SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-142
District Docket No. IIIB-2010-0033E

IN THE MATTER OF	
JOEL LEE SCHWARTZ	
AN ATTORNEY AT LAW	

Decision

Argued: June 21, 2012

Decided: November 1, 2012

Anne C. Singer appeared on behalf of the District IIIB Ethics Committee.

Randolph C. Lafferty appeared on behalf of respondent.

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

We previously considered this matter at our April, 19, 2012 session, as a recommendation for an admonition filed by the District IIIB Ethics Committee (DEC), which we determined to treat as a recommendation for greater discipline. R. 1:20-15(f)(4).

The two-count complaint charged respondent with violating ACPE Opinion 657, 130 N.J.L.J. 656 (February 24, 1992) (requiring lawyers to keep their law practices separate from

their business enterprises); RPC 1.5(c) (failure to provide the client with a written statement stating the outcome of the matter and showing the remittance to the client and the method of its determination); RPC 1.7(a) and (b) (engaging in a concurrent conflict of interest); RPC 1.8(a) (improperly entering into a business transaction with a client); and RPC 1.15(b) (failure to promptly deliver funds or property to a client). For the reasons expressed below, we determine that a censure is warranted.

Respondent was admitted to the New Jersey bar in 1995. He maintains a law office in Northfield, New Jersey. He has no history of discipline.

Count One

For a number of years, respondent had represented grievant Charlene Cianci (Cianci), her father, and her long-time boyfriend and business partner, Steven Cox, in various bankruptcy matters involving their commercial carpet businesses, as well as in other unrelated matters.

Cox testified that he had been in the carpet business for many years and had assisted Cianci and her father in their businesses, including bankruptcy filings for failed carpet businesses. Respondent's experience in representing "carpeting

businesses" dated back to 2000. He believed that Cox was the driving force behind the decision-making process in all the carpet businesses related to the Ciancis.

In December 2006, Cianci, as sole owner, started a carpet business named Commercial Floorz, LLC. On December 6, 2006, she and Cox entered into a commercial lease with landlord Frank Diefenbeck. For reasons that are unclear, Diefenbeck required that both Cianci and Cox sign the lease. They signed it, relying on the landlord's representation that they would have no problem obtaining a mercantile license that was necessary to open a commercial and retail flooring business. They began withholding rent payments, when they were unable to obtain the license.

In August 2007, Cianci and Cox retained respondent to defend them in a landlord-tenant action, seeking their eviction for non-payment of rent for Cianci's commercial flooring business. In September 2007, respondent succeeded in having the case removed from the Special Civil Part (landlord-tenant) to the Law Division. Cianci and Cox intented to assert a counterclaim against the landlord for "breach of the lease based on the landlord's 'misrepresentation associated with the permissible use of the Property.'" They asserted that "'extensive discovery' was required." A court order required Cox and Cianci to post the outstanding rent with the court, as it

became due, and permitted the landlord to file an amended complaint. Cox and Cianci did not have the funds to comply with the order and asked respondent to try to settle the matter.

Negotiations proved unsuccessful. On February 8, 2008, the landlord obtained a judgment of possession based on Cianci and Cox's failure to pay rent into the court.

According to respondent, he dealt directly with Cox in all business matters related to the carpet business. He did not deal with Cianci regarding the "operations" of Commercial Floorz.

Cox maintained that, after he realized that Commercial Floorz was in trouble, he discussed the situation with respondent. The two agreed that "there was a lot of money to be made" in the business and decided to start their own flooring business, Commercial Flooring Contractors, LLC (Commercial Flooring). Respondent claimed that it was Cox's idea to create the new entity, as a means to resolve the landlord-tenant litigation and to obtain a mercantile license. Respondent would be "the face" of the new business, which started while negotiations were still ongoing with the landlord in the Commercial Floorz matter.

Because Cox realized that his money management had not worked out well for the various businesses in which he had been involved, he and respondent agreed that, in their new business,

respondent would take care of the money end. Cox would "bid the work."

