SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-150
District Docket No. IIIA-06-0031E

IN THE MATTER OF	
EDWARD ALLEN MacDUFFIE, JR.	
AN ATTORNEY AT LAW	

Decision

Argued: July 17, 2008

Decided: September 3, 2008

Joseph Grisanti appeared on behalf of the District IIIA Ethics Committee.

David Dugan appeared on behalf of respondent.

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

This matter was originally before us on a recommendation for an admonition filed by the District IIIA Ethics Committee (DEC). At our April 17, 2008 session, we determined to bring the matter on for oral argument.

The two-count complaint charged respondent with violating RPC 1.7, presumably (a)(1) (conflict of interest – representation

of one client that is directly adverse to another client) and RPC 1.15, presumably (a) (failure to safekeep property). We determine that a reprimand is the proper discipline for these violations.

Respondent was admitted to the New Jersey bar in 1971. He maintains a law practice in Lavallette, New Jersey. He has no history of discipline.

Respondent entered into a retainer agreement with Robert Skovronski to represent him in a personal injury action against Home Depot. Robert had sustained injuries on July 22, 2002, when he was struck on the head by a descending overhead door. Although only Robert signed the retainer agreement, respondent also represented Robert's then-wife Valerie, in a per quod claim arising from the same July 2002 incident. Respondent filed the lawsuit on the Skovronskis' behalf just before the statute of limitations expired.

The Skovronskis were "pre-existing clients" of respondent, who had also employed Robert as a roofer/handyman to make repairs on his home and office. Valerie characterized their relationship with respondent as "professional and friendly." Over the course of the representation, however, she became frustrated because she could not obtain any information from respondent about the lawsuit.

At some point in 2006, during the pendency of the lawsuit, the Skovronskis separated and later filed for divorce. Robert and Valerie retained separate attorneys for the divorce matter.

On June 23, 2006, there was a mediation hearing in connection with the personal injury matter. Brian Boyle (employed by respondent on a per diem basis) represented both Robert and Valerie at that hearing. At that time, Valerie was living in Rhode Island.

Prior to the mediation, respondent sent Valerie an email informing her that, if she did not attend it, Robert would receive the entire settlement and she would get nothing. In her May 10, 2006 reply email, Valerie stated that she did not have the funds to get to the mediation and expressed her belief that respondent favored Robert over her. She added:

> I'm quite sure if Bob needed a ride or to rent a car to get there, there'd be no problem. I don't know what you have against me Allen, but I am suggesting you separate "friendship" and "attorney." It's not fair to combine the two, not fair especially to me.
>
> [Exhibit P3.]

Valerie did not know how she would get to New Jersey and felt that respondent seemed unconcerned about it. Respondent replied to her, via email, that he did not have anything against her, but simply did not have the money to get her to the mediation. Respondent did not view his reply as a breakdown of

their attorney/client relationship. Valerie, however, did not believe that respondent was representing her best interests.

The mediation resulted in a $240,000 settlement. Although both Robert and Valerie attended it, there was no apportionment of the settlement between Robert's direct claim and Valerie's per quod claim. Boyle told Valerie that she and her ex-husband would have to work out the percentages that each would receive.

Valerie understood that, after payment of Robert's medical and legal bills, there would be only $60,000 left to divide between them. According to Valerie, Boyle suggested that they accept the settlement nevertheless, because he might be able to negotiate a reduction of some of Robert's medical bills. Valerie believed that they would ultimately realize $100,000 between them.

The division of the personal injury settlement was finalized in Valerie's and Robert's property settlement agreement. Ultimately, Valerie agreed to accept $6,000 for her per quod claim.

According to Valerie, sometime between the mediation and the property settlement agreement, she and Robert had met at respondent's office to try to resolve the outstanding Home Depot settlement. Because Robert was "very angry," they were unable to resolve it. Valerie left respondent's office upset and crying. Respondent followed her outside to console her and ultimately

presented her with a $1,000 check, drawn on his personal checking account, to help her with expenses. At that time, Valerie thought it was a gift. She did not understand that respondent expected to be reimbursed from her share of the proceeds of the Home Depot settlement. She believed that respondent was just trying to help her out, as a friend, as he had done in the past. Moreover, respondent did not have her sign any papers indicating that she had to repay him. Valerie did not learn that the money had been a loan until her matrimonial attorney so informed her, prior to sending her the proceeds of her divorce settlement, from which the $1,000 had been deducted.

