SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-346

IN THE MATTER OF

MARTIN G. MARGOLIS

AN ATTORNEY AT LAW

Decision

Argued: December 17, 1998

Decided: April 5, 1999

Brian D. Gillet appeared on behalf of the Office of Attorney Ethics.

Justin P. Walder 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 the District VC Ethics Committee ("DEC"). The formal complaint charged respondent with a violation of *RPC* 1.15(a) (failure to safeguard funds).

Respondent was admitted to the New Jersey bar in 1961. He has no prior disciplinary history.

Because the facts were not substantially in dispute, the presenter and respondent's counsel entered into the following stipulation:

1. Martin G. Margolis was admitted to the practice of law in this State in 1961. At all times relevant to this matter, Respondent practiced law as a shareholder of a professional corporation with offices located at 60 Pompton Avenue, Verona, New Jersey 07044. Respondent has never been the subject of any other ethics complaint since he has become a member of the Bar.

2. In January 1993, Respondent was representing Jerome Diamond in a civil action involving Jerome Diamond and his brother, Martin Diamond ("grievant").

3. The civil action was settled on January 13, 1993 and the settlement was placed on the record before the Hon. Murray G. Simon. A copy of the transcript of the settlement terms is OAE Exhibit 1.

4. Mr. Margolis was not present before Judge Simon on January 13, 1993. His client was represented by another member of Respondent's law firm, Stuart Pobereskin, Esq.

5. Following the January 13, 1993 court appearance, Respondent assumed responsibility for the documentation required to conclude the settlement.

6. On January 14, 1993, one day after the settlement, the Special Fiscal Agent, Frank Cozzarelli, Esq., forwarded a written Stipulation to the parties.

7. By letter dated January 20, 1993, grievant's attorney, Charles P. Cohen ("Cohen"), sent his attorney trust account check number 2178 in the amount of $45,000 to Respondent. The check was made payable to "Margolis, Meshulam, Pobereskin & Knaub, Esqs., trustees for Jerome Diamond." Copies of the check and the letter forwarding the check are OAE Exhibit 3. Although the letter and check were dated January 20, 1993, they were not

received by Respondent's law firm until January 22, 1993, when they were hand delivered.

8. Mr. Cohen's trust account check was deposited into Respondent's attorney trust account on January 22, 1993. On that same day, Respondent disbursed, with Jerome's consent, $15,000 of the funds to his firm on account of fees. A copy of Respondent's client ledger card is OAE Exhibit 5.

9. Respondent, with Jerome's consent, made three more fee disbursements to his firm from the settlement proceeds on account of fees: $1,000 on January 27, 1993; $5,000 on March 5, 1993; and $5,000 on April 13, 1993. OAE Exhibit 5. On May 10, 1993 Mr. Cozzarelli sent a letter to both Respondent and Mr. Cohen in which he requested payment of his fees as Special Fiscal Agent, and indicated that Jerome Diamond's share of the fee was to be paid out of the settlement proceeds. This was in accordance with Judge Simon's Order dated January 25, 1993 directing that such fees be paid in accordance with the terms and conditions of the settlement set forth on the record on January 13, 1993. On May 10, 1993, with Jerome's consent, a disbursement out of the settlement proceeds was made to Mr. Cozzarelli in the amount of $4,044.12 to pay his fees as Special Fiscal Agent.

10. On May 17, 1993, Respondent released the amount remaining in the escrow account, $14,955.88, to Jerome Diamond. OAE Exhibit 5.

11. As per the terms of the settlement as set forth on the record before Judge Simon on January 13, 1993, Martin Diamond was to consult with his tax advisor (later determined to be Stephen J. Weiss), who was not in court on January 13, 1993, within seven (7) days thereof, for the purpose of determining the identity of the transferee of certain partnership real property which was a subject of the settlement. OAE Exhibit 1, p.14.