Respondent, in turn, asserted that he had no role in Commercial Flooring. He simply lent his name to the business to help Cox obtain the necessary approvals. He acted as the "front person," a "straw man" for Cox's business. He stated that he knew nothing about the flooring business.

Respondent denied, however, that he was trying to mislead the officials who had granted the necessary permits. Respondent claimed that Cox believed that his name had been "sullied" throughout the commercial flooring community and that the township would not grant him use approvals. If, however, "another person made the application, then the use would be approved." According to respondent, he had agreed to start the business with Cox because "they perceived" that there was a negative bias against Cox throughout the community, a bias that prevented Cox and Cianci from obtaining a mercantile license for their carpet business.

In furtherance of their business plan, respondent obtained a certificate of formation for Commercial Flooring, dated December 9, 2007. Respondent was the named member/manager and authorized representative of the business. The certificate listed his law office address as the location for the business.

Because Cox had many years of experience in the carpet industry, respondent relied on him to operate the business. Cox would contribute the expertise.

Cox testified that respondent gave him an office in his law firm to conduct business for Commercial Flooring, as well as a desk and a computer. Respondent dedicated one of the firm's phone lines to the flooring business. When respondent's secretary answered that line, she would say "Commercial Flooring" and would convey messages to Cox.

Respondent's address was used on the company's business cards. His law office and Commercial Flooring used the same fax number. Commercial Flooring used Cox's email address, the same address that Cox had used for the past twelve years. A flyer/advertisement for Commercial Flooring contained respondent's name, law office address, and fax number. Cox drafted the flyer, which included respondent's revisions to it, and mailed the flyer to his contacts. According to Cox, the business cards for Commercial Flooring sat on a counter, near respondent's secretary, so that they would be visible to clients entering the law office.

As to compensation for his role in the business, respondent stated that, "[if Cox] wanted to give me something . . . that was entirely up to him. I wasn't doing anything." Respondent

claimed that he was not apprised of Cox's activities in connection with the business. As far as he knew, the business "never got off the ground." He maintained that he did not "oversee" Cox, who would be in the office approximately one to three times a week. Over the course of approximately a three-month period, Cox came to the office fewer times.

According to respondent, the business eventually "died on the vine." He testified that, in December 2007, when Commercial Flooring was founded, he did not know the status of Commercial Floorz, that is, if it was winding down.

According to Cox, respondent did not want Cianci or her father involved in their new business. Cox stated that he did not feel comfortable leaving them out, but that respondent had told him that it was his business, not Cox's, that Cox worked for him, and that "[t]hey can't touch us." Cox did not disclose to Cianci that he was working with respondent. Respondent, too, conceded that he did not give Cianci written notice that he was starting a business. Despite having represented Cianci in Commercial Floorz' lease dispute with the landlord, respondent asserted that he had no idea that she owned a competing business.

Cianci maintained that she only learned about Commercial Flooring when she saw a letter that respondent had forwarded to

Cox. Cox, who was still working for her at the time, never discussed it with her. She added that no one had requested her permission to start a new company.

When Cianci asked Cox about the business, he admitted that he was going into the carpet business with respondent. Cianci felt that they had gone behind her back and that "pretty much [she] would have been screwed out of everything." Cox acknowledged that, when Cianci found out about Commercial Flooring, she became upset. They broke up but, apparently, got back together at a later time.

Cianci's business was still operating when Cox and respondent started Commercial Flooring. After Commercial Floorz' lease was terminated, Cianci worked from her house to finish up existing jobs.

Respondent admitted that he did not obtain a signed informed consent from Cox, a client, to enter into a business venture with him. Instead, he relied on a hand-written document that set forth Cox's plan and concept of the business and proposed terms and conditions. The writing stated, in part:

> Partnership up to 3 people in retail and commercial
>
> $200,000 open account
>
> Every 50K invested gets 10% ownership . . .
>
> [Ex.R-14.]

