SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-030
District Docket No. XIV-05-303E

IN THE MATTER OF KENNETH A. ROSEN AN ATTORNEY AT LAW	:

Decision

Argued: March 15, 2007

Decided: May 24, 2007

Melissa A. Czartoryski appeared on behalf of the Office of Attorney Ethics.

Joseph P. LaSala 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 between respondent and the Office of Attorney Ethics (OAE). The disciplinary action against respondent arises out of his receipt of a client's $305,265.77 check for legal fees, payable to his

former firm. Respondent failed to notify his former partners about the check, which he turned over to Sovereign Bank (Sovereign), the firm's creditor on a $700,000 loan that respondent and several of his former partners had personally guaranteed, knowing that the funds would be applied to the balance of the loan.

The parties stipulated that respondent violated RPC 1.15(b) (failure to safeguard funds of a third party) and RPC 8.4(c) (conduct involving dishonesty, deceit, misrepresentation, and fraud). For this misconduct, the OAE recommends the imposition of a reprimand. Respondent seeks an admonition on the ground that he neither diverted the funds for his own use nor deprived the former firm of its funds. For the reasons stated below, we conclude that respondent violated only RPC 1.15(b), and that the appropriate measure of discipline is a reprimand.

Respondent was admitted to the New Jersey bar in 1979. Presently, he is a partner at Lowenstein Sandler. He has no disciplinary history.

The facts are taken from the stipulation and eight incorporated exhibits. From 1986 until February 11, 2000, respondent was a partner at the Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. (the Ravin firm). On February

14, 2000, respondent joined Lowenstein Sandler (the Lowenstein firm).

On August 27, 1999, the Ravin firm borrowed $770,000 from Sovereign. Respondent was one of nine partners who had personally guaranteed the loan. The Ravin firm also maintained "various bank accounts" at Sovereign, including a business money market account.

Since 1999, respondent had represented Genesis Direct, Inc. (Genesis) in a Chapter 11 bankruptcy proceeding. When respondent joined the Lowenstein firm in 2000, Genesis became one of its clients.

In April 2000, the Ravin firm "ceased the practice of law." On May 2, 2000, respondent attended a meeting with Genesis representatives, who gave him a $305,265.77 check made payable to the Ravin firm to cover its outstanding legal fees. This payment was authorized by a 1999 bankruptcy court order entered in the Genesis Chapter 11 proceeding. The parties stipulated that respondent neither notified Ravin Sarasohn that he had received the check nor delivered the check to Ravin Sarasohn.

On May 9, 2000, without prior notice to the Ravin firm, respondent delivered the check to Sovereign's Senior Vice

President Joseph Critchley. In the letter accompanying the check, respondent wrote:

> As I have told you, my former firm is unwilling to give me any financial information. You are also aware that I am a guarantor on the Sovereign loan. I am delivering to you a check for $305,265.77 payable to Ravin Sarasohn from Genesis Direct, Inc. Since last Thursday, you have been unable to get Joseph Cook to return your telephone calls. You have advised me that you intend to deposit the check into Ravin Sarasohn's account and debit the principal of the loan.
>
> [Letter from Kenneth A. Rosen to Joseph Critchley, dated May 9, 2000, Exhibit 3 to the Stipulation.]

Thus, respondent stipulated, he knew that "Mr. Critchley would cause the check to be deposited into the business money market account and applied to reduce the balance of the loan that respondent and other equity members of [the Ravin firm] had personally guaranteed."

Respondent also stipulated that, after he gave Critchley the check, he "did not notify [the Ravin firm] that he had caused the check to be deposited at Sovereign Bank and/or that it would be applied to the loan balance." According to the stipulation,

> [p]rior to delivering the check to Sovereign Bank, respondent had requested

> that his former partners provide him with information about the Sovereign loan and the financial status of the firm, and they did not do so (Exhibit 6)[.] Pursuant to the "GUARANTOR'S REPRESENTATIONS AND WARRANTIES" provision of the Guaranty, respondent was obligated to keep Sovereign Bank informed as to "any facts, events or circumstances which might in any way affect [Sovereign Bank's] risks . . ." under the loan. (See Exhibit 1, pg. 7 – first paragraph)[.]
>
> [Stipulation§B¶10.]

Respondent denied that, at the time he gave the check to Critchley (May 9, 2000), he knew that an order had been entered, on February 28, 2000, in a Superior Court lawsuit (Morris County) brought by one of his former partners, captioned Baime v. Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C., et al.. The order prohibited the Ravin firm from "making any distributions to creditors other than in the ordinary course of business without notice to [Baime]."

On May 10, 2000, the day after respondent gave the check to Critchley, it was deposited into the Ravin firm's business money market account. The back of the unendorsed check bore the notation "for deposit," followed by the Ravin firm's business money market account number. Respondent states that he did not mark the back of the check, and he did not prepare the deposit slip for the transaction. The OAE states that it "cannot prove

otherwise." In addition, Critchley does not recall who marked the back of the check or prepared the deposit ticket.

On the same day that the check was deposited in the Ravin firm's business money market account, Critchley approved a debit from the Ravin firm's business account. The entire $305,265.77 that Genesis paid to the Ravin firm to cover legal fees was then applied to the firm's outstanding loan as a principal payment.

On May 11, 2000, the day after the Genesis check was deposited and applied to the loan, Critchley wrote to Ravin firm partner Joseph Cook, and informed him of the relevant facts concerning the Genesis check: its receipt from respondent, its deposit into the firm's business money market account, the debit in an equal amount, and the use of the funds to reduce the outstanding principal on the loan.

