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Attorney Ethics Case Decision Report (September 2016)

Docket No. XIV-2013-0282E

Unfortunately, in the practice of law there are times when even lawyers themselves face injustice. **What happens when a prosecutorial agency in charge of policing New Jersey lawyers decides to flex its muscles and pursue an ethics grievance that it cannot possibly win?** Should lawyers merely accept punishment for acts they didn't commit or defend their professional reputations against unfounded charges? Partner Glenn R. Reiser recently represented an experienced real estate attorney in this exact situation. The attorney hired our law firm, fought the Office of Attorney Ethics and **WON!** Here is his story.

In this case a real estate broker filed a grievance accusing our client of stealing a portion of her company's brokerage fee in a residential real estate transaction in Southern New Jersey where her company was acting as the dual agent - representing both buyer and seller. Our client represented the purchaser in the transaction, and a title company was retained to be the closing settlement agent responsible for fulfilling the lender's closing instructions, including preparing the HUD-1 real estate form, communicating with the lender, receiving and disbursing the lender's loan proceeds, and recording the deed and mortgage.

The parties agreed to close the loan transaction in the morning at our client's office in Northern, New Jersey, and then the buyer would travel to the property in Southern, New Jersey to complete his walk through inspection, deliver the HUD-1 to the seller for signature, obtain the land transfer documents and keys from the seller.

On the morning of the scheduled closing the purchaser appeared at our client's office without sufficient funds to cover his portion of the closing costs; he was approximately \$1,800 short. A title company representative was also present that morning, but left our client's office believing that the closing was aborted. On the chance that the buyer might be able to raise the additional funds and complete the closing later that day, the title company representative left the closing papers at our client's office, including the HUD-1.

After informing the realtor of buyer's inability to close, the realtor verbally agreed to a temporary reduction in her company's brokerage fee (to the extent of the buyer's approximate \$1,800 shortfall) so that the transaction could close. The realtor and the buyer agreed that the buyer would pay back the \$1,800 shortfall after the closing, though no specific time frame was

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discussed. These conversations occurred between the realtor, buyer and our client via telephone calls on the morning of the scheduled closing. The verbal agreement with the broker's fee was not memorialized in writing.

Believing that the parties had reached an agreement as to the broker's fee, our client requested the title company send a closer back to his office. But the title company had no other closers available that morning. When our client informed the title company of the change in the broker's fee, he was advised of the lender's decision to reflect the brokerage fee reduction on the check payable to the brokerage firm. Accordingly, the title company issued a new check payable to the broker and noted the fee reduction in the memo portion of the check. The title company did not change the HUD-1 statement to reflect the lower fee payable to the realtor, and informed our client that he was authorized to sign the HUD-1 statement as an agent of the title company so that the buyer's signature could be notarized. The HUD-1 statement identified the title company as the settlement agent. In reliance on the title company's authority, our client signed the HUD-1 statement identifying himself as the settlement agent and certifying that all information appearing on the HUD-1 statement was truthful and accurate. Our client witnessed the buyer's signature.

Our client then proceeded to close the mortgage loan with the buyer, and the buyer took the HUD-1 and checks for the broker and seller and drove down to the property in Southern, New Jersey, and completed his walk-through inspection and the transaction closed. After the closing the realtor never complained to our client about the shortfall of her company's brokerage fee.

After the closing, the realtor made numerous attempts to collect the unpaid brokerage fee from the buyer - frequently emailing and phoning the buyer. Perceiving that her company wasn't supporting her efforts to collect, the realtor began threatening the buyer with civil and criminal charges and represented to the buyer that she would file an ethics grievance against our client. Meanwhile, the realtor never emailed our client or called him to complain about the buyer not paying her.

The realtor ultimately filed a grievance against our client accusing him of unilaterally determining to steal her company's money at the closing table. By the time the grievance came to be investigated by the Office of Attorney Ethics, the buyer already had paid the entire fee to the broker.

