTORNEY AT LAW	

Decision

Argued: May 20, 2004

Decided: June 29, 2004

Glenn R. Reiser appeared on behalf of the District IIA Ethics Committee.

Respondent waived appearance for oral argument.

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

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

Respondent was admitted to the New Jersey bar in 1974. On March 23, 1999, respondent was suspended for three months, effective April 19, 1999, for gross neglect, misrepresentation and failure to communicate with clients in three separate client

matters. In re Dykstra, 157 N.J. 636 (1999). On September 27, 2000, respondent received an admonition for failure to communicate with a client and to notify the client of his suspension from the practice of law. In the Matter of Paul A. Dykstra, Docket No. DRB 00-182.

The complaint alleges violations of RPC 1.1(a) (gross neglect) and RPC 8.4(c) (misrepresentation) in a real estate transaction.

On June 10, 1996, one James P. Hannon passed away. At the time of his death, James P. had a will, under which he left his estate to his four children: Ann, James, Maureen and Thomas. Thomas acted as executor of the estate. James Jr., predeceased his father. Therefore, his two children took his share.

The estate included the elder James' house. The heirs agreed early on in the administration of the estate that Thomas would attempt to refinance the house so that Maureen could borrow funds from the estate to complete a construction project. At this point in time, the refinancing of the house anticipated that each of the siblings would receive a deed from the estate for his or her one-fourth share, and Maureen would repay the estate for the funds she received, out of her share.

Thereafter, in his capacity as executor, Thomas secured a mortgage and loan commitment from GreenPoint Mortgage Corporation ("GreenPoint"), through a mortgage broker, Central Jersey Mortgage

("CJM"), and retained respondent to represent him in the real estate refinancing as one of the heirs. Respondent also acted as settlement agent in the refinancing, and communicated often with the attorney for the estate, Edmund McCann.

According to respondent, in June 1997, the mortgage broker notified him that the lender required the heirs to execute a "Family Sale Agreement," because of Maureen's poor credit:

> We were told by the lender that – actually, I was told by the mortgage broker that we couldn't place the property in the four names because, number one, there was a judgment against [Maureen] that had to be cleaned up and she had tremendous credit problems. Number two, there were two minor beneficiaries who were out of state. You have to go into a trust situation. So their way of getting around this was to do a family sale document transaction.
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> [T56-T57.][1]

Respondent claimed that a family sale agreement was executed by the parties, in accordance with the lender's requirements, and that he received a copy of the document. The existence or nonexistence of this agreement was a contentious issue in the proceedings. Respondent asserted that the family sale agreement was the central document, signed by all of the heirs, that best expressed their assent to the transaction. The existence or

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[1] T refers to the transcript of the DEC hearing on December 15, 2003.

nonexistence of that document was never established at the DEC hearing, but was part of the probate's findings in the probate matter, described below. Ultimately, the DEC abandoned the issue, when it became apparent that respondent could not produce or even explain the contents of the agreement.

Thereafter, in July 1997, the lender amended the mortgage commitment, requiring the transfer by a single deed to Thomas as an individual, not in his capacity as executor. On July 11, 1997, Wayne A. Stahlmann, the president of Stewart Title Agency, confirmed the arrangement, and revised the title policy to reflect the change.

On July 16, 1997, respondent conducted the closing. He prepared a RESPA statement for the transaction, listing the "Estate of James P. Hannon" as seller. The net proceeds of settlement went to "Thomas F. Hannon" as borrower, in the amount of $203,314.44. Respondent issued his trust account check number 6380 to Thomas in that amount, and received a fee of $550 for the representation and duties as settlement agent.

Thereafter, Thomas placed the closing proceeds in his own business account, instead of the estate account. Rather than preserve the funds for the estate, Thomas used them for his own purposes and those of his sister, Maureen.

Over two and one-half years later, on February 3, 2000, Stahlmann advised respondent of a claim by several heirs arising out of the Hannon transaction. On the same day, respondent wrote to Thomas and Maureen, requesting them to review their files for documents pertaining to the disbursement of the closing proceeds. Respondent noted that he had recently "culled" his file of "paperwork deemed extraneous" before placing it in storage, and did not have certain of the documents in the case. Of particular note, the "family sale agreement," which the heirs allegedly signed, was missing from the file.

In a February 9, 2000 letter to Stahlmann, respondent acknowledged that certain of the heirs had questioned the disbursement of funds. He stated that the mortgage representative, Barry Musto, contacted him about complaints from Maureen, who protested that the estate never received the proceeds of the mortgage loan, and that Thomas subsequently placed second and third mortgages on the property, as well.

By March 2000, litigation over the closing proceeds implicated respondent. Although not yet a party to the litigation, on March 31, 2000, he filed a certification in the estate matter to explain his participation in the transaction. Respondent stated in part:

> On July 16, 1997, closing of title herein was completed. The Estate beneficiaries were aware of same, as was the attorney for the Estate.