12. The OAE does not allege that the Respondent engaged in a knowing misappropriation.

13. No loss was suffered by the grievant, Respondent's client or anyone else.

Following additional facts were presented by way of testimony and documentary evidence. Martin Diamond and his brother Jerome jointly owned and operated several businesses. There was intense animosity and distrust between the brothers. According to the settlement, Martin was to pay Jerome $45,000 in exchange for documents necessary to transfer Jerome's interest in the corporations and real property to Martin. The transcript of the settlement that special fiscal agent Frank J. Cozzarelli placed on the record before Judge Murray G. Simon on January 13, 1993 provided as follows:

> Jerome Diamond will be paid the sum of $45,000 in a lump sum within seven days of the date hereof. That money will be paid to Mr. Diamond's counsel, Stuart Pobereskin.[1] It will be held in escrow by him pending delivery of a deed and other documents necessary to effectuate the transfers that are specified in the terms of this settlement hereinafter.

The transcript of the settlement reveals that Judge Simon confirmed Cozzarelli's recitation of the terms of the settlement with Cohen, Pobereskin, Martin Diamond and Jerome Diamond.

The stipulation of settlement drafted by Cozzarelli and eventually signed by all parties and counsel similarly required Jerome's attorney to escrow the settlement funds until delivery of all necessary documents:

> The Settlement Funds shall be paid to the Order of defendant's attorney, Stuart Pobereskin, Esq., to be held in trust by him pending compliance with all terms and conditions of the within Stipulation of Settlement. No later than

[1] At the time of the settlement, Stuart Pobereskin was affiliated with respondent's law firm.

> January 20, 1993, defendant, Jerome Diamond, shall deliver his deed conveying all of the necessary documents in proper form, to transfer his interest as hereinafter set forth. Each party shall provide a duly executed general release to the other.
>
> Defendant, Jerome Diamond, shall transfer all of his right, title and interest in the real property commonly known as 545 Chancellor Avenue, Irvington, New Jersey to Martin Diamond or his designee. Jerome Diamond shall convey his interest by deed containing covenants versus the grantor, accompanied by an affidavit of title in the usual form.
>
> . . .
>
> Jerome Diamond shall transfer of record effective nunc pro tunc as of December 7, 1990 all of his right, title and interest and shareholdings in and to the closely held corporations, Diamond Brothers Auto Parts Warehouse and Distributors, Inc. and Marty's Auto Sales, Inc. Jerome Diamond shall execute a stock power, in blank and shall otherwise endorse the shares for transfer on the books and records of the aforesaid corporations effective December 7, 1990.

Although the settlement placed on the record contemplated that the exchange of funds and documents would be completed by January 20, 1993, the parties did not meet that deadline. On January 14, 1993, Cozzarelli sent to respondent and Cohen a stipulation of settlement, a deed, stock powers for the transfer of shares of the corporations and other documents needed to complete the settlement. On January 21, 1993 respondent hand-delivered to Cozzarelli a revised stipulation of settlement and a copy of an affidavit of title signed by Jerome. Respondent sent to Cohen by telecopier a copy of the letter and enclosures, noting that the settlement was to have been completed by January 20, the previous day.

On January 22, 1993 respondent hand-delivered to Cohen the stipulation of settlement, a proposed general release for Martin to sign in favor of Jerome and copies of signed documents transferring Jerome's interest in the corporations and real estate to Martin, as well as a general release Jerome had signed in Martin's favor. Although the settlement placed on the record before Judge Simon did not refer to the exchange of releases, Cohen apparently did not object to the inclusion of such a provision in the stipulation of settlement. Both Cozzarelli, who had prepared an earlier draft of the stipulation of settlement, and Judge Simon testified at the ethics hearing that the exchange of general releases was a standard practice in the settlement of commercial litigation.

