SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-277

IN THE MATTER OF

SHELDON N. SPIZZ,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: October 19, 1994

Decided: January 5, 1995

Paul E. Zager appeared on behalf of the District IX Ethics Committee.

Respondent appeared pro se.

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

This matter was before the Board based on a recommendation for public discipline filed by the District IX Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1982. He is a sole practitioner in Manalapan, New Jersey.

In or about May 1987, Helen Ver Strate, Esq., the grievant in this matter, was retained by Peter DiLauro and Janet Friel ("The Buyers") to represent them in the purchase of a business as well as real estate. A closing in escrow took place on June 24, 1987. Ultimately, however, the buyers decided not to proceed with the transaction, whereupon the sellers filed an order to show cause in the Chancery Division to compel the buyers to close. Ms. Ver

Strate replied to the order to show cause and appeared before the court on the return date.

Soon, however, it became apparent to Ms. Ver Strate that she would be a witness in that proceeding. Respondent then substituted her as counsel in that suit. Before Ms. Ver Strate signed the substitution of attorney, she asked the buyers to pay her legal fees. When they refused, she filed a petition for an attorney's lien. As a result, respondent agreed to sign a consent order, dated December 24, 1987, providing as follows:

> 1. Sheldon N. Spizz, Esq., will hold in trust the sum of $3,910.00 pending the resolution of Deakin & Ver Strate's petition for counsel fees.
>
> 2. Deakin & Ver Strate will immediately turn over to Sheldon N. Spizz, Esq., the entire file of the within action.
>
> [Exhibit P-2]

In August 1988, the seller and the buyers settled their dispute. The seller took back the business and the buyers recovered their monies. According to Ms. Ver Strate, her understanding was that her petition for counsel fees was still pending with the court, in the Chancery Division.

In September 1988, respondent filed a legal malpractice suit against Ms. Ver Strate in behalf of the buyers. In January 1989, while that suit was pending, Ms. Ver Strate called the Chancery Division to find out when a hearing on her petition for legal fees would be scheduled. By letter dated January 12, 1989, the court replied to Ms. Ver Strate's inquiry:

Dear Ms. Ver Strate:

I acknowledge receipt of your telephone call inquiring whether a hearing date on your claim for counsel fees can be fixed. I was holding that in abeyance pending the submission of the Stipulation of Settlement which counsel for the parties had placed on the record on August 10, 1988.

They have not submitted that Stipulation despite repeated requests from my chambers. Yesterday, Mr. Spizz was advised to file a motion to enforce the settlement. He agreed to do so. He is to make it returnable on February 2, 1989. I will set your hearing date at that time.

[Exhibit P-3]

Respondent received a copy of that letter. The next day, January 13, 1989, respondent wrote the following letter to the court:

Dear Judge McGann:

Enclosed please find a copy of the Complaint filed under Docket No. L-56598-88, which alleges negligence on the part of Helen Ver Strate, Esq., in her representation in the DiLauro/Cummins matter.

As the quality of Ms. Ver Strate's representation, and entitlement, if any, to a fee, is the subject matter of this litigation, it would seem proper for Ms. Ver Strate to include her claim for a fee as a counterclaim in the negligence action.

In the interest of judicial economy, the fee issue should be resolved in the pending Law Division matter.

I still hold in my trust account the sum of $3,910.00 in accord with Your Honor's Order of December 24, 1987 and will continue to hold same in trust until resolution of Ms. Ver Strate's fee dispute.

[Exhibit P-4]

Upon receiving that letter, Ms. Ver Strate discussed with her attorney the filing of a counterclaim for counsel fees in the malpractice suit. After consultation with her attorney, Ms. Ver Strate decided not to file a counterclaim because she was satisfied that her fee would be protected under the consent order of December 24, 1987. Based on the court's letter advising her that it was holding her petition in abeyance, Ms. Ver Strate anticipated that her fee dispute would be ultimately resolved in the Chancery Division.

After a jury trial, a verdict of no cause of action was returned in the malpractice suit. An order was signed on March 5, 1993, dismissing the suit with prejudice (Exhibit P-5). According to Ms. Ver Strate, she thereafter asked respondent to release the $3,900 in escrow; he refused to discuss the matter with her. In fact, respondent no longer had in his possession the $3,900. On January 16, 1992, more than one year before the dismissal of the malpractice suit, respondent released the $3,900 to the buyers without notice to Ms. Ver Strate and without a court order (Exhibit P-9). At the time that Ms. Ver Strate made the above request to respondent, in 1993, she was still unaware that respondent had released the escrow monies to the buyers in 1992.

Because respondent refused to discuss the matter with her and to reply to her letters, on March 24, 1993, Ms. Ver Strate filed a motion in the Chancery Division under the same docket number assigned to the action between the buyers and the sellers as well as to her earlier petition for an attorney's lien. It was Ms. Ver

Strate's understanding that, now that the malpractice suit had been dismissed, she would be entitled to her legal fees. On April 10, 1993, respondent sent the following letter to the Chancery judge:

> Dear Judge McGann:
>
> Enclosed please find Cerification [sic] in opposition to motion in the above matter.
>
> I no longer hold these funds in trust. They were returned to my clients in 1992. Ms. Ver Strate did not assert any claim for fees in the lawsuit between her and my clients. Under the single controversy rule, any claim must have been claimed therein.

[Exhibit P-6]

It was then that, for the first time, Ms. Ver Strate found out that respondent no longer held the fee in escrow.

