SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-175

IN THE MATTER OF

WILLIAM J. SORIANO

AN ATTORNEY AT LAW

Decision

Argued: September 11, 2003

Decided: October 8, 2003

John McGill, III appeared on behalf of the Office of Attorney Ethics.

Albert B. Jeffers appeared on behalf of respondent.

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

This matter was before us based on a recommendation for an admonition filed by the District XI Ethics Committee ("DEC"), which we determined to bring on for hearing. The complaint charged respondent with violations of *RPC* 1.1(a) (gross neglect), *RPC* 1.3

(lack of diligence), *RPC* 1.15(a) (failure to safeguard escrow funds) and *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1975. He has no disciplinary history.

Respondent does not dispute that he failed to execute his duties as an escrow agent. The Office of Attorney Ethics ("OAE") and respondent entered into a stipulation of facts and a supplemental stipulation of facts. In those stipulations, respondent admitted most of the allegations of the complaint. In addition, the DEC conducted a hearing during which respondent and his attorney in related civil litigation testified.

In 1992, respondent was retained to represent L. Richard Smaldone and Jacqueline A. Lowe ("the buyers"), who wished to buy a funeral home business known as Braviak Funeral Home, Inc. ("funeral home") in Whippany, New Jersey. They also wanted to buy the real estate on which the funeral home was located. The funeral home had been owned and operated by Joseph P. Braviak and Frances L. Braviak ("the sellers"). Because the buyers did not have sufficient capital to buy the real estate or the business, and could not obtain the necessary financing, the sellers consented to enter into two lease agreements with the buyers, with an option to purchase after five years. The buyers planned to operate the funeral home business through a corporate entity known as Lithland Corporation.

One of the lease agreements addressed the real estate and personal property and the second lease agreement was for the funeral home business. Each lease agreement contained a five-year term from April 1, 1992 to March 31, 1997 and provided for the purchase price for the real estate or for the funeral home business upon the exercise of the option to purchase at the end of the lease term. In addition, each lease agreement required the buyers to make monthly payments, to be held in escrow, as security for their performance and as compensation for the sellers in the event that the buyers materially breached the agreement or failed to exercise the option to purchase. If the buyers exercised the option to purchase, the escrow funds would be applied toward the purchase price. According to the lease agreements, thus, under every circumstance, the funds were to be turned over to the sellers.

Each lease agreement contained an escrow provision naming respondent, on behalf of his law firm, as escrow agent. The escrow portion of each lease agreement provided, in part, as follows:

> The Escrow Agent shall hold the money received from TENANT pursuant to this provision in an interest-bearing account, with any taxes due on account of interest earned to be paid by the TENANT.
>
> The Escrow Agent shall, on a quarterly basis, (the first quarter being April, May and June) within thirty (30) days of the end of each quarter beginning June 1992, provide to LANDLORD an accounting showing the money received from the TENANT pursuant to this provision, both during the preceding quarter and cumulatively from the inception of this Agreement.

> In the event the total amount to be deposited pursuant to this Agreement has not been received by the Escrow Agent at the end of any quarter, TENANT shall have thirty (30) days from the end of the quarter to make the required deposit before LANDLORD may declare a default pursuant to the provisions of the Lease Agreement. Proof of any deposit to correct the shortfall made by the TENANT shall be immediately forwarded to LANDLORD by Escrow Agent.

In early 1993, respondent opened an escrow account with Inter-Community Bank in his name as trustee for buyer Smaldone and a second escrow account with that bank in his name as trustee for Lithland Corporation. In 1993, to generate a greater rate of return, respondent transferred the escrow monies to two mutual fund accounts at State Street Research Services ("State Street"), an institution that Smaldone had selected. The accounts were opened in respondent's name as trustee for Smaldone and Lithland, respectively. Neither account named the sellers or the funeral home as beneficiaries. Respondent did not notify the sellers or their attorney of the institution in which the escrow funds were placed.

On October 13, 1995, respondent signed a document changing the dealer from State Street to MML Services, Inc. ("MML"), a broker that Smaldone had selected. Respondent opened two accounts as trustee for Smaldone and Lithland at an entity known as Met Life Managed Asset and Equity Income Funds ("MetLife"). Although respondent signed the document, only the address for the funeral home, not respondent's office, appeared on the form. Beginning in November 1995, periodic statements

addressed to respondent were sent directly to the buyers at the funeral home. Respondent never received written statements from MML or MetLife to verify the account balances. He used an automated telephone system, requiring him to enter various codes, to obtain account balances. According to respondent, the information that he retrieved by telephone was more current than the information he would have received from written statements.