During the course of the ethics investigation, our client informed the Office of Attorney Ethics about the verbal agreement reached between his client and the broker and denied engaging in any misconduct. The Office of Attorney Ethics chose to believe the broker's concocted story that our client stole the money, **and disregarded their own telephone interview with the buyer who confirmed our client's version of the events that transpired that morning; i.e., that he had reached a verbal agreement with the broker that morning to reduce her fees so that the transaction could close.**

At the very outset of our representation we adopted a very aggressive approach to defending this grievance, arguing that the Office of Attorney Ethics could not possibly sustain any RPC violation under the stringent clear and convincing evidence standard by resorting to a

"strict liability" theory. We attempted to explain to the Office of Attorney Ethics that our client had no duty to change the HUD-1, was not responsible for its preparation, had no motive to lie to anyone, that he relied in good faith on the broker's actions and the title company's instructions, and that at most he made an innocent mistake by closing the transaction without documenting the brokerage fee reduction in writing. We further pointed out to the Office of Attorney Ethics that our client is an experienced real estate attorney with an unblemished ethics record, and that since all real estate transactions are documented in writing it made absolutely no sense that in one fleeting moment he decided to engage in criminal misconduct by "stealing" the broker's fee.

Despite our vehement protests, the Office of Attorney Ethics proceeded to file a Complaint and designated the grievance as a "complex matter". The Complaint accused our client of deliberately falsifying the HUD-1 statement in violation of RPC 8.4(c)(acts of fraud, dishonesty and deceit), lying to the Office of Attorney Ethics during the investigation stage in violation of RPC 8.1(a)(false statements to an ethics authority), and making material misrepresentations of fact to third parties in violation of RPC 4.1.

A Special Master was appointed to hear and decide the grievance. We prepared an extensive trial brief arguing, in part, that the broker's grievance amounted to nothing more than a disguised collection case and that the Office of Attorney Ethics could not sustain a "strict liability" charge as to the RPC 8.4(c) violation pertaining to the HUD-1. In other words, we maintained that even if the HUD-1 was deemed inaccurate there could be no finding of an RPC 8.4(c) violation absent proof that our client knowingly and purposely signed the document with the intent to deceive anyone involved in the transaction. We further asserted that our client could not be accused of lying to the Office of Attorney Ethics or any other third person in light of the buyer's corroborating testimony given during his initial telephone interview with the Office of Attorney Ethics; i.e., that he had reached a verbal agreement with the broker that morning on a fee reduction.

Following a contentious 9-day trial conducted in a courtroom located almost 100 miles from my client's office, the Special Master concluded that our client did not engage in any misconduct and dismissed the entire Complaint. Amazingly, during the course of the trial both the broker and her office manager testified that they expected my client to pay their company's fee from escrow funds he was holding in his trust account dedicated to pay for a roof repair. In fact, the broker was the one responsible for hiring the roofer in the first place. Our client refused to release the escrow to the broker. Thereafter, the broker escalated her efforts to collect the unpaid fee from the buyer, with the frequency and tone of her emails and phone calls to the buyer becoming increasingly nasty and threatening.

The Special Master agreed that: (i) the broker's motivation in filing the grievance was to collect her company's unpaid fee; (ii) the broker's cell phone records, emails and conduct post-closing confirmed/ratified the existence of the verbal agreement with the buyer to accept a lower fee at the closing; (iii) our client did not knowingly falsify the HUD-1 statement; (iv) our client had no duty to change or amend the HUD-1 statement because everyone in the transaction knew the title company was acting as the settlement agent, and the title company did perform real estate settlement services; (v) our client had no motive to close the

transaction under the subterfuge of false pretenses; and (vi) the HUD-1 statement was not rendered inaccurate since all parties to the transaction behaved as if it were accurate.

Further, the Special Master found our client to be a credible witness, accepted the buyer's corroborating testimony about the verbal agreement with the broker - **testimony which the OAE knew about in advance of even filing the Complaint**, and completely rejected the testimony of the broker and her supervising office manager.

The Office of Attorney Ethics appealed, but the Disciplinary Review Board rejected the appeal. No further appeal was sought, and the matter effectively concluded in our client's favor.

In this case justice prevailed!