SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-122
District Docket No. XIV-06-199E

IN THE MATTER OF	
THOMAS G. FREY	
AN ATTORNEY AT LAW	

Decision

Argued: June 21, 2007

Decided: August 14, 2007

Melissa Czartoryski appeared on behalf of the office of Attorney Ethics.

Glenn Reiser appeared on behalf of respondent.

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

This matter came before us on a disciplinary stipulation, filed by the Office of Attorney Ethics (OAE). It arose out of respondent's misrepresentation that he had received the full amount of a deposit in a real estate transaction in which he was representing the buyer. Other improprieties followed.

The OAE urges the imposition of a reprimand. We agree that a reprimand is the appropriate discipline in this case.

Respondent was admitted to the New Jersey bar in 1989. He has no prior discipline.

On March 7, 2007, respondent and the OAE entered into a disciplinary stipulation. Respondent admitted violations of RPC 1.15(a) (failure to safeguard third party funds), RPC 1.15(b)(failure to notify third party of receipt of funds), RPC 4.1(a)(1) (knowingly making a false statement of material fact to a third party), RPC 8.4(c) (conduct involving deceit or misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Respondent represented the grievant, Magdi Osman, in a real estate purchase, the details of which are contained in the OAE investigative report, incorporated by reference into the stipulation:

> On or about July 12, 2005, grievant entered into a Contract to purchase real estate. Grievant gave Weichert Realtors an initial deposit of $1,000, which was placed into their escrow account. The contract called for an additional deposit of $31,900 to be deposited into the Weichert escrow account on or before July 22, 2005. Some time in between, grievant retained respondent to represent him in the transaction. On July 20, 2005, respondent wrote a letter to the selling agent from Weichert which, in part, stated, 'In furtherance of our telephone conversation, please be advised that I am in receipt of the additional funds for Magdi Osman.' In fact, respondent had not received additional funds from grievant, and this statement was false. Respondent's false

statement violated RPC 4.1(a) as it was a false statement of a material fact to a third party. Respondent's action also violated RPC 8.4(c) because it was a misrepresentation designed to cause the seller and the seller's attorney to believe that the deposit was fully funded by the grievant. [1]

An inspection of the property revealed that asbestos was present and was required to be removed. Respondent was dissatisfied with the proof of asbestos removal that he received from the seller. On or about October 16, 2005, respondent provided written notice to seller's attorney that his client was canceling the contract. On or about November 3, 2005, Seller's attorney filed suit against grievant and respondent for breach of contract and notified respondent of same via letter. The letter stated, in part, that if respondent deposited $32,900 with the court, seller's attorney would dismiss the case. During this time, respondent requested grievant to fund the full deposit. On or about November 25, 2005, grievant provided respondent with $11,000 cash, but a few days later, requested that respondent return most of the funds due to the illness of his child. On December 1, 2005, respondent paid grievant $10,000 via trust check number 1250. Grievant later gave additional cash to respondent for escrow ($19,500 on December 21st and $5,000 on December 27th), but he never funded the entire deposit. Respondent did not notify seller's attorney that he was not holding the required deposit. Respondent did not notify seller's attorney upon

[1] The investigative report states that respondent "only made that representation to Weichert because [Osman] told him that he would be delivering the money to him, and because of their past professional relationship." Respondent, a certified public accountant, was Osman's accountant.

> receipt of partial payments toward the deposit. Respondent violated RPC 1.15(b) which requires him to promptly notify interested third persons upon receiving funds in which they have an interest. Respondent failed to safe-keep the escrow by returning $10,000 to grievant in violation of RPC 1.15(a). This conduct also violated RPC 8.4(d), conduct prejudicial to the administration of justice, because respondent did so with notice that a lawsuit had been filed with a request made that the funds be deposited with the court.[2]
> Grievant alleged that respondent exerted pressure upon him to forward funds for the deposit by stating that he would be in big trouble with the Court if he did not furnish the funds. Respondent denies making such a statement. Hence, there is no clear and convincing evidence that respondent violated the Rules of Professional Conduct in his attempt to have grievant belatedly fund the full deposit as required in the sales contract.
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> [IR5 to IR6.][3]

Following a review of the record, we find that, with one exception, the stipulated facts support the violations of the RPCs cited in the disciplinary stipulation.

