Book
Order 2/10/98

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-092

IN THE MATTER OF	:
JOEL M. ALBERT,	:
AN ATTORNEY AT LAW	:

Decision

Argued: May 15, 1997

Decided: June 30, 1997

Linda Spiegel appeared on behalf of District IIB 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 discipline filed by the District IIB Ethics Committee ("DEC"). The two-count complaint charged respondent with violations of RPC 1.15(b)(failure to deliver to a third person funds to which the person is entitled to receive)in both counts.

Respondent was admitted to the New Jersey bar in 1961. He maintains a law office in Hackensack, New Jersey.

Respondent received a three-month suspension in 1990 for his conduct in two matrimonial matters, which included gross negligence, lack of diligence, failure to communicate, improperly withdrawing fees and failure to cooperate with ethics authorities. In re Albert, 120 N.J. 698(1990). He also received a private reprimand in 1985 for failure to comply with the DEC investigator's request for information about a grievance. In the Matter of Joel M. Albert, Docket No. DRB 84-381(September 16, 1985).

* * *

The crux of this matter is whether respondent reasonably relied on an attorney's oral representation that his adversary had authorized respondent to release escrow funds.

Respondent represented Joseph Palladino, his uncle by marriage, in a dispute regarding amounts owed to Palladino by his former son-in-law, Frank Gioia, the grievant in this matter. Palladino and Gioia were co-owners of a boat. Gioia was also a partner in a venture known as JDM Company Partnership. The partnership, which owned rental property in Beach Haven, New

Jersey, was comprised of Joseph Palladino and his wife, Gioia and his wife and Gioia's sister-in-law.

At some point prior to March 1992, the Gioias became involved in a bitter divorce battle. As a result, the partnership decided to sell the Beach Haven property and Palladino and Gioia agreed to sell their boat. Once Gioia's wife filed for divorce, Gioia discontinued contributing his share of the fees required to maintain the Beach Haven property.

Initially, Gioia was represented by Barry Croland, Esq. Thereafter, the law firm of Aronsohn & Weiner took over the representation. Gioia's wife, Mary Margaret, was represented by the firm of Rose and DeFuccio, and primarily by Larry J. Esposito, Esq., a lawyer in that firm.

The jointly owned boat was sold for $7,195.50. Respondent received a check in that amount on May 29, 1992. The parties had earlier agreed that respondent would deposit the proceeds of the sale in his trust account and divide the proceeds equally between Gioia and Palladino. Prior to the sale of the boat, however, an issue arose as to Gioia's arrearages on the Beach Haven property. The testimony from respondent and Gioia's first attorney, Barry Croland, seems to indicate that Gioia was aware that Palladino had a claim against Gioia's share of the boat proceeds for Gioia's

arrearages on the shore property. Those arrearages exceeded the value of Gioia's share of the boat. Croland believed that he had advised Gioia of the dispute and the fact that the money would not be disbursed to either Gioia or Palladino until the dispute was resolved. Nevertheless, Gioia's position throughout was that the two issues were unrelated and that he was entitled to his percentage of the proceeds immediately. Palladino, however, refused to authorize the release of Gioia's portion of the proceeds until the partnership issue was resolved. Several letters passed between the attorneys about the release of Gioia's portion of the proceeds and respondent's request for a set-off of the boat proceeds against Gioia's arrearages on the shore property. The dispute between Palladino and Gioia lasted throughout the pendency of the Gioias' divorce proceedings.

According to Esposito, Mrs. Gioia's lawyer, the Gioia divorce was acrimonious. The parties were in court on an ongoing basis, arguing motions for either the enforcement or the modification of orders. Esposito claimed that, at one point, the court required court approval of every expenditure made on behalf of the Gioias' three children. The judge even fashioned an informal process whereby Mrs. Gioia was required to submit information for expenses. Esposito claimed that, as a result of constant contact,

he and his adversaries had a good relationship; it was, therefore, unnecessary to send confirming letters on the many day-to-day matters in the case.

Eventually, an issue arose about the payment of the Gioias' daughter's tuition at Muhlenberg College. The attorneys tried to negotiate a resolution of the matter, to no avail. Esposito was, therefore, required to file an order to show cause to require Gioia to pay the tuition. At the hearing on the motion, the judge suggested that Gioia invade his 401K to pay the tuition. As an alternative, Gioia suggested that the tuition be paid from the Gioias' home equity line of credit, thereby making it a joint obligation. At that time, unbeknownst to the judge, to Mrs. Gioia and to Esposito, the line of credit had been frozen. Esposito's testimony suggested that it had been frozen at Gioia's request. Moreover, all but $10,000 of the line had been exhausted. As a result, the bank required the Gioias to requalify for the line of credit. Each of the Gioias submitted information to the bank on two separate occasions. Their applications were twice rejected. The bank ultimately declined to requalify them.

By this juncture, the Gioias had already received one extension of time to pay the tuition. Once the home equity loan was declined, the parties were left with very few alternatives.