> Thomas Hannon signed as executor and as the party taking title. The proceeds from the matter, in the amount of $203,314.44, were distributed by my trust check #6380, drawn to 'Thomas Hannon – Executor of Est. of Hannon.'
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> [Emphasis added, Ex.R-17.]

Respondent did not produce a copy of check number 6380 with the certification. In fact, he acknowledged that, when the check was negotiated, only Thomas's name appeared on the check's payee line. Respondent admitted at the DEC hearing that he had added "Executor of Est. of Hannon" after his bank returned the canceled check to him. Further, respondent admitted that the handwriting was his own. However, at the DEC hearing, he feigned any knowledge of when, other than at some point prior to submitting the certification to the probate court, he had doctored the check, or why he had done so.

In December 2002, respondent was added as a defendant in the litigation over the refinancing. Six months later, the probate court struck down GreenPoint's mortgage and, on July 29, 2003, found the mortgage loan to Thomas uncollateralized, in the amount of $326,499.86. The probate court entered judgment against the parties in the following percentages: Stewart Title, thirty percent; Thomas, thirty percent; Maureen, thirty percent; and

respondent, ten percent. In so doing, the probate court found that respondent's liability stemmed from the following:

> Transfer of the title from the estate (the will of the decedent having left the residuary to all of the four children and not just one) was accomplished by a deed prepared by [respondent]. That deed, signed on July 16, presumably at the closing, contains a recital that the transfer of title from Thomas as executor to Thomas as grantee and sole owner was 'for a consideration of less than $100.' The affidavit of consideration attached to the deed and recorded with it, to support an exemption from the realty transfer fee, added the language (obviously lifted verbatim from the statute) that the transfer was 'by an executor or administrator of a decedent to a devisee or heir to effect the distribution of the decedent's estate in accordance with the decedent's will or the intestate laws of this State.' Both of these statements were incorrect and [respondent] knew it was an inaccurate statement. To Prepare [sic] and record such documents constitutes legal malpractice. In addition, [respondent] should have inquired as to the size of the estate or the authorization of the beneficiaries in order to verify that the estate benefited from the transaction, as attorney Ouda testified. His expert opinion in this regard is unchallenged.
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> [Ex.C-1 at 15-16][2]

In finding that the family sale agreement never existed, the probate court stated:

> No witness can recall ever having seen this mysterious document whose format or content

[2] Exhibit C-1 is a partial copy of the probate court's "Decision after Trial."

> have never been described any further than I have suggested. Discovery has not turned up any draft, or unsigned copy. While there are references to a 'family-sale document,' nonetheless, no document itself survives. [Respondent] claims that there was such a document sent out but not returned. He never described it further. He said he gave such a document to [Thomas] to distribute. He could provide no further details of how it appeared or how it was to be circulated or whether or not the family members had been apprised of what they might have been asked to sign. I conclude that no such actual document was ever prepared and none ever existed in conjunction with this transaction.
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> [Ex.C-1 at 12.]

The DEC dismissed the RPC 1.1(a) and (b) allegations, finding a lack of clear and convincing evidence of gross neglect or pattern of neglect.[3]

The DEC found that respondent violated RPC 8.4(c), first by adding the executor designation to the face of the settlement check to Thomas, in an attempt to alter the record of the transaction, and second, by lying in his certification, in the underlying litigation, that the check had been made out to Thomas as executor of the estate, knowing that he had altered the check to make it appear so. Finally, the DEC found that respondent's misconduct also

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[3] In the panel report, the DEC opined that it might have found a recordkeeping violation for respondent's file "culling" prior to the expiration of seven years, had the charge been made in the complaint. It declined to do so, noting that such a finding would not have altered its recommendation for a reprimand.

violated RPC 8.4(d), although that charge was not set out in the complaint or litigated in the proceedings.

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

Respondent was charged with violations of only two RPCs in the complaint: RPC 1.1(a) and (b), and RPC 8.4(c). Perhaps because of the relative simplicity of the charges, the DEC hearing was somewhat short and uninformative. Nevertheless, certain misconduct was proved.

Respondent's involvement in the Hannon refinancing was flawed from the outset. That fact did not escape the scrutiny of the probate judge in the underlying estate litigation. There, the judge found that respondent had twice made false statements in the closing documents. In particular, the deed contained a false recital that transfer of title from Thomas as executor, to Thomas as grantee and sole owner, was for a consideration of less than $100. That statement was untrue, and presumably made to avoid the realty transfer tax.