In his January 22, 1993 letter to Cohen enclosing the documents, respondent stated as follows:

> It is my understanding that you will have drawn and deliver to my messenger concurrently with the delivery of the enclosed to you, your trust account check payable to this firm as attorneys for Jerome Diamond, which we will deposit in our Attorney Trust Account and hold in escrow awaiting an exchange of executed documentation, including the enclosed Stipulation of Settlement and release.
>
> Inasmuch as the terms of the settlement mandated its consummation no later than January 20, 1993, I anticipate this matter being fully concluded today and have already summoned my client to this office to execute the revised Stipulation of Settlement; he has already executed the deed and other related documents.
>
> . . .
>
> I will await your telephone advice with respect to execution of documents so that I can dispatch my messenger to exchange documents today. [Original emphasis].

Later in the day, Cohen hand-delivered to respondent a January 20, 1993 letter providing, in part, as follows:

> Enclosed please find my attorney trust account check #2178 in the amount of $45,000.00 payable to your firm as trustees for Jerome Diamond. Pursuant to our agreement, kindly hold this check in escrow until final disposition of all unresolved issues and delivery of appropriate documentation to me and Frank J. Cozzarelli, Esquire.

As noted earlier, on that same day, January 22, 1993, respondent disbursed $15,000 of the funds to his firm for legal fees. Although respondent had Jerome's consent for the disbursement, he did not have Martin's or Cohen's. With Jerome's consent, respondent made the following additional disbursements to his firm in payment of legal fees: $1,000 on January 27, 1993, $5,000 on March 5, 1993 and $5,000 on April 13, 1993. On May 10, 1993 respondent disbursed $4,044.12 to Cozzarelli in payment of his fiscal agent fee.[2] Finally, on May 17, 1993 respondent distributed the remaining escrow balance of $14,955.88 to Jerome. Respondent made all these disbursements before delivery of the settlement documents.

A dispute arose between Jerome and Martin concerning some tax and other provisions contemplated by the settlement. As a result, Cohen sent to respondent a February 10, 1993 letter stating as follows:

> I primarily regret that my best efforts to finalize a settlement entered into by the parties have not resulted in an exchange of executed documents. Needless to say, I must prevail upon you to continue to hold in escrow the $45,000.00 payment with which you were furnished several weeks ago.

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[2] There is no allegation that the disbursement of the funds to Cozzarelli was improper.

Despite receiving this letter, respondent did not disclose to Cohen that he had already disbursed a portion of the escrow funds (S16,000). In fact, respondent continued to disburse the funds through May 17, 1993, as seen above.

Although the executed stipulation of settlement was finally filed with Judge Simon on March 24, 1993, the controversy did not end. At a May 7, 1993 hearing on a motion to enforce the settlement, Judge Simon ordered Martin to execute the general release that respondent had prepared in January. Thereafter, Cohen sent a May 14, 1993 letter to respondent, stating the following, in part:

> I shall be present before Honorable Murray G. Simon, J.S.C. on May 18, 1993, at 2:00 p.m. at which time I shall expect to receive copies of the documents which your client was to execute and deliver to my client pursuant to the Stipulation of Settlement which you have failed and/or refused to provide for my review although you have had my client's $45,000.00 settlement funds in your trust account since January, 1993.

Again, respondent took no action to correct Cohen's understanding that the escrow funds remained intact in his trust account.

After conducting another hearing on May 18, 1993 to enforce the settlement, Judge Simon entered a May 26, 1993 order directing Martin to execute the general release, directing respondent, after he received the signed release, to immediately give to Cohen the original executed documents listed in the stipulation of settlement and directing counsel to submit affidavits of services to support each attorney's motion for counsel fees. Cohen filed a motion for reconsideration, requesting that his client be permitted to execute an alternative form of release. At a July 2, 1993 hearing, Judge Simon denied that motion and reaffirmed

his prior order directing a simultaneous exchange of the release and the settlement documents. Also at the July 2 hearing, and as memorialized in a July 19, 1993 order, Judge Simon awarded respondent $6,500 in counsel fees. After Martin filed an appeal of Judge Simon's order, on April 10, 1995 the Appellate Division affirmed the order requiring Martin to execute the release, but reversed the award of counsel fees. The appellate court noted that, while Judge Simon found that Martin's position had frustrated the original settlement, the judge had not made a finding of bad faith on Martin's part, a prerequisite for the award of attorney's fees.