In July 2006, Valerie's finances were so poor that she went to stay with her husband. At the time, Robert was renting a mobile home from respondent, while working on respondent's property.

On July 5, 2006, respondent appeared at the property to have Valerie "sign a paper regarding Home Depot." The handwritten letter, prepared by respondent, stated that Valerie would no longer seek relief from Home Depot. The letter also authorized respondent to sign all documents on Valerie's behalf "to effectuate the settlement of the lawsuit." At first, Valerie hesitated signing the document and asked respondent whether she "should have an attorney look at it," before signing it. According to Valerie, she got the impression "from the look on [respondent's] face and his actions, that if [she] didn't sign it

right then and there he was going to ask [her] to move, to get off his property." Valerie felt intimidated and signed the paper.

Afterwards, Valerie telephoned respondent's office "on more than one occasion" about the status of the settlement monies, to no avail. At the time she was experiencing extreme financial hardship.

Respondent never notified Valerie of his receipt of the personal injury settlement check. She discovered that information when, after her repeated efforts to reach respondent were unavailing, she called Home Depot's legal department in Atlanta, Georgia. Home Depot informed her that the check had been mailed and that she had been listed as a payee. Valerie never saw or endorsed the check. In addition, she did not sign any documents authorizing disbursements from the settlement and, at the DEC hearing, denied that the signature on a June 30, 2006 release was hers.

On July 27, 2006, respondent deposited the settlement check into his trust account, without first obtaining the endorsement of Robert or Valerie. Valerie became concerned about respondent's disbursing funds from the settlement. Therefore, on July 18, 2006, Valerie sent a "fax" to him, stating that she did not consent to the release of any funds from the settlement and that he needed her written approval on how the funds were to be disbursed. "On or about July 27, 2006," respondent disbursed a

portion of the proceeds from his trust account, including $50,000 to himself. Respondent never notified Valerie about the disbursements.

In a July 28, 2006 telephone conversation, Valerie told respondent that she wanted to resolve the amount that she would receive from the settlement and obtain her portion of it. On that same day, after conferring with Robert, respondent relayed that Robert had offered her $5,000, "because he was in a bad mood that day." Valerie rejected the offer.

After Valerie's many failed attempts to receive information about the settlement, by letter dated August 29, 2006, her matrimonial lawyer, Neil Guthrie, informed respondent that Valerie had been unable to obtain copies of documents relating to the Home Depot lawsuit and settlement. He, therefore, requested a copy of those documents as well as the settlement agreement, release, checks received from Home Depot, and an accounting of monies distributed and/or to be distributed from the settlement. Guthrie gave respondent ten days to comply with his request, lest he seek court intervention.

On November 3, 2006, the court entered an order in the Skovronskis' matrimonial matter, stating that neither party was to receive a payout of the personal injury settlement. However, "if they [had], those proceeds were to be turned over to their respective counsels immediately." On November 9, 2006, Robert's

attorney, Douglas Mundy, faxed a copy of that order to respondent. Respondent claimed, however, that he did not receive the second page, prohibiting the payout of proceeds to either client.

For his part, respondent testified that he knew Robert and Valerie fairly well. He had done quite a bit of legal work for them, including "family issues," municipal court work, and allegations of abuse in the home, among other things.

Respondent admitted that he had prepared the handwritten document for Valerie's signature that released Home Depot from any causes of action and gave him authorization to sign documents on her behalf to "effectuate settlement." According to respondent, he did not pressure or intimidate her to sign it. He acknowledged that Valerie had mentioned that perhaps she should have another lawyer look at it. The purpose of the document, he claimed, was to give him authority to disburse checks to pay off the liens.

Respondent tried to negotiate the outstanding claims against the settlement, but denied trying to divide the net proceeds between Valerie and Robert. He also denied ignoring Valerie's July 18, 2006 fax objecting to the release of any Home Depot funds without her written approval. He explained that he "did not disburse her funds - - any moneys that she was going to

be entitled to [sic]. I had more than enough money to protect those moneys."

