Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 18-220
District Docket No. XIV-2017-0248E

In The Matter Of	:	
Annette P. Alfano	:	
An Attorney At Law	:	Dissent

Argued: September 20, 2018

Decided: December 12, 2018

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

The majority has recommended that respondent be suspended from the practice of law for three months for her violations of RPC 1.15(b) (failure to deliver funds to a third party that the third party is entitled to receive), RPC 4.1(a) (making a false statement of material fact to a third person) and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation). We dissent from that recommendation for the reasons that follow and recommend that she be censured.

Our disagreement with the majority is with the degree to which it recommends enhancing the sanction to a three-month suspension from what otherwise would be, at most, a reprimand. While we agree that the admonition adjudicated by the special master who heard this case is insufficient, we believe that no more than a censure is justified by the facts and our precedent. Indeed, as discussed below, the majority cites no precedent in which more than a reprimand was imposed for these same RPC violations.

The facts, in summary, are as follow: respondent represented The Community Group, LLC of which Kerry Gillon was the principal and authorized agent. In February 2010, Gillon entered into an agreement with Jaswant Masson to purchase, rehabilitate and sell a New Jersey property. At about the same time, Gillon asked Masson to provide $40,000 in connection with a different real estate transaction, a request to which Masson agreed if the money were held by respondent in escrow. On February 22, 2010, respondent wrote to Masson stating the terms of the escrow agreement, namely, (a) she would hold the money until title on the property closed; (b) if the closing did not occur within five weeks, the money would be returned; and (c) Gillon would pay a "service fee" of $1,300 per week until the money was returned.

About a week later, on March 2, 2010, Gillon signed a promissory note requiring repayment of the $40,000 in weekly $1,300 "service fee" increments,

with full repayment due by April 2, 2010. Masson did not provide his $40,000 check until the promissory note was signed but then did so that same day.

The special master found that "the relationship, if any between [the February 22, 2010 escrow agreement] and the promissory note dated March 2, 2010 is ambiguous at best." Both Gillon and respondent testified that that the promissory note superseded the February 22, 2010 escrow agreement. