SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-117
District Docket No. XIII-09-033E

IN THE MATTER OF	
ALAN E. WELCH	
AN ATTORNEY AT LAW	

Decision

Argued: July 21, 2011

Decided: October 6, 2011

John Lanza appeared on behalf of the District XIII Ethics Committee.

Gerard Hanlon 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 on a recommendation for an admonition filed by the District XIII Ethics Committee (DEC), which we determined to treat as a recommendation for discipline greater than an admonition. R. 1:20-15(f)(4). The complaint charged respondent with violating RPC 1.15(a) (failure to safeguard property belonging

to a client or a third party) and RPC 8.4(d) (conduct prejudicial to the administration of justice). This matter arose from respondent's release of proceeds from a check to one of two payees, without the endorsement or permission of the other payee, and his attempt to shield himself from an ethics grievance. We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1973. He has no history of discipline.

Respondent represented James Parascandola (Parascandola) in a contentious divorce proceeding against Catherine Parascandola, a/k/a Catherine Sutton (Sutton), who was represented by Janna M. Chernetz.

On September 24, 2008, Parascandola delivered to respondent a homestead rebate check in the amount of $1,257.89, payable to both Parascandola and Sutton. Only Parascandola endorsed the check, which respondent deposited in his attorney trust account.[1]

On October 9, 2008, respondent disbursed the proceeds of the check to Parascandola, without authorization from either Sutton or Chernetz. The record contains a letter, dated November 3, 2008, from respondent to Chernetz, enumerating several expenses that Sutton was

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[1] There are no allegations that either respondent or Parascandola forged Sutton's signature.

delinquent in paying and stating that he had turned over the $1,257.89 to Parascandola. Respondent testified that he had conversations with Chernetz and that she had objected to his paying Parascandola the entire proceeds of the homestead rebate check.

The record does not clearly and convincingly establish that such discussions occurred before the disbursement on October 9, 2009. In fact, the presenter "testified"[2] that Chernetz denied having ever discussed the disbursement with respondent prior to October 9, 2009 and that, according to Chernetz, she found out about it only upon receiving the November 3, 2009 letter from respondent.

In a December 2009 letter to the presenter, respondent stated that he had not reached out to Chernetz to have Sutton endorse the check because he knew that Sutton would refuse to do so, unless she received the funds. Respondent conceded that he could have filed a motion for an order allowing the disbursement of the funds, but stated that the process was too expensive for his client.

Respondent cited several reasons for disbursing the funds to Parascandola, including: 1) Sutton was not making mortgage payments on the marital home, as required by a court order; 2) Sutton had received an $1,800 stimulus check and had not applied the proceeds

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[2] Chernetz did not testify below.

in accordance with a court order; 3) Parascandola was in charge of their children's care, earned less than Sutton, and was in need of funds; and 4) the disbursement to Parascandola was disclosed to Chernetz before and after it took place. Essentially, respondent believed that all matters concerning funds received by the parties and the ultimate division of those funds would be determined at the end of the matrimonial proceeding.[3]

In early 2009, Sutton filed an ethics grievance against respondent.[4] In August 2009, Parascandola and Sutton signed a property settlement agreement, which was incorporated into the final judgment of divorce in September 2009. Paragraph 34 of the agreement stated, in part:

> The parties have also received a real estate rebate check jointly for the Tax Year 2008 in the amount of $1,257.89. Each party acknowledges receiving one-half or $628.94 and neither party makes any further application with regard to rebate or tax refund. The Husband shall be solely

[3] When the payment to Parascandola was discovered, Sutton had the bank debit $1,257.89 against respondent's attorney trust account. She received that amount. It is unclear how this was accomplished.

[4] The DEC declined to proceed at that time because the matrimonial litigation was ongoing.

> entitled to any real estate tax refund from the State of New Jersey for the tax year 2009 and thereafter. The Wife waives any right, title and interest she may have in and to the real estate tax refund check. The Wife also waives and forever relinquishes any ethics grievance against Husband's Attorney or his Law Office regarding the previous processing and clearance of the real estate tax refund check payable to the parties.
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> [Ex.I;Ex.H-4.]

In August 2009, respondent sent a letter to Chernetz that stated, in part:

> Paragraph 34 must remain as is. In fact, because your client has filed an Ethics Complaint against me, this Agreement will not be signed until I have a full Release from her. You are not allowed to delete this Paragraph. In fact, please contact me regarding your client's Release of any potential claim against this office. If I do not have a Release, this matter will not be resolved.
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> [Ex.J.]

