Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 95-016

IN THE MATTER OF ROBERT SUSSER AN ATTORNEY AT LAW	DISSENT

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

We are compelled to record our dissent from the Board majority's recommendation for disbarment. The majority has determined that disbarment must be ordered because of the Supreme Court's pronouncement in In re Hollendonner, 102 N.J. 21 (1985). We disagree and vote to impose a six-month suspension.

Sixteen years ago, our Supreme Court instituted a bright-line rule for cases involving the knowing misappropriation of clients' funds. In re Wilson, 81 N.J. 451 (1979). The Wilson rule is simple: attorneys who steal or borrow clients' monies without their consent shall be disbarred. The rule is rooted in the need to maintain the confidence of the public in the integrity of the bar and the judiciary. Id. at 460. Since Wilson, lawyers who have engaged in knowing misappropriation have been invariably disbarred, without regard for mitigating circumstances.

Six years after Wilson, the Court decreed that attorneys who knowingly misuse escrow funds shall suffer the same fate as those who misappropriate client's funds. In re Hollendonner, supra, 102

N.J. 21 (1985). The Court's rationale was grounded on the obvious parallel between clients' funds and escrow funds.

Attorney Hollendonner represented a seller of real estate. In the course of the transaction, he became the escrow agent of a $2,000 deposit, not to be released until the sale agreement was completed. When he lacked sufficient cash in hand to buy a used car, he proposed to the seller that he take the deposit money as his fee. The seller agreed. Although Hollendonner realized that escrow funds could not be used without the consent of both parties, he believed that the buyer's permission was not necessary because the $2,000 deposit was nonrefundable. Hollendonner was not disbarred for two reasons: the absence of clear and convincing evidence that he had invaded the escrow funds with knowledge that their use was improper and the lack of prior notice to the bar that escrow funds and clients' funds are nearly identical.

Since Hollendonner, no lawyer has been disbarred for prematurely disbursing escrow funds to a party to the escrow agreement. Despite the undeniable fact that, in such a situation, the attorney fails to keep escrow funds inviolate, the Board and the Court have recognized that that misconduct is not of the sort that calls for mandatory disbarment under Wilson and Hollendonner. In one such case, the Court ordered that an admonition issue against an attorney who knowingly disbursed to his clients funds that, pursuant to a court order, had to be held in escrow pending the resolution of a fee dispute between his clients and their prior counsel. In re Spizz, 140 N.J. 38 (1995). In that case, Spizz

agreed, by way of a consent order, to hold in trust the sum of $3,900 until prior counsel's petition for counsel fees was resolved. In the interim, however, Spizz filed a malpractice suit against the prior attorney in behalf of his clients. Prior counsel did not file a counterclaim for legal fees because she believed that her fee would be protected under the consent order. In fact, while the malpractice suit was pending, the former attorney called the judge that had signed the consent order to find out about a hearing date on her petition for legal fees and was advised, by letter from the judge, that the hearing date would be set as soon as Spizz submitted a certain document to the court. Spizz received a copy of the judge's letter, to which he replied. In his letter, copied to the former attorney, Spizz assured the court that he was still holding the $3,900 in escrow in accordance with the court's order and would continue to hold them in trust until the resolution of the fee dispute. That letter was dated January 13, 1989. In reality, Spizz had released the escrow funds to his clients one year before, without the prior attorney's knowledge and without obtaining the court's permission.

After a verdict of no cause of action was returned in the malpractice suit, the former attorney asked Spizz to release to her the $3,900 in escrow; he refused to discuss the matter with her. When prior counsel was forced to file a motion to compel Spizz to disburse the $3,900 to her, she learned that Spizz had given the money to his clients more than one year before. Spizz's explanation was that the authorization of prior counsel was not

necessary because the entire controversy rule required her to assert a counterclaim for fees in the malpractice action, which she had failed to do. Why was Spizz not disbarred? He unilaterally removed funds from the escrow account without the other party's consent and in violation of a court order. He was not disbarred because he disbursed the funds to a party and under the alleged belief that the former attorney had either waived or forfeited her claim for the fee. His conduct did not fall under the category of knowing misuse of escrow funds. Of course, he was guilty of violating the escrow agreement and the court order as well. But premature and unauthorized release of escrow funds and knowing misappropriation of escrow funds are two different things.

