SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-459

IN THE MATTER OF

RICHARD M. MILSTEAD

AN ATTORNEY AT LAW

Decision

Argued: February 11, 1999

Decided: June 9, 1999

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

Vincent Pancari appeared on behalf of respondent.

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

This matter was before the Board based on a recommendation for discipline filed by special master David H. Dugan, III. The formal complaint charged respondent with violations of *RPC* 1.15(a) (failing to safeguard escrow funds), *RPC* 3.4(c) (disobeying an obligation under the rules of a tribunal) and *RPC* 8.4(d) (engaging in conduct prejudicial to the administration of justice).

Respondent was admitted to the New Jersey bar in 1965. He has no prior disciplinary history.

This case has a lengthy procedural history. Initially, a single attorney member of the District I Ethics Committee recommended an admonition, under *R.* 1:20-6(d)(3). The Board reversed and remanded the case for a hearing before a full panel. The District IIIB Ethics Committee then recommended an admonition. The Board again reversed and remanded the matter, directing that a special master hear the case. The matter appeared before the Board again after that hearing.

Prior to the hearing before the special master, respondent stipulated that he had committed the misconduct charged in the complaint. He stipulated to the admission of the complaint and its exhibits as evidence. As a result, the testimony presented related solely to mitigation.

According to the complaint, respondent was a member of the law firm Milstead & Ridgway ("the Milstead firm"). Donald Shapiro was also a member of the Milstead firm. In addition, respondent, Shapiro and others were partners in a real estate partnership.

At one point Shapiro filed a lawsuit against the Milstead firm alleging wrongful termination of employment and tortious conduct. The litigation ended in 1987. The real estate partners sold or assigned their interests in that partnership to Chester Ottinger. In 1988 Ottinger sold the last property that belonged to the partnership, taking back a $100,000 mortgage from the purchasers.

Several days after the sale, Shapiro sued Ottinger and his wife, claiming an interest in the real estate partnership. Another member of the Milstead firm represented the Ottingers. That attorney and Shapiro's attorney entered into a consent order providing that the mortgage proceeds were to be held in an interest-bearing escrow account by the Milstead firm until further order of the court. On December 21, 1988 the court signed the consent order. On December 15, 1988 the mortgage principal amount, $100,934.34, was placed in the Milstead firm's trust account.

On February 27, 1989 respondent's counsel, Vincent J. Pancari of Pancari, Zerella, Tedesco & Pancari ("the Pancari firm") took over the representation of the Ottingers from the Milstead firm. Respondent continued to act as escrow agent. A $100,934.34 certificate of deposit ("CD") was purchased in respondent's name as escrow agent for the Ottingers.

In October 1989 the Pancari firm filed a motion on behalf of the Ottingers seeking the release of the escrow funds. The court ordered the money released only if respondent and another partner, Ridgway, were to provide written indemnifications to the Ottingers. Ridgway refused. After the entry of the court order, respondent met with Ridgway and Pancari to discuss the indemnification issue. At this point, respondent was aware that Ridgway was not willing to provide the written indemnification required for the release of the escrow funds.

On December 22, 1989 the CD was redeemed. Respondent received a $103,788.59 check as escrow agent for the Ottingers. Several days later, on December 26, 1989,

respondent sent a bank check for $103,788.59 to Ottinger with a memorandum stating that he had endorsed the check to Chester Ottinger's order. There was no court order authorizing the release of those funds. Respondent had not obtained the consent of Shapiro or Shapiro's attorney to release the monies to Ottinger.

About three years later, in January 1993, Shapiro filed an amended complaint adding respondent individually, the Milstead firm and others as defendants in the litigation. During respondent's June 21, 1993 deposition, respondent revealed that in December 1989 he had released the escrow funds to Ottinger. The trial court ordered the defendants, including respondent, to redeposit the funds plus interest into an escrow account held by Pancari. At the end of the *Shapiro* litigation, the court ordered the escrow funds released to Ottinger. The judge also referred the matter to the same court that had executed the consent order requiring the funds to be held in escrow. Respondent waived a hearing before that court, choosing instead to have the matter decided on the papers. On May 2, 1994 the court found respondent guilty of contempt of court, ordering him to perform twenty-five hours of community service.

At the ethics hearing, respondent explained why he had released the escrow funds to his client:

> Well, I've tried to explain it on three other occasions, and the only thing I can say is it was just a mistake. I mean I didn't specifically decide I'm going to ignore [the judge's] order, I practiced law before [that judge] for many years, he was a personal friend of mine, and I would have never intentionally

violated his order. I can't really explain why I did it, why I released the funds, but I just did.