On April 16, 1993, the return date of Ms. Ver Strate's application for the release of the counsel fees, the Chancery court denied her application, ostensibly because of her failure to make an application for an allowance of counsel fees. The court apparently forgot about its letter to Ms. Ver Strate of January 12, 1989, assuring her that her claim for counsel fees was being held in abeyance pending the submission of a stipulation of settlement. In the interim, however, the Cummins v. DiLauro suit in the Chancery Division had been dismissed, without the resolution of Ms. Ver Strate's claim for counsel fees. The court's reasoning for the dismissal of Ms. Ver Strate's application for the release of counsel fees was placed on the record on April 16, 1993:

So, it was obvious that there was a substitution of attorney taking place, that there was a claim that counsel fees were owing and that the entitlement to counsel fees would abide a petition to be filed by the outgoing law firm to decide whether they were entitled and, number two, how much.

The moving papers indicate that in a separate action -- no. I take that back. I think Cummins and DiLauro the basic action was transferred to the Law Division, because there was no equitable relief that would be afforded. The case was tried there and resolved as to the liability of the parties to each other, but nothing was done at that time with regard to the petition for the allowance of counsel fees.

The application here is basically from the firm of Deakin and Ver Strate 'the case is over. Please send me the $3910 that you're holding. Mr. Spizz was holding it for four years and nothing happened. So I turned it over to my client, but you never made an application for counsel fees' and I think that that's true as I read the order. It was suppose [sic] to be held but pending the petition for counsel fees which means activity on behalf of the law firm, apparently, never took place.

So for those reasons I'll deny the application and maybe they'll [sic] be a separate suit then for an allowance of counsel fees.

[Exhibit C-3]

At the DEC hearing, respondent advanced the following position to defend his actions. He claimed that he had agreed to hold the $3,900 in escrow "in the interest of getting the file. It was my belief that the fee dispute would be resolved in the malpractice action." T6/8/1994 45-46. Respondent contended that, after Ms. Ver Strate had declined to assert a counterclaim in the malpractice action, as she was invited to do in his letter of January 13, 1989 to the Chancery judge, he concluded that she had abandoned her claim to the disputed fee. Accordingly, he released the escrow

monies to his clients. Respondent testified that he "believed that [he] had an obligation to release the fund to [his] client * * * because there was no claim from Ms. Ver Strate for that money. She had abandoned and waived that claim." T6/8/1994 48-49. Respondent added that he was obligated to hold the monies in escrow only until the resolution of the fee dispute. In his view, there was a "resolution" of the fee dispute when Ms. Ver Strate declined to assert a claim for fees in the malpractice action.

* * *

At the conclusion of the ethics hearing, the DEC found that respondent had violated RPC 1.15(c), when

> * * * in the course of his representation of the DiLauros the respondent came into possession of property in which Helen B. Ver Strate, Esq., claimed an interest. The disbursement of the escrow funds in January of 1992 occurred at a time when there was still a viable interest in those funds in favor of the grievant, Helen B. Ver Strate, Esq., and said interest had not been severed as of that date.

The DEC also found that respondent had violated RPC 8.4(d) (conduct prejudicial to the administration of justice),

> * * * in that at the time he disbursed the escrow funds from his trust account in January of 1992 to his clients, the DiLauros, the Order of the Court (P-2) requiring said funds to be held in escrow pending resolution of the fee dispute had never been vacated in any way and was still effective. Essentially, the Committee found that respondent knowingly disbursed the funds despite the clear Court

Order requiring that they be held in escrow until the fee dispute was resolved.

CONCLUSION AND RECOMMENDATION

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

The DEC properly found that respondent violated RPC 8.4(d) and RPC 1.15 when he released the escrow funds to his clients without Ms. Ver Strate's knowledge and consent and, moreover, without a court order. Pursuant to the December 24, 1987 consent order, respondent was obligated to hold the monies in escrow until the resolution of Ms. Ver Strate's petition for counsel fees. Whether respondent was right or wrong in his interpretation of the entire controversy rule is irrelevant to a finding of unethical conduct. Respondent was obligated by court order to hold the monies in escrow for the benefit of his clients as well as of Ms. Ver Strate, until either Ms. Ver Strate dismissed her claim or the court ruled that she was not entitled to a fee. Until then, he was duty-bound to keep the funds inviolate in his escrow account. In fact, the circumstance that respondent did not release the funds to his clients until almost three and one-half years after the filing of the complaint for malpractice gives rise to an inference that he knew that his conduct was wrong. This conclusion is further supported by respondent's failure to notify Ms. Ver Strate, in

1992, of his release of the monies and his refusal to discuss the possibility of releasing the fees to her after the dismissal of the malpractice suit.

In In re Flayer, 130 N.J. 21 (1992), an attorney was publicly reprimanded for making unauthorized disbursements against escrow funds. In that case, the attorney represented himself in the purchase of real estate. Because certain repairs needed to be made on the property, the attorney and the builder agreed that the attorney would escrow funds to cover those repairs. When the repairs were not completed after a substantial time, the attorney became frustrated. He, therefore, wrote to the builder and his counsel on several occasions, demanding that the repairs be completed within a particular timeframe and, further, warning that, if the repairs were not made, he would arrange to have them undertaken at that builder's expense. When the attorney received no response to his letters and the repairs remained uncompleted, he used the escrow funds to make some repairs himself and to hire workers to make others. Acknowledging the clear impropriety of the attorney's conduct, for which he received a public reprimand, the Court nevertheless recognized his frustration in dealing with an unresponsive builder and counsel. See also In re Power, 91 N.J. 408 (1982) (public reprimand for improperly disbursing escrow funds to an architect in satisfaction of the architect's bill, after being falsely told by the client that the would-be purchasers had authorized the disbursement).

After consideration of all relevant circumstances, which

include respondent's acknowledgement to the Board that, in retrospect, he should have notified Ms. Ver Strate of the release of the funds and, further, should have sought the court's guidance, the Board unanimously recommends that respondent receive an admonition. Three members did not participate.

The Board further recommends that respondent be required to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 1/5/1995

By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board