The writing also specified various documents that needed to be signed, including a lease, contained the notation "open up bank accounts," and listed Cox's proposed salary and benefits. Cox was to collect "up to" sixty percent of the proceeds and a $100,000 salary; the "others" share in the business would be forty percent.

The proposal never progressed to a "formal final agreement." Respondent contended that he had agreed to enter the business as a favor to Cox, who was a friend and long-time client. He stated that Cox wanted to be introduced to respondent's clients, who might want to invest in the business. According to respondent, Cox had told him that "the bigger you get the easier it is to make money. . . . We get the big deals, and we'll make a lot of money." Respondent did not know if the business had realized any profits.

Count Two

Prior to the resolution of the landlord-tenant case, respondent also represented Cianci in a contract and personal injury matter against Atlas Pool Company. On December 5, 2007, Cianci and respondent entered into a contingent fee agreement. The agreement provided that Cianci would not be responsible for

costs, unless there was a recovery. She understood that costs and expenses were to be paid by the defendants. Respondent conceded that the intent of the agreement was that Cianci "wasn't going to pay anything until we knew we were going to get some money".

Respondent explained that, because of the "financial decline" over the years, his practice had evolved from estate and business planning to other matters. Cianci's case was his first slip-and-fall case. He, therefore, did not routinely prepare contingent fee agreements.

Respondent maintained that, at some point not specified in the record, Cox became a third-party defendant in the case, as the general contractor who installed the pool. Afterwards, Cianci brought her brother Ralph with her to the meetings at respondent's office. Respondent did not believe that Cianci had a level of sophistication or understanding about the issues in the case. Cianci, therefore, wanted him to discuss it with Ralph, who, in turn, would explain things to her. Ralph also accompanied Cianci to a mandatory court arbitration, but was prohibited from attending it.

Despite the terms of the contingent fee agreement, Ralph paid the expenses in Cianci's case, totaling $1,100. According to respondent, Ralph "volunteered" to pay the bills. Respondent

explained that, because he had a small practice, it was cost-prohibitive to lay out great sums of money "advances against a recovery that may or may not come."

Cianci claimed that she did not know that Ralph had paid the costs until after she filed the grievance against respondent. It was her understanding that everything would be paid from a settlement.

Respondent admitted that he discussed the suit with Ralph, outside of Cianci's presence, but claimed that Cianci had authorized him to talk to Ralph. He also claimed that, through discussions with Ralph and Cianci, he understood that Ralph would be entitled to a portion of any settlement proceeds, as reimbursement for loans that Ralph had made to Cianci for living expenses. Ralph claimed that the loans totaled $108,000 and that, in the early phase of the Atlas lawsuit, Cianci had agreed to turn over her entire recovery to him to pay off her loans. Cianci, however, denied that she owed her brother any money. She stated that she had borrowed money only from her father.

On January 30, 2008, respondent filed a complaint on Cianci's behalf, alleging various tort, consumer fraud, and contract claims. An ensuing arbitration resulted in a $12,500 award, without attorney's fees. Cianci declined the arbitration award and elected to proceed to trial. Prior to trial, the

defendant offered Cianci a $25,000 settlement. Cianci claimed that she authorized the settlement because respondent had told her that, if she did not accept it, she might not recover anything.

Respondent waived his one-third fee to facilitate a settlement. No costs or disbursements were deducted from the settlement. Respondent claimed that, when he approached Cianci with the settlement offer, she told him that she no longer wanted him talking to Ralph, stating "it's all my money."

Respondent believed that Ralph had a valid claim to the settlement funds because of the loans that had purportedly made to Cianci. He sent letters to Cianci and to Ralph advising them to resolve their dispute. Respondent's letter to Cianci stated that he had had a lengthy discussion with Ralph, who had threatened to sue Cianci for the proceeds of the lawsuit. Respondent advised Cianci to work out her differences with Ralph because he had "no intention of being involved in that lawsuit as anything other than a witness" on her brother's behalf. Cianci, thus, understood that she would not receive her full settlement because respondent and her brother would sue her for it.

According to respondent, within a week of his letter, Cianci informed him that she and Ralph had "worked it out" and

instructed him to prepare a $20,000 check to her and a $5,000 check to Ralph. Respondent was "relieved that the matter had resolved itself" and considered their agreement binding.

Respondent testified that, after he disbursed the funds, however, he learned that Cianci had objected to Ralph's distribution. He stated: "[w]hen the money finally came in and [Cianci] wanted to back out of the agreement, I wasn't comfortable taking either position." He admitted that he did not have a written authorization from Cianci to distribute the funds to anyone else.

Cianci's version was that she kept calling respondent's office to see if he had received the full settlement. His secretary informed her that Ralph kept calling the office stating that he wanted the check made out to him and that he would make the disbursement to Cianci. Cianci told the secretary that she should not be talking to Ralph, that he had nothing to do with the case, that she had not authorized the disbursement to him, and that the check should be made out to her. Cianci conceded that she should have put all of this in writing. Cianci also claimed that she had never authorized respondent to talk to her brother or to give him any portion of her settlement proceeds.

Following the settlement, respondent neither provided Cianci with a statement breaking down the distribution of the settlement nor met with her about it.

By emails to respondent on April 10 and 20, and June 16, 2010, Cianci notified him that she was going to file a grievance against him, if he did not return the $5,000 to her. Ralph claimed that he had offered to return the $5,000 to Cianci, but that she had refused to accept it. Respondent did not reply to Cianci's emails.

In a May 11, 2010 letter to Cianci's new attorney, respondent contended that the $20,000 and $5,000 payments "were made in accordance with an agreement between Ms. Cianci and her brother Ralph." He added that the agreement had been witnessed by himself and his office staff and that the funds had been disbursed in accordance with Cianci's and her brother's instructions, as consideration for her brother's loans for her living expenses, during the course of the litigation. At the DEC hearing, however, respondent explained that, when he told the lawyer that their "agreement was witnessed by myself and my office staff," he meant that he had spoken to Cianci to confirm that she had reached an agreement with Ralph and his secretary had spoken to Ralph to confirm the agreement.

In mitigation, respondent offered his good reputation in the community, the absence of an ethics history, his cooperation with the DEC investigator, and his activities in his synagogue. The presenter pointed out, also, that respondent did not benefit from the transactions. In his brief to us, respondent's counsel pointed out that he was inexperienced in personal injury matters.

The DEC disbelieved Cianci's testimony that she knew nothing about the business that respondent and Cox had formed. To the contrary, the DEC found that respondent and Cox's testimony that respondent entered into the business to help Cianci's business to obtain a mercantile license was credible and consistent.

The DEC found that Cox was "at least as sophisticated as Respondent in [the carpet] business, if not more so." It also found that the entity that Cox and respondent had formed had never transacted business and that the business had never produced any earnings or losses. The DEC accepted respondent's argument that the reasoning in In re Palmiere, 76 N.J. 51 (1978), applied, even though Palmiere was factually distinguishable. The Court in Palmiere would "not impose a professional obligation under these circumstances, where the reliance is plainly no more than part and parcel of a joint

business venture among sophisticated businessmen." The DEC, therefore, dismissed the charged violation of RPC 1.7(a) in the first count.

The DEC noted that there had been testimony that business cards for the "carpet business were set out." The DEC accepted the testimony that the cards were not so prominent as to cause confusion to the public about the purpose of the office. The DEC, therefore, dismissed the allegation that ACPE Opinion 657 had been violated.

As to count two, the DEC remarked that there was no testimony about the existence of a written agreement on the distribution of the settlement proceeds, nor was there written authorization for the distribution. Cianci never testified that she had agreed to accept $20,000 as full payment for the settlement.

The DEC, thus, found that respondent did not deliver the entirety of the settlement funds to Cianci, thereby violating RPC 1.15(b). The DEC also found that respondent did not provide Cianci with a written statement of the method of the determination of the remittance, thereby violating RPC 1.5(c).