[T16][1]

In mitigation, respondent testified that December 1989, when he released the escrow funds, was a difficult period for him for a number of reasons. He was counsel and director of Security Savings Bank, which was affected by federal regulations passed in August 1989. According to respondent, the regulations rendered the bank's capital deficient. Respondent explained that, as a result, he traveled to New York and Washington almost twice a week to raise capital, while at the same time downsizing the company. In addition, respondent revealed that he was experiencing marital problems at the time, which added to his stress. About six weeks after respondent released the escrow funds, he suffered a heart attack. However, respondent denied that he was pressured by Ottinger to disburse the funds or that he suffered from any mental illness.

Paul Ricci, chairman of the board of Security Savings Bank, testified that respondent "carried on the tradition of his father who was one of the most honored attorneys in Vineland" and that respondent enjoyed an impeccable reputation. Ricci noted that with the passage of the August 1989 bank regulations respondent was under a lot of stress.

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[1] T refers to the transcript of the October 6, 1998 hearing before the special master.

In addition, Michael D. Capizola, a Vineland attorney, testified that respondent enjoyed a very high reputation for honesty and integrity among the legal community in Vineland.

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Based on respondent's admission of misconduct, the special master found that respondent violated *RPC* 1.15(a), *RPC* 3.4(c) and *RPC* 8.4(d). At the ethics hearing, respondent's counsel urged an admonition, citing *In re Spizz*, 140 *N.J.* 38, (1995). However, the special master found *Spizz* distinguishable. First, the special master noted, the escrow amount in *Spizz* was only about $3,900, while respondent released more than $103,000 to his client. In addition, Spizz claimed a good faith belief that the disbursement was proper and ultimately acknowledged that he should have given notice and obtained court approval before releasing the funds. In contrast, respondent never suggested that the disbursement was justified and continued to insist that he never intended to violate the court order. The special master characterized respondent's view as follows:

> The position respondent is taking here falls short of a true acknowledgment of his wrongdoing. Moreover, for him to say, as he does, that he does not know why he disbursed the funds is troubling. In essence he is detaching himself from his actions, which is an entirely unacceptable approach for a lawyer to take.

The special master recommended the imposition of a reprimand.

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Following a *de novo* review of the record, the Board is satisfied that the special master's findings are supported by clear and convincing evidence. It is unquestionable that respondent breached *RPC* 1.15(a), *RPC* 3.4(c) and *RPC* 8.4(d). He was obligated by court order to hold approximately $103,000 in escrow until further order of the court. He breached both the court order and his fiduciary duty as escrow agent, when he released the funds to his client before receiving court approval.

This case is to be distinguished from others in which the attorney misused escrow funds for the attorney's personal benefit. *See, e.g., In re Gifis*, 156 *N.J.* 323 (1998) and *In re Susser*, 152 *N.J.* 37(1997), in which the attorney released escrow funds to his client who was also his business associate. Although Susser did not receive the funds directly, he derived an indirect benefit because he was affiliated with the client to whom he had disbursed the funds. In *Susser*, the Court imposed a three-year suspension. Here, respondent did not receive any of the funds, nor did he benefit in any way from their early release.

Unless the invasion of escrow funds rises to the level of a knowing misappropriation, as in *In re Hollendonner,* 102 *N.J.* 21 (1985), a circumstance not present here, the violation of an escrow agreement, without more, usually warrants the imposition of an admonition or a reprimand. *See In re Spizz, supra*, 140 *N.J.* 38 (1995) (admonition where attorney agreed to hold funds in escrow until resolution of a dispute over fees of prior counsel and then disbursed funds to client without prior counsel's knowledge) and *In re Flayer*, 130 *N.J.* 21

(1992) (reprimand where attorney, the buyer of real property, released escrow funds to himself after builder failed to complete work, as previously agreed).

Here, the Board was troubled by respondent's inability to explain why he had violated a court order and breached an escrow agreement by prematurely releasing escrow funds to his client. Moreover, the Board considered that respondent had been found guilty of contempt of court for his misconduct. In mitigation, however, the Board noted that respondent enjoyed a prior unblemished career of thirty-three years and that this matter occurred more than nine years ago.

After balancing respondent's misconduct as well as his lack of explanation, on the one hand, with the mitigating factors, on the other hand, the Board unanimously determined that a reprimand is the appropriate discipline for this respondent. Two members did not participate.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 6/9/99

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board