Respondent never received money from the buyers pursuant to the lease agreements. Instead, he allowed the buyers to deposit the escrow amounts into accounts at financial institutions that the buyers had selected, without reporting to him the amounts of the deposits. Respondent's signature was required for withdrawals from the escrow accounts.

During a period of about four years, respondent furnished to the sellers or their attorney periodic reports, although, by his own admission, not always on a timely basis. Respondent relied on either written statements, or, after he stopped receiving them, information that he had received from the financial institution by telephone. These reports indicated the amount of funds in the escrow accounts.

The last report that respondent issued to the sellers was dated June 14, 1996, and stated that $224,692.61 was held in escrow. At that time, however, respondent was not aware that Smaldone had withdrawn substantial funds from the escrow accounts by

impersonating respondent in a telephone call to the financial institution and forging respondent's signature on checks that he had obtained. When respondent obtained the account balances by telephone before issuing his June 14, 1996, report, he noticed that the sums were substantially less than the amount that should have been on deposit. He made inquiry to Smaldone, who told respondent that he had been transferring the escrow monies among different funds offered by MetLife. Smaldone "faxed" a report to respondent indicating that one fund held $127,447.43 and a second fund held $97,245.18, for a total of $224,692.61. Without verifying these amounts with MML or MetLife, respondent relied on Smaldone's information in issuing his own June 14, 1996, report to the sellers. According to MetLife's records, the total escrow balance as of June 14, 1996, was only $68,950.63.

On December 20, 1996, the sellers filed a civil action against the buyers, respondent, his law firm and others in Superior Court, Morris County. The court issued a letter opinion on July 27, 1999, finding the sellers entitled to summary judgment and stating as follows:

> It was flatly and egregiously wrong for Mr. Soriano not to take direct control of the escrow funds which were supposedly being deposited by Mr. Smaldone and Ms. Lowe. One of the basic purposes behind the creation of an escrow fund is to take control of funds away from one side of the contract and to place control of those funds with an independent agent who has fiduciary responsibilities to the parties on both sides of the contract. That basic purpose is totally frustrated when the escrow agent never takes control of the funds, but, on the contrary, allows control of the funds to

Although respondent stated that he never gave the codes to the buyers, he conceded that the statements may have contained the codes used to verify the account information.

Respondent testified that, although he was aware that the buyers could, and did, shift the escrow monies between funds, as long as the monies remained in the account, it did not matter in which investment fund the monies were placed. According to respondent, the escrow agreement did not require the sellers' knowledge of, or consent to, the transfer of the funds. Respondent claimed that, because the sellers did not object when he placed the funds in Inter-Community Bank, no one was concerned about where the escrow monies were placed. He acknowledged, however, that the sellers were not aware that he had transferred the funds to the mutual fund account.

In addition, respondent asserted that, as long as the account was in his name as trustee, the escrow agreement did not require that he receive and deposit the monies into the account. Respondent opined that this arrangement complied with the escrow agreement provision that the escrow agent shall hold the money received from the buyers. In respondent's view, his only obligations under the escrow agreement were to ensure that the money was deposited and remained in the account and to issue quarterly reports.

Respondent also claimed that he had listed the buyers as beneficiaries of the escrow accounts, but not the sellers, because the buyers were depositing the monies into the accounts. Although he admitted that, under any scenario described in the lease, the

escrow funds would be paid to the sellers, he contended that they had no interest, beneficial or otherwise, in the deposited funds.

On March 18, 1994, the sellers' attorney asked respondent to include the following information in his quarterly reports: the name of the institution where the escrow monies were placed; the account numbers; the dates and amounts of deposits; the amount of earned interest; and the total balance. On April 4, 1994, respondent replied that the lease agreements did not require that he provide the name of the institution, the account numbers or the dates of deposits. In January 1997, after filing the civil lawsuit, the sellers removed respondent as escrow agent. At the hearing, respondent testified that, because the agreement did not require that he produce the requested information, and because the buyers, his clients, did not want him to disclose this information, he did not disclose it. Respondent denied any express or implied obligation as escrow agent to disclose the information.

The DEC found that respondent violated *RPC* 1.15(a) by failing to maintain required records of escrow accounts. The DEC did not find clear and convincing evidence of any other violations. The DEC recommended an admonition.