The mitigating factors considered by the DEC were respondent's lack of a disciplinary history and his testimony about his service to the community. The DEC determined that an

admonition was appropriate discipline, conditioned on respondent's refund of $5,000 to Cianci.

In respondent's brief to us, his counsel acknowledged that, generally, RPC 1.8 requires a writing. He argued, however, that there was a descriptive writing, prepared by Cox, that set forth the nature and terms of the proposed relationship. Relying on In re Palmieri, supra,, 76 N.J. 51, counsel argued further that a writing was not required here, where the transaction was not premised on an attorney-client relationship, but was simply a joint business venture between sophisticated businessmen. Counsel asserted that, in fact, Cox's business savvy in the commercial flooring industry far exceed respondent's. Counsel further argued that the purpose of the rule is to prevent unscrupulous attorneys from utilizing their superior skill and knowledge to take advantage of unwary clients. Counsel concluded that, if anyone needed protection in the transaction, it was respondent.

As to the conflict relating to Cianci, counsel suggested that, because the "inchoate" business relationship never materialized into anything that generated pecuniary results or benefits, it did not trigger the requirements of RPC 1.8.

Likewise, counsel maintained that respondent did not engage in a concurrent conflict of interest (RPC 1.7(a)) by

representing Cianci, while operating his own carpet business and without obtaining her written consent. Counsel took the position that there was "an identity of interest, and actions in concert, between Cianci and Cox;" they were partners in Commercial Floorz and shared in the profits. In light of the identity of interests, counsel concluded, there could be no conflict of interest.

As to the RPC 1.5(c) violation, counsel argued that, because respondent was not making any deduction from the settlement proceeds for costs or attorney's fees, the matter was no longer "in the nature of contingent fee and was therefore no longer within the purview of the requirements of RPC 1.5(c) and corollary R. 1:21-7."

With respect to RPC 1.15(b) (failure to safekeep property), counsel maintained that there was a legitimate dispute between Cianci and Ralph as to entitlement to the settlement proceeds and that the proofs on this point were in equipoise. He pointed out that, even after the settlement funds were disbursed, Cianci objected to the "modified" agreement and rejected Ralph's offer to refund the $5,000 to her.

Counsel argued that respondent had a dual obligation to Cianci and to Ralph and pointed out that, because of a potential conflict, respondent had asked the parties to resolve it

themselves. After they came to an agreement, however, Cianci changed her mind about it. Counsel, thus, urged a finding of no clear and convincing evidence of a violation of RPC 1.15(b).

Finally, counsel argued that ACPE Opinion 657 was inapplicable. He pointed out that the concerns of that opinion were whether the attorney's legal representation and ancillary services were related. He noted that ACPE Opinion 498 was the more appropriate guideline, because it related to the sharing of office space or facilities with non-legal businesses.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent was guilty of unethical conduct was fully supported by clear and convincing evidence. We are unable to agree with some of its conclusions and findings, however.

We find, initially, that it is of no relevance to our analysis that Commercial Flooring ultimately failed. At its inception, the expectation was that it would be a successful concern. As Cox's partner in the business, respondent must have anticipated realizing some profit. As its attorney, he was required to comply with the appropriate rules and regulations. Respondent testified, however, that he was only lending his name to the business to help Cox obtain the necessary approvals. Were this true, then the documents that he prepared were false and

misleading. If, on the other hand, he expected to profit from the business, then his role was more than merely affixing his name to various documents and his testimony before the DEC was false. Either scenario presents us with an aggravating factor.

We find that respondent's conduct evidenced multiple conflicts of interest. Count one charged that he violated RPC 1.8(a) by entering into a business transaction with Cox, a client, without complying with the requirements of that rule, that is, that the transaction and terms were fully disclosed and transmitted in writing to the client; that the client was advised in writing of the desirability of seeking independent legal counsel and was given a reasonable opportunity to seek such counsel; and that the client gave informed consent in writing to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer was representing the client in the transaction.