In addition, respondent added language to the affidavit of consideration to reflect that the transfer was from an executor to an heir to effect the distribution of the decedent's estate in

accordance with the decedent's will or the intestate laws of New Jersey. We find that statement to be false as well, insomuch as the transfer was made to Thomas individually, not as an heir, and was not made in accordance with the elder Hannon's wishes, as expressed in the will. Both of the statements were in violation of RPC 8.4(c).

Respondent also misrepresented the facts of the transfer by adding language to the face of check number 6380, after it had been negotiated and returned to him. We found respondent not credible in his claim that he did not recall when or why he made that change. No infirmity was offered to explain his lapse of memory. Equally incredible was respondent's feigned ignorance about why he altered the check. At the time of the litigation, one powerful reason existed – to avoid a malpractice suit – for respondent to alter the check, namely to disguise the true nature of Thomas's involvement in the transaction, and to disguise the falsities in closing documents that he, respondent, prepared for the transaction (the deed and affidavit of consideration). We need not unearth respondent's reason for altering the check. We find that his misstatements in the closing documents and the alteration of the settlement check to be per se misrepresentations, in violation of RPC 8.4(c).

So, too, respondent misrepresented in the certification that his client, Thomas, had taken title to the property as executor. The RESPA, which respondent had prepared as settlement agent, clearly showed that Thomas was taking the property in his individual capacity. Despite that obvious fact, respondent misrepresented to the court that Thomas was acting as the executor.

With respect to RPC 1.1(a), the facts of the case do not support a finding of neglect. Respondent appears to have handled the matter, a straightforward real estate refinancing, in a reasonable period of time. He did not fail to take action in the case, a required element of gross neglect. Rather, he mishandled the matter, a potential malpractice concern, but not evidence of gross neglect. For these reasons, we dismiss the allegation regarding RPC 1.1(a).

There remains an issue regarding the DEC's finding that respondent engaged in conduct prejudicial to the administration of justice, in violation of RPC 8.4 (d). The complaint does not charge him with a violation of RPC 8.4(d), or contain facts in support of such a charge. Moreover, the DEC did not question respondent about or otherwise litigate the issue. It appears for the first time in the panel report. Because respondent was not on notice that his actions may have violated this RPC, we determine to dismiss it.

Respondent's false statements in the closing documents are analogous to conduct involving failure to disclose secondary financing in real estate transactions. Such conduct will yield a reprimand to a suspension, depending on the number and nature of the infractions. See In re Sarsano, 153 N.J. 364 (1998) (reprimand for concealing secondary financing from primary lender and preparing two different RESPAs, in violation of RPC 8.4(c)); In re Silverberg, 142 N.J. 428 (1995) (reprimand for gross neglect, lack of diligence and misrepresentation; the attorney failed to make changes to an inaccurate RESPA utilized by his clients to conceal secondary financing; the attorney was unaware of his clients' scheme at the closing, but neglected to change the RESPA once he became aware of it); and In re Alum, 162 N.J. 313 (2000) (one-year suspended suspension for attorney who participated in five real estate transactions involving "silent seconds" and "fictitious credits"; the attorney either failed to disclose to the primary lender the existence of secondary financing or prepared and signed false RESPA statements showing repair credits allegedly due to the buyers; in this fashion, the clients were able to obtain one hundred percent financing from the lender; because the attorney's transgressions had occurred eleven years before and, in the intervening years, his record had remained unblemished, the

imposition of the one-year suspension was suspended and he was placed on probation).

In cases involving misrepresentation to a court, discipline ranging from an admonition to a suspension has been imposed. See In re Lewis, 138 N.J. 33 (1994) (admonition for attempting to deceive a court by introducing into evidence a document falsely showing that a heating problem in an apartment of which he was the owner/landlord had been corrected prior to the issuance of a summons); In re Johnson, 102 N.J. 504 (1986) (three-month suspension for misrepresenting to a trial judge that the attorney's associate was ill in order to obtain an adjournment of a trial); In re Kernan, 118 N.J. 361 (1990) (three-month suspension for filing a false certification in the attorney's own matrimonial matter).

Here, respondent's misconduct was not widespread, as in Alum. Nevertheless, it was aggravated by a three-month suspension for similar misconduct, including a pattern of misrepresentation. Moreover, his actions here were moved by ill-motives. Five members, therefore, voted for a three-month suspension, while three members

voted for a six-month suspension. One member did not participate.

We also require respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

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 Paul A. Dykstra
Docket No. DRB 04-099

Argued: May 20, 2004

Decided: June 29, 2004

Disposition: Three-month suspension

Members	*Disbar*	*Three-month suspension*	*Reprimand*	*Six-month suspension*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley		X					
O'Shaughnessy		X					
Boylan							X
Holmes		X					
Lolla				X			
Pashman		X					
Schwartz				X			
Stanton		X					
Wissinger				X			
Total:		5		3			1

Julianne K. DeCore
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Chief Counsel