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. Respondent breached his fiduciary duty as escrow agent in several ways.

Although the lease agreements required respondent to issue quarterly escrow reports beginning June 1992, he did not even establish the escrow accounts until early 1993. When respondent opened the accounts at Inter-Community Bank, he failed to name the sellers as beneficiaries. At the ethics hearing, respondent contended that the buyers were the beneficiaries because they were funding the deposits. Respondent's position establishes that he continues to misapprehend the nature of an escrow account and his duties as an escrow agent. In general, both parties have an interest in escrow funds.

> [A]bsent some extraordinary provision in an escrow agreement, absent here, it 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. *In re Hollendonner*, 102 *N.J.* 21, 28 (1985).

In this matter, the sellers had an even greater interest than in the typical case because under any scenario described in the lease agreement, i.e., whether the buyers breached the agreement, failed to exercise the option to purchase, or exercised the option to purchase, the sellers were entitled to the escrow monies. Respondent, thus, should have included the sellers as beneficiaries when he established the escrow accounts. If he had done so, the buyers' ability to obtain the funds may have been thwarted because the financial institution may have required all beneficiaries to authorize removal of the funds.

More egregiously, respondent completely abdicated his responsibilities as escrow agent. He permitted his clients to make the deposits directly into the escrow accounts. He

permitted his clients to choose the financial institution in which the funds were placed. He permitted his clients to transfer the funds as they, or their investment adviser, saw fit. He permitted his clients to have complete control over the accounts, retaining only the authority to withdraw the funds. He failed to receive the written account statements, to investigate the reason that he was not receiving the statements, or to inquire whether his clients were receiving the statements, which contained confidential code information. Respondent observed that he stopped receiving the statements shortly after June 1995 when his law office relocated. His failure to receive the statements is more likely attributed to the October 13, 1995, dealer change form in which only the address of the funeral home, not respondent's law office, appeared. Presumably, the statements were sent directly to the buyers after that form was submitted.

Respondent contended that, because the escrow agreement did not require him to maintain control over the funds, he was permitted to relinquish control to his clients. Respondent's interpretation is erroneous, however, because the escrow agreement required the escrow agent to "hold the money received from TENANT." In addition, the nature and purpose of an escrow agreement requires the escrow agent to control the funds. Black's Law Dictionary (7th ed. 1999) defines escrow as "a legal document or property delivered by a promisor to a third party to be held by the third party for a given amount of time or until the occurrence of a condition, at which time the third party is to

hand over the document or property to the promisee." By agreeing to serve as escrow agent, respondent undertook a fiduciary obligation to safeguard the escrow funds. He should have carried out that obligation by selecting the financial institution in which the escrow monies were deposited and by requiring the buyers to give the funds to him for deposit. Respondent breached his fiduciary duty by permitting his clients to choose the financial institutions in which the funds were placed and to make the deposits directly. His belief that the funds were secure as long as he was the only party authorized to make withdrawals was incorrect.

Respondent further failed to execute his duties as escrow agent by not issuing timely reports to the sellers. He conceded that he had not furnished the reports on a timely basis.

On June 14, 1996, respondent exacerbated his betrayal of his fiduciary duties when he issued a report to the sellers in reliance on Smaldone's representation of the amount of funds on deposit. After respondent learned by telephone inquiry to the financial institution that there was a substantial shortage in the escrow account, he contacted Smaldone, who misrepresented that more funds were in the account. Without verifying Smaldone's version with the financial institution, respondent reported that the total balance in the escrow account was $224,692.61. Due to the buyers' theft of the funds, the actual balance at that time was much less.

While acknowledging that there is no suggestion that respondent had any involvement in the criminal activity, the presenter argued that respondent's negligence created an "environment" that permitted his clients to invade the funds. Respondent, on the other hand, contended that the controls that he had in place were adequate and were circumvented only by an unforeseeable combination of his clients' criminal activity and the financial institution's negligence. Although others may share the blame for the loss, respondent is one of the responsible parties. His failure to execute his duties as escrow agent permitted the buyers to steal the monies that he should have been safeguarding.