Respondent deposited the settlement check on July 27, 2006. On that same day, he disbursed $50,000 to himself, but did not advise Valerie of that disbursement, or of any of the other disbursements because, he claimed, "any disbursements that were made were not any part and parcel of any of the funds that she would be entitled to." He contended that there was more than sufficient money in his trust account to protect her per quod claim. He added, "And, as it turned out, my quote, unquote, prophecy was right; the per quod claim was not worth a substantial amount of money."

On November 13, 2006, pursuant to the November 3, 2006 court order, respondent forwarded $1,000 to each of the Skovronskis' matrimonial attorneys. The following day, November 14, 2006, respondent made a $10,000 disbursement to Robert. On January 22, 2007, he made additional disbursements of $10,000, $4,000, and three more disbursements, each for $2,000. The disbursements were made without Valerie's consent and, according to the DEC, "in contravention of the Superior Court Order." Respondent explained that he disbursed the funds separately because Robert had to pay various bills and also wanted cash. Respondent never notified Valerie or any of the matrimonial attorneys about these disbursements.

Respondent explained:

> Well, it was Bob's money. I mean, at least - - they were working out whatever they were going to work out between the matrimonial lawyers.
>
> Bob was the person who was injured, and my sole thought process of things was - - made [sic] sure and keep all of the necessary funds that would adequately address Valerie's per quod situation.
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> Q. So you didn't consider them equal clients . . . ? You considered Bob to be the real client?
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> A. No, no, no, no, not at all. There is a - - there was a large differentiation, okay? They're not people that are on the same levels.
>
> . . . .
>
> [B]ased upon all of the information that I had, that her per quod claim was basically worth nothing. Okay?
>
> [T119-1 to T120-1.][1]

Respondent was "a hundred percent confident" that he was not wrong about the disbursements to Robert. He added that, if he had disbursed Valerie's money, he would have notified her and her attorney. According to respondent, some of the money was Valerie's, some was Robert's, "[a]nd the amount of money that belonged to Valerie, I maintained." His "philosophy" was "there

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[1] T refers to the October 23, 2007 hearing transcript.

was more than enough money in the trust account to take care of Valerie's situation."

Respondent admitted that, although he did not make Valerie sign a document for the $1,000 he loaned her, he did not consider it a gift. He "felt she was in really bad shape, she needed money, she needed to go to a doctor, she needed something. She didn't have any food, she didn't have anything." He thought he would get the money back from her.

After Valerie's matrimonial attorney, Neil Guthrie, requested information relating to the Home Depot settlement, respondent wrote to Robert's matrimonial attorney, Douglas Mundy, inquiring whether he considered any of the enclosed information privileged: the Home Depot complaint, the answer, information relating to the mediation, letters from medical providers, "letters of protection" to various medical providers to whom settlement funds had been disbursed, the retainer agreement, and an accounting of the funds received and disbursed. Respondent did not know if any of the information was privileged between his clients because he was not familiar with matrimonial matters and there were two separate lawyers involved. He did not want to jeopardize or interfere with the matrimonial matter.

As of the date of the DEC hearing, October 23, 2007, respondent was still maintaining $1,639.61 from the settlement in his trust account.

The DEC concluded that, initially, when respondent undertook the Skovronskis' representation, there was no conflict of interest. However, in 2006, when the parties became embroiled in divorce proceedings, their interests in the settlement proceeds became adverse. Respondent's continued representation of one client was directly adverse to the interests of the other client and, therefore, a conflict of interest.

The DEC also found that respondent failed to safeguard the settlement funds because, despite Valerie's July 18, 2006 fax stating that she did not consent to the disbursement of the funds, respondent had disbursed funds to Robert ($10,000 on November 14, 2006, and four checks totaling $8,000 on January 22, 2007), and had not obtained the consent from the Skovronskis' matrimonial attorneys for those disbursements.

Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

The DEC properly concluded that, at the time the Skovronskis separated and filed for divorce, their interests in the Home Depot litigation/settlement became adverse. Therefore, respondent's

continued representation of the Skovronskis constituted a conflict of interest, particularly in the absence of any evidence that he had complied with the requirements of RPC 1.7(b)(1) (obtaining a written consent to the dual representation, after providing the clients with full disclosure of the risks involved). Moreover, Valerie's May 10, 2006 email to respondent underscored her belief that respondent favored respondent's interests over her own. Respondent should have been aware, at least at that point, of his obligation to withdraw from the representation of both parties.