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[2] There was no court order directing that the funds be deposited with the court. Three months after the suit was filed, the court dismissed the count for damages against respondent and for the deposit of the funds with the court.

[3] IR denotes the investigative report.

As stipulated, respondent misrepresented, in a letter to Weichert Realtors, that he had received "the additional funds" from Osman. The "additional funds" consisted of the $31,900 balance of the deposit. In fact, respondent had not received any monies from Osman. His explanation for his falsehood was that, based on a professional relationship of many years, he had relied on Osman's representation that the funds would be forthcoming.

By knowingly making a false statement of material fact to Weichert, on which statement the seller, too, had reason to rely, respondent violated RPC 4.1(a)(1), as well as RPC 8.4(c) (conduct involving misrepresentation).

Respondent also stipulated that he failed to safeguard escrow funds, a violation of RPC 1.15(a), by returning the sum of $10,000 to Osman. To be sure, respondent did not have a contractual obligation to hold the deposit monies in escrow. The contract called for Weichert to keep those funds in escrow until the closing; nothing in the record establishes that the parties had agreed to shift that duty to respondent.

Nevertheless, when Osman entrusted respondent with the $11,000 installment toward the deposit, respondent became a fiduciary agent, to the extent that he was, at a minimum, the conduit through which the funds were to be remitted to Weichert,

the escrow agent. Therefore, respondent could not have released any portion of the funds to Osman, who was not entitled to ask for their return. Osman had agreed that the deposit was to be held in escrow until the closing; without the seller's authorization, he had no right to the return of the funds. Monies held in escrow are held for the benefit of both parties. In re Hollendonner, 102 N.J. 21, 26 (1985).

Unquestionably, thus, by releasing the $10,000 to Osman, respondent failed to safeguard funds that had to be maintained in trust, a violation of RPC 1.15(a).

On the other hand, we do not find that respondent violated 1.15(b), by not notifying the seller or the seller's attorney of his receipt of partial payments toward the deposit. That rule more specifically addresses an attorney's failure to notify a client or a third person of the receipt of, for instance, settlement funds (in which a client, and sometimes an expert or a lienholder have an interest) or estate or trust funds (in which a beneficiary has an interest). More properly, respondent's failure to disclose to the seller his receipt of installment payments toward the deposit was a continuing violation of his duty of candor toward the seller and Weichert, that is, his duty to reveal to them that, contrary to his representation, he was not in possession of the entire deposit

stipulated by the contract. In this respect, respondent's conduct was a perpetuation of his misrepresentation contained in his July 20, 2005 to Weichert and, therefore, continuing violations of RPC 4.1(a)(1) and RPC 8.4(c).

Finally, respondent's release of the $10,000 escrow to Osman prejudiced the administration of justice, a violation of RPC 8.4(d). Respondent was aware of the pendency of a lawsuit in which the seller was seeking, among other things, to keep the deposit monies as damages. His release of the escrow funds to Osman could have detrimentally affected the seller's ability to recoup those monies directly from either Weichert or respondent, in the event of a ruling in favor of the seller.

There are no aggravating factors to consider. In mitigation, respondent has no ethics history; had little or no experience in the real estate area; trusted that Osman, with whom he had a professional relationship as an accountant, would make good on his obligation to fund the deposit; and released the $10,000 to Osman because of Osman's need to pay his son's hospital bills.

Knowingly making a false statement of material fact to a third person ordinarily requires a reprimand. See In re Lowenstein, 190 N.J. 58 (2007) (reprimand for attorney who failed to notify an insurance company of the existence of a lien

that had to be satisfied out of settlement proceeds; the attorney's intent was to avoid the satisfaction of the lien).

An attorney who, among other improprieties, misrepresented that he was in possession of a real estate deposit received a reprimand. In re Agrait, 171 N.J. 1 (2002) (despite being obligated to escrow a $16,000 deposit shown on a RESPA, the attorney failed to verify it and collect it; in granting the mortgage, the lender relied on the attorney's representation about the deposit; the attorney also failed to disclose the existence of a second mortgage prohibited by the lender; the attorney's misconduct included misrepresentation, gross neglect, and failure to communicate to the client, in writing, the basis or rate of his fee; prior admonition for negligent misappropriation and recordkeeping violations).