Another case that dealt with the unauthorized disbursement of escrow funds resulted in a private reprimand (now an admonition). There, attorney X represented the buyers of real estate. At the closing of title, the sellers informed attorney X that his broker had agreed to reduce his commission by $900. In order to proceed with the closing, attorney X drew two checks against his trust account, payable to the broker: one for the undisputed amount and the other for the disputed balance. Attorney X gave both checks to the sellers' attorney, to be held in escrow until the sellers were able to resolve their dispute directly with the broker. However, before the sellers' lawyer could solve the problem, attorney X stopped payment on both checks and issued a new check directly to the broker for the full commission. He did so six days after the closing and without the knowledge of the sellers' attorney.

Attorney X considered his actions justified based on his perceived obligation, as closing agent, to ensure that all post-closing disbursements were made promptly and based on his belief that the sellers were attempting to "cheat" the broker out of his earned commission. Although there were some allegations that attorney X's conduct was prompted by the broker's promise to send some future business his way, there was no clear and convincing evidence of such improper motive. Again, why was attorney X not disbarred under Hollendonner? Because his conduct was confined to breach of the escrow agreement through the release of the funds to a party (or a third-party beneficiary) to the agreement, the broker, and under the claimed belief that his duty to promptly disburse the closing proceeds and to do right by the broker so required.

In yet another case, an attorney received a public reprimand for releasing escrow funds to himself as buyer of real property. In re Flayer, 130 N.J. 21 (1992). Flayer became the agent of escrow funds at the closing of title, when he complained that the builder had left several items unfinished. The funds were to be released to the builder upon substantial completion of the work.

When Flayer became unhappy with the builder's non-performance, he twice asked the builder to finish the work on the items, under the penalty that he, Flayer, "arrange to have these items accomplished at your expense." Dissatisfied with the builder's response, Flayer withdrew the escrow funds to pay for the repairs. Finding that Flayer's notice to the builder was insufficient, the

Board and the Court agreed that his conduct, albeit improper, had not risen to the level of the knowing misuse contemplated in Hollendonner. The reprimand was premised on Flayer's breach of the escrow agreement.

We now turn to the facts of this case. Respondent admitted that, three weeks after the closing, he prematurely released $5,000 from the escrow account to a party, DPI, which was not only his client, but also a corporation in which he had an interest. Respondent conceded that the disbursement was accomplished without the buyers' consent and before the satisfaction of the conditions precedent to the release of the funds. Respondent also agreed that his conduct constituted a breach of the escrow agreement. He denied, however, that his actions amounted to knowing misappropriation of escrow funds à la Hollendonner. We agree and vote against disbarment for two reasons: one, we do not believe that this is the type of conduct the Court had in mind when it warned the bar that attorneys who misuse escrow funds will be disbarred and, two, attorneys have not been adequately forewarned that the early disbursement of escrow funds to a party (or a third-party beneficiary) to the agreement shall always be punished with disbarment.

The distinction between a Hollendonner situation and a mere breach of escrow agreement situation is critical because of the ultimate penalty — disbarment— that may befall the attorney. In Hollendonner cases, the lawyer takes the escrow funds either for himself or herself or third-persons who have no claim to the funds.

Obviously, the lack of a reasonable, good faith belief of entitlement to the money is required for the application of the Hollendonner rule. But if the lawyer steals or, without both parties' consent, borrows the money for his or her benefit or for the benefit of others totally unrelated to the transaction, then the lawyer is guilty of knowing misuse of escrow funds and disbarment must follow. For example, in In re Pérez, 104 N.J. 316 (1986), the attorney invaded the deposit in a real estate transaction, to be held in escrow until settlement. The invasion was prompted by Pérez's promise to lend $3,500 to a friend. Although there were some allegations that the seller had consented to Pérez's use of the deposit, there was no question that the buyers had not. The Court refrained from ordering Pérez's disbarment only because his conduct had predated Hollendonner.

To be distinguished from knowing misuse of escrow funds are those situations involving breach of escrow agreement arising out of the release of the funds prior to the satisfaction of the conditions to the agreement. In the latter case, the lawyer prematurely disburses the funds to either a party or a third-party who is somehow related to the transaction (an expert witness, for example), presumably under some alleged belief that it was proper to do so. Spizz, Flayer and attorney X were all guilty of such conduct.

Here, respondent released the escrow funds to a party, DPI, three weeks after the closing, based on the alleged belief (1) that the monies in escrow far exceeded the value of the uncompleted

items; (2) that "a lot" of the work had been done since the closing date; and (3) that the few minor items that remained would unquestionably be completed because John Cremeans could not evade the buyers: the latter were already living in the house and John Cremeans worked in the development daily. Yes, the record is replete with evidence that respondent released the money because he was afraid of Robert Cremeans. But the record also supports the inference that respondent would not have released the funds to DPI, no matter how strong-armed he might have been by Cremeans, if not for his above-mentioned beliefs. Indeed, queried by the Special Master, respondent admitted that he would not have released the funds if they had substantially exceeded $5,000.