Respondent's testimony that Valerie's per quod claim was virtually worthless; his distributions to Robert, not Valerie, despite her dire financial circumstances, before the settlement funds were apportioned; his failure to notify Valerie of the disbursements or to seek her prior consent; and his reluctance to turn over information to Valerie's attorney, absent approval from Robert's attorney, all demonstrate that he engaged in a conflict of interest situation by placing Robert's interests ahead of Valerie's. In addition, Valerie asked respondent if she should have another attorney review the authorization that respondent had prepared. Valerie's sheer discomfort with respondent's representation should have triggered the realization that, at that point, a conflict existed. Yet, respondent took no action to comply with the rule's requirement that he obtain written consent

for the continued representation, after informing both clients of the risks involved with continuing with the representation.

Respondent's denials that he engaged in ethics violations are not worthy of consideration. We reject his claim that Robert was the primary client and Valerie was the secondary client. This argument highlights respondent's failure to treat both clients with undivided loyalty. That he believed that Valerie's interests were protected by his holding sufficient funds in his trust account is of no moment. Respondent's calculations may have been flawed. Moreover, the record is replete with references to Valerie's dire financial circumstances and her repeated efforts to obtain her share of the Home Depot settlement funds, funds that she so desperately needed to subsist. Undoubtedly, respondent's allegiance was to Robert. He made disbursements to Robert, not to Valerie.

Respondent's argument that a "per quod" client should be treated differently from any other client is unpersuasive. An attorney must represent all clients with the same degree of fidelity. If that becomes impossible, the attorney must terminate the representation. We find, thus, that respondent's continued representing of parties with conflicting interests violated RPC 1.7(a)(1).

As to the charged violation of RPC 1.15(a), we find that respondent's disbursements to Robert were improper, particularly

after respondent received Valerie's July 18, 2006 fax, withholding her consent to the disbursement of the settlement funds, and the court's November 3, 2006 order, prohibiting any payment to anyone, other than the parties' attorneys.

Respondent claimed that he did not receive the second page of the court order. Because, however, there was no signature on the order, respondent should have been alerted to the fact that the order was not complete. In any event, after Valerie objected to the release of any settlement funds, respondent was prohibited from doing so without the parties' or their lawyers' consent or a court order directing the release of funds. Respondent's actions to the contrary violated RPC 1.15(a).

Release of escrow funds without the parties' or the court's authorization generally results in the imposition of a reprimand. See, e.g., In re Milstead, 162 N.J. 96 (1999) (attorney disbursed escrow funds to his client, in violation of a consent order); In re Margolis, 161 N.J. 139 (1999) (attorney breached an escrow agreement requiring him to hold settlement funds in escrow until the completion of the settlement documents; the attorney used part of the funds for his fees, with his client's consent); and In re Flayer, 130 N.J. 21 (1992) (attorney made unauthorized disbursements against escrow funds; the attorney represented himself in the purchase of real estate). But see In re Spizz, 140 N.J. 38 (1995) (admonition for

attorney who, against a court order, released to the client funds that had been escrowed for a former attorney's fees and misrepresented to the court and to the former attorney that the funds had remained in escrow; the attorney argued that the former attorney had either waived or forfeited her claim for the fee).

A reprimand, too, is the proper discipline for attorneys who engage in conflicts of interest. In re Berkowitz, 136 N.J. 148 (1994). If the conflict involves "egregious circumstances" or results in "serious economic injury" to the client, then discipline greater than a reprimand is warranted. In re Berkowitz, supra, 136 N.J. at 148. See also In re Guidone, 139 N.J. 272, 277 (1994) (noting that, when an attorney's conflict of interest causes economic injury, discipline greater than a reprimand is imposed; Guidone, who was a member of the Lions Club and represented the Club in the sale of a tract of land, engaged in a conflict of interest when he acquired, but failed to disclose to the Club, a financial interest in the entity that purchased the land and then failed to (1) fully explain to the Club the various risks involved with the representation and (2) obtain the Club's consent to the representation; Guidone received a three-month suspension because the conflict of interest "was both pecuniary and undisclosed").