Counsel argued that respondent and Cox were merely partners in a business venture, not attorney and client. We disagree. Even if that were so, however, as noted in Kevin H. Michels, New Jersey Attorney Ethics, §27:3 at 644 (2012), "the attorney-client relationship need not exist with respect to the particular transaction between the parties for the rule's disclosure and writing requirements to apply." If the parties

had an attorney-client relationship at any time prior to entering into a business transaction, the attorney may be unable to claim that he or she is only acting as a business person with respect to the transaction between them and that he or she is not, therefore, not subject to the requirements of RPC 1.8(b). Ibid. Michels further pointed out the distinction in early cases when the DRs were in effect: the DRs regulated only transactions between lawyer and client where the client "expected" the lawyer to exercise professional judgment for the client's protection. In contrast, RPC 1.8(a) applies to all of an attorney's business transactions with a client. Id. 645-646.

In dismissing this portion of count one, the DEC relied, in part, on a 1978 case, In re Palmieri, supra, 76 N.J. 51. The Court in Palmieri did not find any ethics impropriety in connection with the attorney's hotel business venture with two former clients. The Court found no attorney-client relationship between the parties in that case. It found that the proofs were insufficient to permit even an inference of the existence of an attorney-client relationship. Any reliance that Palmieri's clients reposed in him was not in his professional capacity as an attorney. The Court would not consider prior matters in which the attorney had previously represented the clients. Rather, the Court considered the shrewd business sense and experience of the

lawyer's co-venturers and the fact that they were well-versed in business affairs and experienced in investing their money.[1]

In the present case, an established attorney-client relationship existed between respondent and Cox concurrently with the business transaction. Respondent was representing Cianci and Cox in the landlord-tenant matter at the same time that he entered into the business transaction with Cox. He also represented Commercial Flooring, when he obtained a certificate of formation for the new carpet business. He was listed as the member/manager and authorized representative of the business. His role was both attorney and business partner in the transaction.

By entering into a business transaction with a client, respondent was required to comply with the requirements of RPC 1.8(b). The writing prepared by Cox was a vague business plan. It did not comport with the requirements of RPC 1.8(a)(1). The terms of the transaction were not "fully discussed" and the document was not prepared by respondent to be transmitted to his client, and the writing did not comport with the remaining requirements of the rule. We, therefore, find that respondent

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[1] Although the Court found no ethics improprieties in that regard, it imposed a public reprimand in connection with a companion grievance.

violated this rule, notwithstanding that the business did not realize any profits.

Respondent's reliance on Palmieri was misplaced. The DR in effect in 1978 was significantly different from RPC 1.8(a). DR 5-101(a) provided as follows:

> Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

The DR did not require any writings or any informed written consent as does the current rule, RPC 1.8(a).

Respondent argued, also, that a writing was not necessary because of Cox's business sophistication. That is incorrect. A writing is always required, regardless of the level of sophistication of the client.

We find that respondent's violation of RPC 1.7 was clear and multileveled. He was involved in a business that was in competition with Cianci's business at the same time that she was his client in two matters: the landlord-tenant matter and the

Atlas Pool litigation.[2] In addition, his business partner, Cox, was one of the defendants in the Atlas Pool lawsuit in which Cianci was the plaintiff. How could Cianci expect respondent to represent her with undivided loyalty when not only was he involved in a competing business with her but, moreover, his business partner was one of the parties against whom she was seeking a recovery? Furthermore, in the Atlas Pool lawsuit, respondent had informed Cianci that he would be a witness against her if a dispute arose with her brother over the distribution of the settlement proceeds, giving rise to yet another conflict of interest.

Unlike the DEC, we find that respondent's conduct violated ACPE Opinion 657, 130 N.J.L.J. 656 (February 24, 1992). That opinion, which deals with the extent to which lawyers may offer non-legal services to their clients, states that "lawyers must keep their law practices entirely separate from their business enterprise. Consequently, lawyers must operate their practices and businesses in physically distinct locations, refrain from joint advertising or marketing of the two, and avoid any other demonstration of a relationship between the two."