While it was Gioia's sole obligation to pay for the tuition payments, because time was of the essence Mrs. Gioia offered to pay one-half of the tuition by cashing in her IRA and a small profit sharing plan (totaling approximately $7,000), if Mr. Gioia agreed to pay the remainder.

Esposito testified that he and Louis Cirrilla, Esq. (Gioia's attorney from Aronsohn & Weiner) discussed Mrs. Gioia's offer to pay for one-half of the tuition. The deadline for the payment, August 16, 1993, was quickly approaching. Esposito also informed Cirrilla that he was prepared to file another order to show cause to force Gioia to pay the tuition. Cirrilla, therefore, suggested that Gioia's share of the boat proceeds be used for the tuition. Following their conversation, Esposito believed that Cirrilla had given him oral authorization to have Gioia's share of the boat proceeds released from respondent's trust account. Esposito did not believe that he needed written authorization or a confirming letter to go forward. Following his conversation with Cirrilla, Esposito telephoned Mrs. Gioia to "tie up loose ends." He told Mrs. Gioia that he would call respondent to tell him what to do. 1T189.[1] Esposito thereafter attempted to contact respondent to no

[1] 1T denotes the transcript of the April 25, 1996 DEC hearing.

avail. Respondent had taken the day off, a Friday, and was out of town for the weekend. Because Esposito was scheduled to be out of the office the following Monday, he left instructions with one of the firm's associates, Sharon Clancy, Esq., about the details. Esposito also left a message at respondent's office.

Mrs. Gioia's father, Palladino, who had been informed of the oral agreement, "faxed" the following instructions to respondent on August 14, 1993:

> As discussed – please split boat amount in two – Make one check payable to me and the other check payable to MUHLENBERG COLLEGE – Charles DeFuccio will not be in Monday but a lady lawyer in his office named Sharon has more particulars if you need them. Mimi [Mrs. Gioia] will come to your office around 10:00 AM Mon. to pick up both checks.
>
> Also Charles DeFuccio wants to have a meeting with Mimi and I [sic] at 4:00 PM on Wednesday – Do you want to come too?
>
> [Exhibit 16]

Respondent testified that he contacted Sharon Clancy, an attorney from Esposito's firm whom he had known for several years, to confirm the details of the transaction. According to respondent, Clancy informed him that she had been advised that he had the authority to release the funds because there was an agreement between the parties. Respondent explained that he had

not been involved in the matrimonial proceedings and was, therefore, unaware of the dispute with regard to the tuition payment. Based on Clancy's representations, respondent released one-half of the funds to Palladino and also wrote a check for the remainder to Muhlenberg College.

According to respondent, he believed that his actions were reasonable because of his familiarity with Palladino, Mrs. Gioia, and the attorneys involved in the transaction. He had known all of them for years and considered them to be honest. Respondent acknowledged, however, that under similar circumstances he would never again release escrow funds without first obtaining written authorization.

Louis Cirrilla did not recall the events as clearly as did Esposito, nor did his testimony correspond with Esposito's. According to Cirrilla, Gioia's position was always that the issues of the boat proceeds and of the shore arrearages were independent of each other. Cirrilla claimed that rarely did a telephone conversation with Esposito go unconfirmed by a letter. Cirrilla remembered that there had been suggestions about using the proceeds from the boat for the tuition payments. His recollection was that Gioia had rejected the suggestion. Cirrilla recalled one conversation about the use of the proceeds after the bank denied

the requalification of the Gioias' line of credit. According to Cirrilla, he afterwards told Esposito that he would discuss the matter with Gioia. Although Cirrilla asserted that his client never authorized the release of the proceeds, he did not recall informing Esposito of Gioia's position. Cirrilla conceded that "it was just one of those things that kind of fell through the cracks." He never got back to Esposito. According to Cirrilla, it was not until he had a subsequent conversation with Esposito that he inquired, "Gee, where did you get the money for the tuition?" Cirrilla maintained that it was only then that he become aware that respondent had used the boat proceeds for the tuition payment.

The divorce proceedings between the Gioias ended in a settlement. As a result, Gioia was obligated to pay two-thirds of his daughter's tuition, while Mrs. Gioia was to be responsible for the remaining one-third. As part of the divorce settlement, Palladino purchased Gioia's interest in the Beach Haven property. Adjustments were made to Gioia's proceeds from that sale for the amounts he owed on the property.

At the second day of the DEC hearing, respondent offered the testimony of Richard Aronsohn, from the firm of Aronsohn & Weiner, whose testimony respondent believed to be critical. Respondent explained that Cirrilla worked for Aronsohn at the relevant time

and that Aronsohn's testimony would contradict Cirrilla's. Specifically, respondent maintained, Aronsohn would testify that Cirrilla had informed Aronsohn that an agreement had been made about the release of the boat proceeds.

Based on respondent's representations, the DEC determined that both Aronsohn's and Clancy's testimony was necessary. Unfortunately, at the time of the hearing, Aronsohn was undergoing chemotherapy. He subsequently passed away. The matter was decided without his or Clancy's testimony.