In special situations, we have imposed admonitions on attorneys who have violated the conflict of interest rules post-Berkowitz and Guidone. See, e.g., In the Matter of Cory J. Gilman, 184 N.J. 298 (2005) (imputed conflict of interest (RPC 1.10(b)), among other violations, based upon attorney's preparation of real estate contracts for buyers requiring the purchase of title insurance from a company owned by his supervising partner; in imposing only an admonition, we noted as "compelling mitigating factors" that it was his "first brush with the ethics system; he cooperated fully with the OAE's investigation, and, more importantly, he was a new attorney at the time (three years at the bar) and only an associate"); In the Matter of Frank Fusco, DRB 04-442 (February 22, 2005) (attorney who represented the buyer and seller in a real estate transaction without obtaining their consent "did not technically engage in a conflict of interest situation" because no conflict ever arose between the parties to the contract; special circumstances were (1) the attorney did not negotiate the terms of the contract but merely memorialized them; (2) the parties wanted a quick closing "without lawyer involvement on either side;" (3) the attorney was motivated by a desire to help friends; (4) neither party was adversely affected by his misconduct; (5) the attorney did not receive a fee for his services; and (6) he had no disciplinary record); In the Matter

of Carolyn Fleming-Sawyerr, DRB 04-017 (March 23, 2004) (attorney collected a real estate commission upon her sale of a client's house; in mitigation, we considered the attorney's unblemished fifteen-year career, her lack of knowledge 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 the passage of six years since the ethics infraction); In the Matter of Anton Muschal, DRB 99-381 (February 4, 2000) (attorney represented a client in the incorporation of a business and renewal of a liquor license and then filed a suit against her on behalf of another client, a violation of RPC 1.7 and RPC 1.9(a)(1); in imposing only an admonition, we noted the attorney's unblemished twenty-four-year career); and In the Matter of Jeffrey E. Jenkins, DRB 97-384 (December 2, 1997) (attorney engaged in a concurrent non-litigation conflict of interest by continuing to represent husband and wife in a bankruptcy matter after the parties had developed marital problems and had retained their own matrimonial lawyers; in imposing only an admonition, we noted the attorney's lack of malice, the lack of a pattern of improper conduct, his thirteen-year untarnished disciplinary record, and his cooperation with disciplinary authorities).

Here, respondent did not offer any mitigation that would warrant downgrading the standard form of discipline, a reprimand,

to an admonition. We have considered, however, his unblemished ethics record during his thirty-seven years at the bar, the same type of mitigation we considered in Muschal (twenty-four years), Fleming-Sawyerr (fifteen years), and Jenkins (thirteen years). We find, however, that respondent's conduct was more serious than in Gilman, because respondent was not a fledging attorney when he engaged in these ethics offenses. Respondent's conduct was also more serious than in Fusco, because Fusco, unlike respondent, did not engage in an actual conflict of interest situation. Finally, we considered respondent's loan to his client as an aggravating factor. Such conduct is prohibited under RPC 1.8(a) (business transaction with client), unless certain safeguards are observed. Respondent did not comply with the requirements of the rule.

We find that this case is most similar to the Jenkins matter. Jenkins continued to simultaneously represent a husband and wife in a bankruptcy matter, after their interests were no longer common because of their matrimonial problems. At times, Jenkins advanced the interests of one client, while compromising the interests of the other. In imposing only an admonition, we considered that Jenkins' actions were not malicious and did not represent a pattern of improper conduct; that Jenkins cooperated with disciplinary authorities; and that he lacked a disciplinary history in his thirteen years at the bar.

The mitigating factors considered in Jenkins are also present in this case. Because, however, respondent also disbursed escrow funds without authorization from Valerie and, in aggravation, made a loan to Valerie without complying with the rule requirements, we see no compelling reason for a downward departure from the usual degree of discipline for violations for RPC 1.7(a) and RPC 1.15(a), that is, a reprimand for each of those offenses. By the same token, we are convinced that respondent's spotless thirty-seven-year career militates against imposing more than a reprimand for both violations, combined.

Member Boylan did not participate.

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 Edward Allen MacDuffie, Jr.
Docket No. DRB 08-150

Argued: July 17, 2008

Decided: September 3, 2008

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Boylan						X
Clark			X			
Doremus			X			
Lolla			X			
Stanton			X			
Wissinger			X			
Total:			8			1

Julianne K. DeCore
Chief Counsel