Improper release of escrow funds has generally resulted in discipline ranging from an admonition to a reprimand. See In the Matter of Kevin S. Quinlan, DRB 03-228 (October 21, 2003) (admonition for attorney who prematurely released to the seller of real property the sum of $1,000 to be maintained in escrow, pending the completion of repairs to the property; the attorney reasonably believed that he had the buyer's consent to the release); 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 Milstead, 162 N.J. 96 (1999) (attorney reprimanded for releasing to his former clients $100,000 required to be kept in escrow, pursuant to a consent order; the attorney did not disclose the disbursement to the other party; the attorney was found guilty of violating RPC 1.15(a) (failure to safeguard escrow funds), RPC 3.4(c) (disobeying an obligation under the rules of a tribunal), and RPC 8.4(d) (conduct prejudicial to the administration of justice); mitigating and aggravating factors considered in the assessment of the appropriate form of discipline); In re Margolis, 161 N.J. 139 (1999) (reprimand for attorney who breached his fiduciary duty as escrow agent by releasing $45,000 in escrow funds to his client and to his law firm as legal fees, before he delivered the original settlement documents to his adversary; the attorney

took no action to correct his adversary's understanding that the escrow funds remained intact in the attorney's trust account); and In re Flayer, 130 N.J. 21 (1992) (reprimand for attorney who, during the course of representing himself as buyer of real property, used escrow funds to complete repairs to the property, without first obtaining the seller's consent to the use of the monies; the attorney's attempts to put the seller on notice of the use of the escrow funds was deemed inadequate).

As the above cases demonstrate, prematurely releasing escrow monies with the reasonable belief that the release was authorized leads to an admonition; the absence of a reasonable belief that the disbursement was proper merits a reprimand. Here, an admonition would be insufficient for that violation alone because respondent did not reasonably believe that he was authorized to surrender the $10,000 to Osman.

Respondent's conduct was similar to that found in Milstead. Like attorney Milstead, respondent improperly released funds that were to remain escrowed until the conditions that gave rise to the escrow agreement were fulfilled; like Milstead, respondent did not disclose to the interested parties that he had disbursed escrow funds to his client; and, like Milstead, respondent prejudiced the administration of justice, although respondent's release of the funds in the face of a pending

lawsuit was less serious than Milstead's violation of a court order. In fact, as noted earlier, three months after the filing of the suit, the court dismissed the count seeking to have the $32,900 down payment deposited with the court until the resolution of the seller's claims.

In light of the similarity between respondent's and Milstead's conduct, we are persuaded that a reprimand is adequate here as well. It is true that Milstead did not make an affirmative misrepresentation, after the release of the escrow funds, that he still had the funds in his possession, unlike respondent, who misrepresented to Weichert that the deposit funds were in his custody. On the other hand, the mitigating factors found in Milstead were offset by the aggravating factors present in that case. Here, the several circumstances that mitigate respondent's conduct militate against imposing more severe discipline than the reprimand meted out in Milstead.

We further considered that a reprimand, too, issued in Agrait, where the attorney not only failed to collect a deposit that he had the duty to keep in escrow, but failed to disclose the existence of a second mortgage prohibited by the lender, and was found guilty of gross neglect and failure to memorialize the basis or rate of his legal fee. Agrait had received an admonition for negligent misappropriation and recordkeeping violations.

Although respondent's conduct was serious, it certainly was no more serious than Agrait's. We, therefore, determine that he should be reprimanded.

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
William J. O'Shaughnessy, Esq.

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Thomas G. Frey
Docket No. DRB 07-122

Argued: June 21, 2007

Decided: August 14, 2007

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
O'Shaughnessy			X			
Pashman			X			
Baugh			X			
Boylan			X			
Frost			X			
Lolla			X			
Neuwirth			X			
Stanton			X			
Wissinger			X			
Total:			9			

Julianne K. DeCore
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Chief Counsel