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[2] Although the complaint charged respondent with violating RPC 1.8(a) for starting a business in competition with Cianci's, we find that it is more properly a violation of RPC 1.7.

As stated in the factual recitation, Cox used an empty office in respondent's law firm for their commercial flooring business. Cox testified that the business cards for the flooring business were prominently displayed in respondent's law office and that there was signage relating to the business on the front of the building. Regardless of whether the two businesses were related, we find that ACPE Opinion 657 makes it clear that the business were required to be in physically distinct locations.

The complaint also charged that respondent failed to provide Cianci with a written statement setting forth the outcome of the matter and showing the remittance to her and the method of its determination, as required by RPC 1.5(c). Respondent argued that, because he did not deduct a fee or costs from the settlement, the matter was no longer "in the nature of a contingent fee and was, therefore, no longer within the purview of the requirements of RPC 1.5(c)." R. 1:21-7(g) (contingent fees) states that, "[u]pon conclusion of the matter resulting in a recovery, the attorney shall prepare and furnish the client with a signed closing statement" [emphasis added.] Neither R. 1:21-7(g) nor RPC 1.5(c) releases an attorney from the obligation of providing such a statement, if no fee is charged.

When respondent undertook Cianci's matter, he did so on a contingent fee basis and that did not change throughout the course of the representation. At one point, he determined to waive his fee to facilitate a settlement and conclude the case. His March 18, 2010 letter to Cianci informed her of the amount of the settlement, but failed to show how the funds would be disbursed or the method for that determination. He did not provide Cianci with a subsequent writing showing the $5,000 disbursement to Ralph. Unquestionably, thus, he violated RPC 1.5(c).

The complaint also charged respondent with violating RPC 1.15(b). That rule states that a lawyer shall promptly deliver to the client any funds that the client is entitled to receive. Here, the testimony is at odds. On one hand, respondent claimed that Cianci had authorized the $5,000 distribution to her brother and that, after he had distributed the funds to Ralph, she had changed her mind. On the other hand, Cianci vehemently denied that she had ever authorized the disbursement to her brother. The purported agreement was not memorialized in writing, as it should have been.

Clearly, if respondent had distributed the settlement while there was a dispute over its division, he would have been guilty of violating this rule. But he may have reasonably believed that

he was authorized to make the disbursement to Ralph. The DEC made no credibility findings in this regard. We find, thus, no clear and convincing evidence that respondent failed to remit to Ciancia funds that she was entitled to receive and dismiss the charged violation of RPC 1.15.[3]

We now turn to the proper quantum of discipline for respondent's multiple conflicts of interest and violation of RPC 1.5(c).

Conflicts of interest alone, absent egregious circumstances or serious economic injury to the clients, ordinarily result in a reprimand. In re Guidone, 139 N.J. 272, 277 (1994), and In re Berkowitz, 136 N.J. 134, 148 (1994).

In special situations, admonitions have been imposed. See, e.g., In re Bjorklund, 200 N.J. 273 (2009) (attorney engaged in a conflict of interest when he represented two criminal defendants in unrelated matters, with the potential that each of the defendants could be a witness against the other; compelling mitigation considered, including the possibility that the

[3] Post-oral argument before us, by letter dated August 23, 2012, respondent's counsel brought to our attention that Cianci, her father, and Ralph had executed a general release in favor of respondent, releasing him from paying the disputed $5,000 amount, in exchange for respondent's dismissal of a replevin action against them. We need not act on that information because we did not find clear and convincing evidence that respondent violated RPC 1.15. The issue is, therefore, moot.