If respondent's beliefs were behind his decision to disburse the funds to DPI, why should his conduct not be treated as Spizz's or attorney X's? Why should it not be deemed merely a breach of escrow agreement without the added element of knowing misappropriation? Indeed, both Spizz and attorney X breached escrow agreements because of their own advanced reasons: belief of entitlement. One tempting answer might be that this respondent's beliefs were unreasonable. But what of attorney X's arbitrary decision to release the escrow funds because the broker was entitled to the commission? Was attorney X's suspicion that the sellers were trying to "cheat" the broker out of his commission any more reasonable than respondent's convictions?

* * *

Arguably, the fact that DPI was more than a client/party — an entity in which respondent had an interest — might make respondent's conduct more questionable than attorney X's and Spizz's. But Flayer, also, released the money to himself in a transaction in which he was attorney and client/party, thereby once more pointing out the pitfalls of mixing the identity of attorney with that of party.

We, too, took special note of the circumstance that respondent had an interest in DPI. But our reading of the record leaves us convinced that respondent released the funds to DPI with no contemplation whatsoever of benefit to himself. Otherwise put, it was not his interest in DPI that motivated his conduct. He was not moved by self-gain. Instead, he displayed monumental bad judgment in the face of pressure and fear. He did not have the mens rea to steal or borrow, either for himself or for DPI. Rather, he viewed his conduct as the disbursement (concededly premature) of funds to a client, who was one of the parties to the escrow agreement. It is undisputed that he did not directly benefit from the disbursement. Indirect benefits to him, if any, were tenuous. Under the circumstances of this case, to disbar respondent just because he was a shareholder seems unfair. If the recipient of the funds were IBM instead and if respondent were the owner of one single share of IBM, would he be disbarred because of that interest? We think not. Similarly, had Flayer been the builder,

instead of the buyer, and had he released the escrow money to himself, as builder, one day after the closing because he needed the money for the repairs — which were then completed on time — would he have been disbarred? It is not so clear. Finally, if the motive for attorney X's release of the commission check to the broker had been the broker's promise to throw some business his way, would attorney X have been disbarred? The answer again is not so obvious. Hence, to disbar respondent merely because of the added factor that he had an interest in DPI would tend to produce an anomalous result under the facts of this case.

But the central reason that compels these members to recommend against disbarment is that, in our view, there is insufficient notice to the bench and the bar that the release of escrow funds to a party to the agreement shall always be met with disbarment. That is not a conclusion easily inferable from Hollendonner, which dealt with the use of escrow funds by the lawyer himself. And although we can foresee situations where an escrow agent's release of the money to a party might be knowing misappropriation because, say, of malicious intent, the fact remains that no one since Hollendonner has been disbarred for such reason, malicious intent or not. Moreover, it cannot be said that, because of the holding in Wilson, there is no need for further notice that the early release of escrow funds to a party will merit disbarment. Wilson, as we know, stands for the proposition that unauthorized use of client funds for the lawyer or for anyone else mandates disbarment. One might, thus, be tempted to ask why it would be unfair to disbar an

attorney who prematurely releases escrow funds to a party, as opposed to the attorney himself or herself. The answer is all too simple: Wilson dealt with disbarment for stealing or borrowing client funds; for obvious reasons, it did not have to deal with an attorney's release of client funds to a party, the client. That is obviously not an impropriety. In the case of escrow funds, however, it is. And it is our firm conviction that there has not been sufficient warning that such conduct leads to disbarment.

We emphasize that our dissent is not premised on any belief that the mandatory disbarment rule is too harsh. We are not urging that this matter be the vehicle for carving out an exception to the Wilson or the Hollendonner rules. We are, however, immensely troubled by the result recommended by the majority because we do not believe that Hollendonner gave sufficient notice to the bar that the unauthorized release of escrow funds to a party before the time is ripe shall invariably result in disbarment. If that message is unclear to these members — judge, lawyer and public member — it could be equally unclear to at least some members of the branches we represent: the bench, the bar and the general public.

Undeniably, however, respondent's actions were unethical: he violated the escrow agreement — an impropriety aggravated by the fact that he had an interest in the entity to which he released the money — and he acted with bad faith when he misrepresented to Michael Irene that the funds were still in his escrow account. For

his violations of RPC 1.15, RPC 8.4(c) and RPC 4.1(a)(1), we would impose a six-month suspension.

Dated: December 20, 1995

Lee M. Hymerling

Paul R. Huot

Barbara F. Schwartz