Respondent's breach of his fiduciary duties as escrow agent violated *RPC* 1.1(a), *RPC* 1.3, and *RPC* 1.15(a). Respondent's utter failure to carry out his duties as escrow agent amounted to gross neglect and failure to safeguard funds, in violation of *RPC* 1.1(a) and *RPC* 1.15(a). *RPC* 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Respondent contended that because *RPC* 1.3 applies only to clients, he did not violate that rule. Although respondent did not have an attorney-client relationship with the sellers, he owed them a fiduciary obligation. In that sense, they were his "escrow clients." In *In re Gavel*, 22 *N.J.* 248, 265 (1956), the Court discussed an attorney's obligations to non-clients:

> In addition to the duties and obligations of an attorney to his client, he is responsible to the courts, to the profession of the law, and to the public, *In re Genser*, 15 *N.J.* 500 (1954); *In re Howell*, 10 *N.J.* 139 (1952). He is bound even in the absence of the attorney-client relation to a more rigid

> standard of conduct than required of laymen. To the public he is a lawyer whether he acts in a representative capacity or otherwise. In *In re Genser, supra,* 15 *N.J.* 600, 606 (1954) we held that:
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> > "The fiduciary obligation of a lawyer applies to persons who, although not strictly clients, he has or should have reason to believe rely on him. *Drinker, Legal Ethics* (1953), *p.* 92."

Similarly, in *In re Bancroft*, 163 *N.J.* 139 (2000), the attorney represented the sellers in a real estate transaction. A title problem developed concerning access to the property. At the closing, the buyers, sellers and Bancroft entered into a rider in which Bancroft, the sellers' attorney, agreed to bring a quiet title action on behalf of the buyers. A sum of money was held in escrow for the attorney's expenses. The attorney failed to file the quiet title action and was guilty of numerous ethics infractions, including lack of diligence. The attorney's argument that he was not the buyers' attorney was rejected. By signing the rider, the attorney agreed to represent the buyers. *Bancroft* is distinguishable because of the finding of a direct attorney-client relationship. However, the principle that an attorney who agrees to undertake a fiduciary obligation will be held accountable for a breach of that fiduciary duty is equally applicable here. The sellers reasonably relied on respondent. He is accountable for his lack of diligence, which violated *RPC* 1.3.

Moreover, respondent violated *RPC* 8.4(c) when he issued reports to the sellers that implied that he was holding the escrow funds. The sellers could reasonably interpret respondent's reports as confirmation that he held the escrow funds in his control. That

was not true. In addition, the June 14, 1996, report misrepresented the amount of funds in the escrow account. Although respondent contended that he relied on information that he received from his clients, respondent's reliance was not reasonable. Respondent learned from the financial institution's automated telephone system that the amount on deposit was woefully short. Respondent was, therefore, on notice that some of the funds were missing. He should not have relied on his client's explanation that he was moving the monies among different funds.

In *In re Agrait*, 171 *N.J.* 1 (2000), the attorney reported on real estate closing documents that the buyer had paid a $16,000 real estate deposit. The attorney relied on a representation from his client, the seller, that the deposit had been paid. The contract, however, required the attorney to hold the deposit in escrow until final inspection of the property. The attorney never received the deposit. The Court determined that the attorney's report on the closing documents, that the deposit had been paid, violated *RPC* 8.4(c).

Respondent's representation to the sellers that he was holding $224,692.61 also amounted to a violation of *RPC* 8.4(c).

In sum, respondent violated *RPC* 1.1(a), *RPC* 1.3, *RPC* 1.15(a), and *RPC* 8.4(c). For similar combinations of violations, reprimands have been imposed. *See, e.g., In re Agrait, supra,* 171 *N.J.* 1 (reprimand where attorney failed to prepare a written fee agreement, failed to hold escrow funds and misrepresented that a real estate deposit had

been paid); *In re Silverberg*, 142 *N.J.* 428 (1995) (reprimand for gross neglect, lack of diligence and misrepresentation in a real estate matter in which the attorney failed to amend a closing statement to accurately reflect the terms of the transaction). Although respondent urged that an admonition is warranted, citing *In re Witman*, 174 *N.J.* 338 (2002), we found *Agrait, supra,* and *Silverberg, supra,* to be more on point.

Based on the foregoing, we unanimously voted to impose a reprimand for respondent's infractions. Two members recused themselves. One member did not participate.

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

Disciplinary Review Board
Mary J. Maudsley, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of William J. Soriano
Docket No. DRB 03-175

Argued: September 11, 2003

Decided: October 8, 2003

Disposition: Reprimand

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*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:			6			2	1

Julianne K. DeCore
Acting Chief Counsel