Sutton testified that she signed the property settlement agreement, relying on her counsel's advice that paragraph 34 was unenforceable.

Respondent testified that he, too, did not believe that paragraph 34 was enforceable.[5] Rather, he sought to "freeze" Sutton with regard to any potential disciplinary action against him. He explained that Parascandola had instructed him to require paragraph 34, as a condition of any settlement. Parascandola wanted respondent "to be able to continue [the representation] unfettered without compromise because he knew what was in store for him after the final judgment would have been addressed."[6]

In mitigation, respondent pointed to his previously unblemished career, his admission of wrongdoing and remorse, and his lack of personal gain from his actions. In addition, he noted that this was an isolated incident and that he had taken the Parascandola case more personally than others in his career.

The DEC concluded that respondent violated RPC 1.15(a), when he accepted a check from Parascandola and deposited it in

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[5] Although respondent testified that he thought that the language in question was unenforceable, in his reply to the grievance he pointed to paragraph 34, noting that Sutton "also waives any grievance against [respondent]."

[6] As of the date of the hearing panel report, October 8, 2010, the matrimonial proceeding was ongoing. Respondent was representing Parascandola. Sutton was acting pro se.

his trust account with only his client's signature, even though Sutton was also a payee, and then disbursed the funds to Parascandola. The DEC noted that respondent knew that Chernetz objected to the disbursement of the funds solely to Parascandola and that Sutton would not agree to it. In the DEC's view, respondent had a fiduciary obligation to hold the funds for the owner(s), here, Parascandola and Sutton. The DEC remarked that respondent had other options, including seeking a court order. The DEC found that respondent's reasons for disbursing the funds to Parascandola were insufficient to overcome his obligations to both parties as an escrow agent.

On the other hand, the DEC noted that respondent did not act out of personal gain, that he did not hide the disbursement to Parascandola, and that Sutton was ultimately made whole, albeit through her own efforts, rather than respondent's.

As to the charged violation of RPC 8.4(d), the DEC found that respondent's requirement that Sutton sign a property settlement agreement that included a paragraph exculpating him from any ethics violations was improper. The DEC reasoned that, "[a]s a condition of signing a matrimonial property settlement, a party cannot be forced to give up an ethical claim against an attorney. Such a position and provision would be contrary to public

policy." The DEC expressed concern about the exculpatory claim in the agreement, notwithstanding the testimony of Sutton and respondent that they did not think it was enforceable. The DEC reasoned that, at the very least, respondent attempted to interfere with the administration of justice.

The DEC found not credible a portion of respondent's testimony on this score:

> [Respondent] testified that he knew that paragraph 34 was unenforceable, but that he included it in order to "freeze" Ms. Sutton so that the case would not be taken up with collateral matters involving ethics grievances. [Respondent], through his attorney . . . noted that ethical charges are common in matrimonial cases, as such matters are usually quite contentious in general. That testimony is belied by [respondent's] demanding language in his August 10th letter. In essence, there would be no agreement at all unless Ms. Sutton waived her right to file an ethics charge against [respondent].
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> Though [respondent] also testified at hearing that this paragraph was required at the request of his client, the panel also did not find that testimony credible. The panel believes that the intent of paragraph 34 was to protect [respondent's] interest and not those of his client.
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> [HPR9.][7]

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[7] HPR refers to the hearing panel report, dated October 8, 2010.

The DEC noted that respondent was moved by self-benefit, when he attempted to avoid ethics charges. The DEC considered, however, that respondent had been trying to represent Parascandola vigorously, "perhaps becoming too personal in doing so."

Finally, the DEC noted that, although respondent was mistaken in his belief that his actions were justified because all financial issues between Parascandola and Sutton would be resolved in the property settlement agreement, such belief militated against a finding of knowing misappropriation.[8]

Taking into account respondent's prior unblemished record, the DEC determined that an admonition was the appropriate measure of discipline here.

Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence. Respondent violated RPC 1.15(a) and RPC 8.4(d), when he released

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[8] Respondent was not charged with knowing misappropriation. Pursuant to In re Susser, 152 N.J. 37 (1997), the release of escrow funds to a party, on the reasonable belief that the release is appropriate under the circumstances, does not constitute a knowing misappropriation.

escrow funds to only one of the parties and attempted to shield himself from an ethics grievance by Sutton.