Apparently, in September 1993 either Cohen or Martin became concerned that respondent was no longer holding the funds in escrow. On September 24, 1993 Cohen requested that respondent confirm that the escrow funds were being held inviolate or provide "the date and purpose of all unauthorized disbursements from settlement funds held in trust by your firm." In a September 26, 1993 reply, respondent did not mention that all of the escrow funds had already been distributed, although he disclosed that he had disbursed the fiscal agent's fee.

After yet another hearing to enforce the settlement, on January 28, 1994 Judge Simon ordered Martin to sign and deliver the release and to pay respondent $750 in counsel fees by 4:00 p.m. on February 2, 1994. The order further provided that, if Martin did not comply with the court's instruction, Pobereskin was designated to sign the release in Martin's stead. Martin finally complied with the order.

One significant factual dispute was presented at the ethics hearing. Respondent contended that, after he had received Cohen's January 20, 1993 letter instructing him to hold the funds in escrow until the final disposition of all unresolved issues, he had immediately telephoned Cohen to inform him that there was no escrow agreement. Respondent testified as follows about this conversation:

> I said, I got your letter and your check and all the closing documents are executed, all the transferred documents are executed, there'll be no escrow, what do you mean by unresolved issues? I guess that's what I was bothered by. And I said, there'll be no escrow, no way, no how. And he said, all right, all right. I guess I sounded rather annoyed and excited. And that was the extent of the conversation.
>
> [1T247][3]

Respondent's billing records do not contain any reference to this telephone conversation. Respondent conceded that, in hindsight, he should have confirmed the conversation in writing.

Respondent's former partner, Pobereskin, testified that he was present in respondent's office at the time of the telephone conversation between respondent and Cohen. Pobereskin confirmed that respondent had informed Cohen that he would not agree to hold the funds in escrow.

Respondent, thus, contended that, notwithstanding the provisions of the stipulation of settlement, Cohen had agreed that the funds were not required to be held in escrow pending the delivery of the settlement documents.

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[3] 1T refers to the February 10, 1998 hearing before the DEC.

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The DEC found that respondent violated *RPC* 1.15(a) by disbursing the escrow funds without authorization from Martin Diamond or his counsel. The DEC determined that the stipulation of settlement did not permit the release of the escrow funds until the original documents transferring title were executed and delivered to Martin. The DEC rejected as not credible respondent's testimony that Cohen had agreed to dispense with the escrow agreement. The DEC noted that respondent's answer to the ethics complaint did not mention Cohen's alleged consent to nullify the escrow agreement and that respondent never referred to this purported consent in any of his letters to Cohen, despite Cohen's inquiry about the status of the escrow funds.

The DEC recommended the imposition of a reprimand.

*   *   *

Following a *de novo* review of the record, the Board is satisfied that the DEC's finding that respondent breached *RPC* 1.15(a), when he failed to abide by the escrow agreement, is supported by clear and convincing evidence. Respondent agreed to hold the $45,000 in escrow until the execution and delivery of the original documents needed to

complete the settlement. This obligation was created in two ways. First, respondent was bound by Pobereskin's assent to the terms negotiated at the January 13, 1993 settlement proceeding. Second, in the stipulation of settlement and in his January 22, 1993 letter to Cohen, respondent agreed to hold the funds in escrow. Accordingly, respondent was obligated to retain the funds in his trust account until the fulfillment of the terms of the escrow agreement. "* * * [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 one of them to act as the depository of funds relevant to that transaction, the attorney receives the deposit as the agent or trustee of both parties." *In re Hollendonner*, 102 *N.J.* 21, 28 (1985) (citations omitted). Here, respondent breached his fiduciary duty as escrow agent when he released the funds to his firm and his client before he delivered the original settlement documents to Cohen.