attorney might not have been aware of the circumstances that gave rise to the conflict, the absence of a disciplinary record in his twenty-three years at the bar, the passage of thirteen years since the infraction, and his acknowledgement of the impropriety in representing criminal defendants with potentially competing interests; although the matter proceeded as a default, the discipline was not enhanced because the attorney may not have realized the need to file an answer after he informed the Office of Attorney Ethics that he did not intend to contest the charges); In the Matter of Cory J. Gilman, 184 N.J. 298 (2005) (among other violations, the attorney prepared real estate contracts for buyers requiring the purchase of title insurance from a company owned by his supervising partner; compelling mitigating factors were that it was his first brush with the ethics system, that he cooperated fully with the ethics investigation, and that he was a new attorney at the time); and In the Matter of Carolyn Fleming-Sawyerr, DRB 04-017 (March 23, 2004) (attorney engaged in a conflict of interest (RPC 1.7(b)) when she collected a real estate commission upon her sale of a client's house; mitigation included that she had on unblemished fifteen-year career, that she was unaware that she could not act simultaneously as an attorney and collect a real estate fee, thus negating any intent on her part to take advantage of the

client, and that six years had elapsed since the ethics infraction).

For violations of RPC 1.8(a) admonitions are ordinarily imposed. See, e.g., In the Matter of Frank J. Shamy, DRB 07-346 (April 15, 2008) (attorney made small, interest-free loans to three clients without advising them to obtain separate counsel; the attorney also completed an improper jurat; significant mitigation considered); In the Matter of April Katz, DRB 06-190 (October 5, 2006) (attorney solicited and received a loan from a matrimonial client; the attorney did not comply with the mandates of RPC 1.8(a)); and In the Matter of Frank J. Jess, DRB 96-068 (June 3, 1996) (attorney borrowed $30,000 from a client to satisfy a gambling debt; the attorney did not observe the requirements of RPC 1.8(a)).

The existence of aggravating factors or of additional ethics infractions often results in the imposition of greater discipline. See, e.g., In re Strait, 205 N.J. 469 (2011) (reprimand imposed on attorney who, after having been given use of a "companion" credit card by a close, longtime, elderly friend, for whom he had provided legal representation in three "minor matters" within a twenty-five year period, ran up the balance beyond the credit limit, which he could not pay, and did not inform his friend about it; her credit rating was

compromised as a result; the attorney also had gained control over the friend's assets when she gave him power of attorney and named him executor of her will; aggravating factors included the vulnerability of the friend, the trust she reposed in him because of their "extremely close relationship," his failure to inform her of the accumulated debt, his false assurance to her that he would bring the account current, and his failure to return her telephone calls after she began to receive communications from a collection agency); In re Gertner, 205 N.J. 468 (2011) (reprimand for attorney who provided legal representation at the closings on houses that he and his business partner purchased and flipped; the attorney also negligently misappropriated client funds on four occasions); In re Cipriano, 187 N.J. 196 (2008) (on a motion for discipline by consent, reprimand imposed on attorney who borrowed $735,000 from a client without regard to the requirements of RPC 1.8(a); and he also negligently invaded client funds ($49,000) as a result of poor recordkeeping practices; two prior reprimands, one of which involved a conflict of interest); and In re Moeller, 201 N.J. 11 (2009) (three-month suspension for attorney who borrowed $3000 from a client without satisfying the requirements of RPC 1.8(a), did not memorialize the basis or rate of his fee, and did not adequately communicate with the

client; aggravating factors were the attorney's failure to take reasonable steps to protect his client when he withdrew from the matter and his disciplinary record, consisting of a one-year suspension and a reprimand).

In the present matter, there are two mitigating factors to consider: respondent's otherwise unblemished record and the fact that he derived no benefit from the transactions. Aggravating factors are that he either lied to the DEC, when he stated that he had no interest in Commercial Flooring, or misled the licensing authorities by lending his name to the company, and that he threatened to be a witness against Cianci if she did not come to an agreement over the settlement with her brother. Under the totality of the circumstances in this matter, we find that a censure is the appropriate discipline.

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 Joel Lee Schwartz
Docket No. DRB 12-142

Argued: June 21, 2012

Decided: November 1, 2012

Disposition: Censure

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

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel