DISCIPLINARY REVIEW BOARD

OF THE

SUPREME COURT OF NEW JERSEY

RICHARD J. HUGHES JUSTICE COMPLEX
P.O. BOX 962
TRENTON, NEW JERSEY 08625-0962
(609) 292-1011

June 11, 2013

Mark Neary, Clerk
Supreme Court of New Jersey
P.O. Box 970
Trenton, New Jersey, 08625

RE: **In the Matter of David M. De Clement**
Docket No. DRB 12-390
District Docket No. XIV-2012-0410E

Dear Mr. Neary:

The Disciplinary Review Board reviewed the motion for discipline by consent (reprimand or such lesser discipline as the Board shall deem warranted), filed by the Office of Attorney Ethics pursuant to R. 1:20-10(b). Following a review of the record, the Board determined to grant the motion. In the Board's view, a reprimand is the appropriate sanction for respondent's violation of RPC 1.15(a) (failure to safeguard funds in which a client or third party has an interest), in that he released a portion of escrow funds to a party to an escrow agreement without first obtaining the other party's consent.

Specifically, on December 17, 2010, First Fund Ltd. (First Fund), an investment company based in Nevis, West Indies, with service offices in Miami, Florida, entered into a joint venture agreement (the agreement) with Mahamane Sani Dan-Dodo (Sani), the officer and sole shareholder of DK Export Import Corporation (DK), a commodities trading company based in Opa Locka, Florida. The purpose of the venture was to import oil from Ecuador.

The agreement provided that Sani would receive $75,000, in return for securing a $3 million Standby Letter of Credit for one of First Fund's clients. The agreement further provided that the $75,000 was to be paid to DK by check "[u]pon confirmation that the [letter of credit had] been delivered into the [First Fund]'s client in BANCO PICHINCHA CA . . . ."

Notwithstanding this provision, on the same date of the agreement, December 17, 2010, First Fund issued a check for $75,000, payable to respondent. A notation on the memo portion of the check labeled the payment as "ESCROW DEPOSIT & PAYMENT."

The agreement did not provide that the $75,000 was to be held in escrow, but a handwritten notation on its last page identified respondent as "ESCROW ATTORNEY." Although respondent was an acquaintance of Sani's and had represented him in the past, respondent did not represent Sani in negotiating the agreement with First Fund and, in fact, was not aware that there was such an agreement. Based on their prior relationship, however, Sani asked respondent to hold the funds in escrow in his trust account. Respondent agreed to do so. Sani represented to respondent that he was allowed to receive certain sums from the escrow to cover his expenses, as he worked to secure the letter of credit. Respondent relied on Sani's representation.

On December 21, 2010, respondent deposited the check in his trust account. On that same date, he wire-transferred $18,000 to a member of DK, Marc Thomas. Respondent did not seek First Fund's authorization for this disbursement, a violation of RPC 1.15(a). Instead, he relied on Sani's representation that Sani was allowed to use the escrow funds to cover his expenses in procuring the letter of credit.

Prior to releasing escrow funds, an escrow holder must obtain the permission of both parties to the escrow agreement. "[I]t is a matter of elementary law that when two parties to a transaction select the attorney of one of them to act as the depository of funds relevant to that transaction, the attorney receives the deposit as the agent or trustee for both parties [citations omitted]." In re Hollendonner, 102 N.J. 21, 28 (1985).

The stipulation cites, as mitigating factors, respondent's cooperation with the OAE, his acknowledgement of wrongdoing, the fact that he was not motivated by self-interest, and his clean disciplinary record since his 1994 bar admission.

Ordinarily, the improper release of escrow funds results in discipline ranging from an admonition to a reprimand. See, e.g., In the Matter of Joseph Jerome Fell, DRB 10-328 (January 25 (2011) (attorney received an admonition for releasing $325,000 in escrow funds to his client, the seller of a one-third interest in a business, without determining that all contracts and operating agreements had been signed by all parties and approved by the buyers' attorney, as instructed; the attorney mistakenly believed that the contract had been properly executed; the attorney's acceptance of responsibility for his conduct, remorse, lack of self-interest, and spotless disciplinary record were viewed as mitigating factors; that the buyers never received the one-third interest in the business was considered an aggravating factor); In the Matter of Michael D. Landis, DRB 09-395 (March 19, 2010) (admonition for attorney who disbursed an $86,500 real estate deposit to his client, the buyer, in the face of a contractual dispute and despite a contract clause providing for the deposit of the funds with the court in the event of a disagreement between the parties; mitigating factors were the attorney's belief that he had properly voided the contract of sale, the lack of disciplinary history, and his inexperience in real estate matters); In the Matter of Kevin S. Quinlan, DRB 03-228 (October 22, 2003) (attorney received an admonition for releasing to the seller of real property, without the consent of the buyer, a $1,000 sum held in escrow for the completion of repairs; the attorney mistakenly believed that he had the consent of the buyer, his client; the attorney also did not timely return his client's phone calls; no prior discipline); In re Holland, 164 N.J. 246 (2000) (reprimand for attorney who was required to hold in trust a fee in which she and another attorney had an interest; instead, the attorney took the fee, in violation of a court order); In re Milstead, 162 N.J. 96 (1999) (attorney reprimanded for disbursing escrow funds to his client, in violation of a consent order); and In re Margolis, 161 N.J. 139 (1999) (reprimand for attorney who breached an escrow agreement requiring him to hold settlement funds in escrow until the completion of the settlement documents; the attorney used part of the funds for his fees, with his client's consent).

As the above cases indicate, the attorneys who received admonitions held reasonable, although mistaken, beliefs that, for one reason or another, the release of the escrow funds was appropriate. In the absence of this mitigating circumstance and without other serious improprieties, a reprimand is the proper form of discipline for the premature disbursement of funds that should have remained intact until the purpose of the escrow agreement was satisfied.

Here, the record makes no mention of a reasonable belief on respondent's part. He simply relied on Sani's representation that Sani was allowed to use a portion of the $75,000 for his expenses, while he was procuring the letter of credit.

In accordance with established precedent, respondent's unauthorized disbursement of $18,000 to Sani, on December 21, 2010, must be met with a reprimand because of the lack of any reasonable, but mistaken belief, on respondent's part, that he could release the funds to Sani without First Fund's consent. Respondent agreed that he should receive that degree of discipline. In the Board's view, the mitigating factors cited in the stipulation are not sufficient to downgrade the otherwise appropriate reprimand to an admonition.

Enclosed are the following documents:

1. Notice of motion for discipline by consent, dated October 12, 2012.

2. Stipulation of discipline by consent, dated September 24, 2012.

3. Affidavit of consent, dated September 5, 2012.

4. Letter to the Board from the Office of Attorney Ethics, dated May 18, 2012.

5. Letter to the Board from the Office of Attorney Ethics, dated April 24, 2012.

6. Ethics history, dated June 11, 2013.

Very truly yours,

Julianne K. DeCore
Chief Counsel

JKD/tk
c: Bonnie Frost, Chair, Disciplinary Review Board
Charles Centinaro, Director, Office of Attorney Ethics
Melissa A. Czartoryski, Deputy Ethics Counsel
Office of Attorney Ethics
David M. De Clement, Respondent