Respondent advanced several arguments in support of his contention that he had committed no wrongdoing. He alleged that Cohen had consented to a waiver of the escrow obligations. As noted above, the DEC rejected respondent's argument as incredible, in part because respondent's answer to the formal complaint did not to refer to Cohen's consent. In his answer, respondent alleged that he had advised Cohen that, because the terms of the escrow had been satisfied, he would be disbursing the escrow funds. Respondent also presented the following affirmative defense:

> The escrow provisions of the settlement expired by their terms as a result of the execution of the required documents by Respondent's client on January

> 20, 1993, and discussions with counsel for the grievant (Martin Diamond), thereby permitting the disbursements of settlement funds by Respondent in accordance with his client's direction and consent.

Although respondent's answer referred generally to discussions with Martin's counsel, it failed to mention Cohen's purported consent.

Even more compelling was respondent's failure to reply to Cohen's subsequent references to respondent's continuing obligations under the escrow agreement. On February 10, 1993 and May 14, 1993 Cohen sent letters to respondent about the continuing requirement that the funds be held in escrow. Respondent neither refuted the need for the escrow nor informed Cohen that he had already disbursed the funds. In response to Cohen's September 24, 1993 inquiry about the status of the escrow funds, respondent stated that he had disbursed fees to Cozzarelli, but failed to disclose that he had distributed the remainder of the funds to his firm and to his client. If indeed Cohen had agreed to waive respondent's escrow obligations, Cohen would not have expected respondent to continue to hold the funds and, more importantly, respondent would have mentioned the waiver in his reply. Respondent's continued concealment of the escrow fund disbursements belies the contention that Cohen had agreed to dispense with the requirements of the escrow agreement.

At the ethics hearing, respondent insisted that Martin had frustrated the stipulation of settlement. No doubt respondent and his client, Jerome, were exasperated by Martin's repeated refusal to execute the general release, despite numerous orders entered by Judge Simon directing him to do so. Nevertheless, respondent was required to abide by the terms

of the settlement agreement and retain the escrow funds in his trust account until the completion of the settlement. In addition, respondent should have applied to Judge Simon for an order permitting him to disburse the funds before the delivery of the settlement documents. Moreover, respondent disbursed a portion of the funds on the same day that he received them. At that time, respondent could not have known that it would take more than one year for Martin to comply with the agreement.

Respondent further contended that, because he was holding the funds for his client's benefit, he needed only his client's consent to disburse them. This argument ignores the basic proposition that an escrow agreement is for the benefit of two parties, in this case, Jerome and Martin. Although the settlement agreement provided that the funds were owed to Jerome, if the settlement had unraveled for any reason, Martin would have had an interest in those monies. Furthermore, if respondent needed only his client's consent in order to disburse the funds, there would be no reason for the escrow agreement. The agreement was intended to secure the funds and the documents until their mutual exchange. As the DEC pointed out, until the documents were delivered, Martin retained an interest in the escrow funds to ensure the performance of Jerome's obligations under the settlement.

As noted earlier, although respondent did not deliver the original settlement documents to Cohen, he provided copies of the signed originals. Respondent, thus, maintained that he had complied with the settlement and was, therefore, authorized to disburse the funds. However, respondent was required to deliver executed original

documents. Obviously, the documents were intended to convey Jerome's interest in the corporations and real property. Such transfers of ownership are effective only upon execution and delivery of original documents. As respondent conceded at the ethics hearing, Martin could not have sold the corporate stock or real estate without original documents received from Jerome. Thus, respondent's delivery of signed copies did not comply with the settlement and did not render the conditions of the escrow agreement satisfied.