On May 30, 2000, Sovereign, through counsel, notified the Ravin firm that it had deemed the Ravin firm in default of the loan, due to the firm's "liquidation and winding up." The letter also notified the Ravin firm that the bank would be exercising its right of set-off. Notwithstanding Sovereign's application of the $305,000 check to the loan twenty days earlier (May 10, 2000), the stipulation states that, pursuant to the May 30 letter, the bank exercised its "right to set-off

against the check" and "applied the Genesis check and other Ravin Sarasohn funds on deposit with Sovereign Bank against the loan and paid the loan in full." The stipulation further provides that "[t]here is no clear and convincing evidence that respondent persuaded Sovereign Bank to exercise its right of set-off nor that he was aware Sovereign Bank would do so at the time he delivered the check."

The OAE recommends the imposition of a reprimand. According to the OAE, respondent did not knowingly misappropriate law firm funds, but, rather, resorted to "self help" when he authorized the funds to be applied to the firm's indebtedness.

For his part, respondent recommends the imposition of an admonition because he "did not take possession of the funds at issue for his own use." He argues:

> He [respondent] did not deposit the funds into his own account, nor did he even endorse the check from Genesis. Instead, respondent delivered the check to the Vice President of *Sovereign* Bank because his former partners had not complied with his requests for information regarding the status of the Firm's finances and the loan. Moreover, respondent knew that the bank had a security interest in the firm's accounts receivable. The absence of any intent on the part of respondent to divert these funds

> for his own use distinguishes this matter from those involving attorneys who were reprimanded for wrongfully converting firm fees.
>
> [Stipulation§D¶2.]

Respondent added that, although he neither notified the Ravin firm of his receipt of the check, he did not retain funds to which he was not entitled, did not deposit the check into his own account, and did not intend to deprive the Ravin firm of its money.

Following a de novo review of the record, we are satisfied that the stipulation fully supports a finding that respondent's conduct was unethical. Respondent clearly violated RPC 1.15(b), as stipulated, when he accepted Genesis's $305,000, check but failed to turn it over to the Ravin firm. However, the facts do not support the stipulated violation of RPC 8.4(c).

RPC 1.15(b) provides that, "[u]pon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person." Moreover, the lawyer is to "promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." RPC 1.15(b). The Genesis check, payable to the Ravin firm, represented payment of legal

fees incurred while Genesis was still a client there. Because only the Ravin firm had an interest in the check, respondent should have notified the firm of its receipt and promptly delivered it to the firm. His failure to do so violated RPC 1.15(b).

Beyond this failure, however, the entire amount of the check was used to reduce the balance of the Ravin firm loan with Sovereign. In this respect, it is significant to note that no one from the Ravin firm objected to respondent's handling of the Genesis check, with the exception of the former partner who had instituted suit against the firm and filed the grievance in this matter.

Ordinarily, an admonition is imposed on attorneys who fail to comply with RPC 1.15(b). See, e.g., In the Matter of Craig A. Altman, DRB 99-133 (June 17, 1999) (despite attorney's letter of protection issued to a medical provider of his client, he failed to pay the provider's bill after he had received the settlement check, in violation of RPC 1.15(b)). Even if other violations have been committed, an admonition may still be imposed if mitigating factors are present. See, e.g., In the Matter of Angela C. W. Belfon, DRB 00-157 (January 11, 2001) (attorney violated RPC 1.15(b) when she failed to deliver

settlement funds to her client, although they had been deposited and remained in the attorney's trust account; the attorney also violated RPC 1.1(a), RPC 1.3, and RPC 1.4(a) in her handling of the client's litigation, by making no attempt to move the case forward after the complaint was filed, failing to keep her client informed about the status of the case, and failing to return the client's telephone calls; in imposing only an admonition, we considered that the attorney's battle with multiple sclerosis was at least partially responsible for her misconduct); and In the Matter of Douglas F. Ortelere, DRB 03-377 (February 11, 2004) (after attorney settled his client's case for $8500 in June 2000, he did not deposit the check until October 2000; although the attorney informed his client that he was holding the funds while he attempted to reduce the amounts owed on client's medical bills, he paid only one bill; after the attorney failed to return any of the client's telephone calls during the fall of 2000, the client filed a grievance in December 2000; the attorney did not deliver any settlement funds to his client until January 2001, and then, only in increments, with the last payment taking place in August 2001; we concluded that the attorney had violated RPC 1.4(a) and RPC 1.15(b); also the attorney was ineligible to practice law at the time he was

retained by the client, in violation of RPC 5.5(a); in imposing only an admonition, we took into account that, at the time of his misconduct, the attorney was suffering from depression, and that he had an unblemished disciplinary history).

In this case, respondent did not simply fail to promptly notify and promptly deliver the Genesis check to the Ravin firm. He did so in the face of a court order prohibiting payments to creditors other than in the ordinary course of business. While respondent denies awareness of the order, he must have been aware of the litigation itself, one seeking the appointment of a receiver over the firm's assets. He should at least have inquired as to whether the court had imposed any restriction on the use of firm funds. Under all the circumstances, we believe a reprimand is the appropriate discipline.

Member Boylan recused himself.

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
Chair

By: [signature]
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

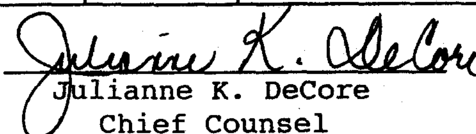
In the Matter of Kenneth A. Rosen
Docket No. DRB 07-030

Argued: March 15, 2007

Decided: May 24, 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:			8		1	



Julianne K. DeCore
Chief Counsel