Improper release of escrow funds, without more, has generally resulted in discipline ranging from an admonition to a reprimand. See, e.g., In the Matter of Karl A. Fenske, DRB 98-211 (May 25, 1999) (admonition imposed on attorney who, although obligated to hold a real estate deposit in escrow, released it to his client, the buyer, when a dispute arose between the parties; in mitigation, it was considered that there was some confusion as to the proper escrow holder and contractual dates); In the Matter of Joel Albert, DRB 97-092 (February 23, 1998) (admonition for the release of a portion of escrow funds to pay college tuition costs of a daughter of a party to the escrow agreement, without first obtaining the consent of the other party; the attorney had a reasonable belief that consent had been given); In re Spizz, 140 N.J. 38 (1995) (admonition for attorney who, against a court order, released to the client funds escrowed for a former attorney's fees and misrepresented to the court and to the former attorney that the funds remained in escrow; the attorney relied on a legal theory to argue that the former attorney had either waived or forfeited her claim for the fee); 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); 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); and In re Flayer, 130 N.J. 21 (1992) (reprimand for attorney who made unauthorized disbursements against escrow funds; the attorney represented himself in the purchase of real estate).

In the cases where an admonition was imposed (Fenske, Albert, and Spizz) there had been either some confusion about entitlement to the funds, or a belief that consent had been given for a release of the funds, or a theory that the other claimant to the funds had waived or forfeited that claim. In other words, the attorney had some belief, albeit mistaken, that there was no impediment to the release of the funds.

Here, respondent knew that neither Sutton, the second payee on the check, nor her lawyer would have agreed to the release of

the funds solely to Parascandola. Respondent's argument that the money should have gone to his client because Sutton was not holding up her financial obligations was without merit. That was an issue for the court to decide, not respondent. Instead, he engaged in "self-help" on his client's behalf, a decision that was not his to make.

There is an additional element of misconduct for our consideration: respondent's attempt to prevent Sutton from pursuing an ethics grievance against him. That respondent knew that the language in paragraph 34, eliminating Sutton's right to file a grievance against him, was unenforceable is without moment. The point was that he wanted Sutton to believe it was enforceable. In respondent's own words, he sought to "freeze" her from filing a grievance against him, so that he could continue to represent Parascandola. Respondent's actions were an attempt to restrict Sutton's rights, a violation of RPC 8.4(d).

In cases where attorneys have taken steps to have ethics grievances dismissed, a private reprimand (now an admonition), admonitions, and a reprimand have been imposed. See, e.g., In the Matter of _____, DRB 91-254 (January 22, 1992) (private reprimand for attorney who prepared a "Payment Affidavit and

Cash Receipt" intended to force his client to withdraw all ethics grievances against him)[9]; In the Matter of R. Tyler Tomlinson, DRB 01-284 (November 2, 2001) (admonition for attorney who improperly conditioned the resolution of a collection case on the dismissal of an ethics grievance filed by the client's parents); In the Matter of Harry J. Levin, DRB 07-132 (January 15, 2008) (admonition for attorney who contacted the grievant's son and convinced him to obtain his mother's withdrawal of her grievance; the attorney also wrote a letter to the grievant containing threats of lawsuits and of court-ordered psychiatric examinations, which threats frightened the grievant into withdrawing her allegations); and In re Mella, 153 N.J. 35 (1998) (reprimand imposed for conduct prejudicial to the administration of justice; the attorney communicated with the grievant in an attempt to have the grievance against him dismissed in exchange for a fee refund and some additional remedial conduct; the attorney was also guilty of lack of diligence and failure to communicate with clients).

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[9] Because private reprimands are confidential, the name of the respondent has been omitted.

Respondent's violation of RPC 8.4(d), standing alone, most closely resembles the misconduct in Tomlinson (admonition), where the attorney conditioned the resolution of a matter on the dismissal of an ethics grievance. But we need to consider respondent's other ethics transgression, namely, his release of escrow funds to his client alone, knowing that another party had an interest in the funds. As seen from the above cited precedent, ordinarily that offense is met with a reprimand.

Generally, for the sum of misconduct like respondent's we would impose a censure. In mitigation, however, we have considered respondent's lengthy unblemished career of thirty-eight years. We have also considered his quick admission of wrongdoing, his expression of remorse, and his statement that he took this matrimonial matter more personally than other cases. We, therefore, determine that a reprimand is sufficient discipline for the aggregate of respondent's violations.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Alan E. Welch
Docket No. DRB 11-117

Argued: July 21, 2011

Decided: October 6, 2011

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			9			

Julianne K. DeCore
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Chief Counsel