Respondent's failure to notify Cohen of the disbursement of the escrow funds could be deemed a violation of *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). "In some situations, silence can be no less a misrepresentation than words." *Crispin v. Volkswagenwerk, A.G.*, 96 *N.J.* 336, 347 (1984). Here, respondent's failure to correct Cohen's misapprehension that the escrow funds were still intact could constitute misrepresentation by silence. Because, however, respondent was not charged with this violation and the facts in the complaint did not give him notice of the potential violation of that *RPC*, it would be inappropriate to deem the complaint amended to conform to the proofs.

There remains the question of discipline. This case is to be distinguished from others where the attorney misused escrow funds for the attorney's personal benefit. Here, although a portion of the monies went for respondent's fees, it is undisputed that respondent was entitled to the fees and that his client agreed that the fees would be paid out of the settlement funds belonging to the client. In that sense this case is different from a recent decision

issued by the Court in *In re Gifis*, 156 *N.J.* 323 (1998), where the attorney was disbarred for utilizing for his own gain monies that had to be held in escrow and in which he had no interest whatsoever. The escrowed monies were either deposits in real estate transactions or settlement funds. The attorney there alleged that he had obtained the consent of one of the parties to the escrow agreement, his client. He admitted, however, that he had not consulted with the other party to the agreement. Finding that the attorney had knowingly misused the escrow funds for himself, the Court ordered his disbarment. Here, respondent prematurely released the settlement funds to his client — a party to the agreement — who, in turn, authorized respondent to keep a portion as his fees. As the Court recognized in *In re Susser*, 152 *N.J.* 37 (1997), premature release of escrow funds to a party-in-interest, absent some evidence of malice or other ill motive on the attorney's part, constitutes a breach of the escrow agreement, but does not rise to the level of knowing misappropriation. This is so because in that case the attorney does not misuse the funds for either his/her benefit or for the benefit of another who is unrelated to the escrow agreement.

Unless the invasion of escrow funds rises to the level of a knowing misappropriation, as in *In re Hollendonner, supra,* 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*, 140 *N.J.* 38, (1995) (admonition where attorney agreed to hold funds in escrow until resolution of a dispute over fees of prior counsel, attorney disbursed funds to client without prior counsel's knowledge) and *In re Flayer,* 130

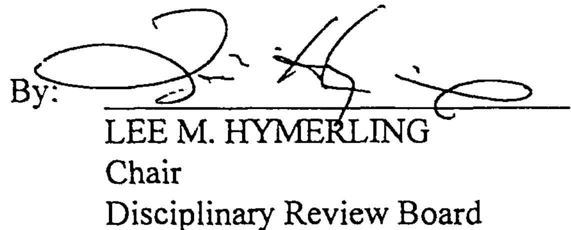
N.J. 21 (1992) (reprimand where attorney, the buyer of real property, released escrow funds to himself after builder failed to complete work as previously agreed).

Here, respondent breached the escrow agreement almost immediately after he received the escrow funds. However, there are mitigating factors. Respondent enjoyed a prior unblemished career of thirty-seven years before this incident. In addition, his client's brother, Martin, who ultimately filed the grievance, began to undermine the settlement almost immediately after agreeing to it. Nevertheless, although Martin's unreasonable behavior undoubtedly contributed to respondent's frustration, it did not excuse respondent from complying with his fiduciary obligation as an escrow agent.

Based on the foregoing, the Board unanimously determined to impose a reprimand. One member recused herself.

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

Dated: 4/5/99

By: 
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Martin G. Margolis
Docket No. DRB 98-346

Argued: December 17, 1998

Decided: April 5, 1999

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			x				
Zazzali			x				
Brody			x				
Cole			x				
Lolla			x				
Maudsley						x	
Peterson			x				
Schwartz			x				
Thompson			x				
Total:			8			1	

Robyn M. Hill 5/3/99
Robyn M. Hill
Chief Counsel