* * *

The DEC concluded that as to count one respondent's conduct was not unethical because there was a bona fide dispute as to the entitlement of the proceeds from the sale of the boat. The DEC, therefore, declined to find that respondent's failure to promptly deliver one half of the proceeds to Gioia was a violation of RPC 1.15(b).

The DEC did find, however, a violation of RPC 1.15(b) in the second count, concluding that respondent's conduct in releasing Gioia's funds to a third-party, Muhlenberg College, without first obtaining the authorization of either Gioia or his attorney, was a

violation of that rule. The DEC recommended that respondent be reprimanded.

* * *

Upon a de novo review of the record the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

Like the DEC, the Board found that the evidence established the existence of a bona fide dispute about the distribution of the proceeds from the sale of the boat. Accordingly, count one of the complaint should be dismissed. Count two charged respondent with a violation of RPC 1.15(b), which states, in relevant part, that "a lawyer shall promptly deliver to . . . [a] third person any funds or other property that the . . . third person is entitled to receive." Respondent's conduct in this matter does not fall squarely within this section of the rule. The crux of this case is whether respondent reasonably relied on the representations of Mrs. Gioia's attorneys that he could release her husband's share of the proceeds in payment of their daughter's tuition. As noted by the presenter:

> We're not disputing that Mr. Esposito told Mrs. Gioia what happened and she acted according to what her attorney told her. There's no dispute. . . . In terms to [sic] Mr. Aronsohn, I don't disagree that under certain circumstances, an attorney binds a client. We do this every day of the week. The question that we have here is whether or not the authorization given to Mr. Albert was the correct authorization. And I understand that he relied on another attorney. Okay? And I don't doubt that he had dealings with them and he felt he had reason to rely on them. That is not what's in dispute. The dispute is should they have been relied on, regardless of their honesty. There is no question here, should respondent have relied on the representations of an attorney, that it was proper for him to release the funds he was holding in his trust account.

In this matter time was of the essence. The Gioia's daughter's tuition was due; one tuition deadline had already passed. Esposito's position was that he would be filing an order to show cause if Gioia did not come up with the money. Since Gioia was responsible for the tuition, it was very likely that the court would have ordered the release of the boat proceeds. It was, therefore, reasonable for respondent to have assumed that Cirrilla did, in fact, authorize the release of the funds, possibly without his client's approval. What respondent could not know is whether Cirrilla spoke for his client without authorization and relayed that information to Esposito, or whether Esposito improperly

authorized respondent to release the funds. Thus, respondent had a duty to personally obtain authorization from Gioia's attorney to release the escrow funds. His conduct in this regard violated RPC 1.15(b).

The facts of this case do not support a finding of knowing misuse of escrow funds for which disbarment would be appropriate à la In re Hollendonner, 102 N.J. 21(1985). Rather, the evidence here allows the conclusion that respondent relied on Mrs. Gioia's attorney's statement that Gioia and/or his attorney had agreed to release the escrow funds to pay the college tuition. Under this scenario respondent erred only in failing to confirm the consent in writing, a technical violation.

In a real estate matter, an attorney was privately reprimanded for releasing the balance of escrow funds to his client, when he was unable to obtain bills from two of his clients' creditors. He released the funds with the understanding that his client would be responsible for paying those bills directly. The attorney, however, failed to obtain the consent for the release of the monies from the other party to the escrow agreement. In another real estate matter, the attorney also improperly disbursed escrow funds without authorization, consent or approval from the seller or his attorney. In imposing only a private reprimand, the Board

considered that the attorney honestly believed that his client was entitled to the monies and that the attorney had taken appropriate steps to insure that the grievant had been made whole. In yet another case, the attorney was privately reprimanded for unilaterally disbursing escrow funds in a real estate transaction to his client, without any notice to the other party or that party's attorney. The attorney ultimately returned the escrow funds.

In one case, an attorney received a public reprimand for releasing escrow funds to himself as buyer of real property. In re Flayer, 130 N.J. 21(1992). Flayer held the escrow funds. However, when he became dissatisfied with the builder's non-performance, respondent notified the builder that if he did not make the necessary repairs, respondent would take care of the problems at the builder's expense. Respondent then withdrew the funds to complete the repairs. Finding that Flayer's notice to the builder was insufficient and that he had breached the escrow agreement, the Court imposed a reprimand.

After consideration of the relevant circumstances, including that respondent's prior ethics problems took place more than seven years ago, the Board unanimously determined that an admonition was sufficient discipline for respondent's ethics transgression.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 6/30/97

LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joel M. Albert
Docket No. 97-092

Hearing Held: May 15, 1997

Decided: June 30, 1997

Disposition: Admonition

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling				x			
Zazzali				x			
Brody				x			
Cole				x			
Lolla				x			
Maudsley				x			
Peterson				x			
Schwartz				x			
Thompson				x			
Total:				9			

Robyn M. Hill 7/14/97

Robyn M. Hill
Chief Counsel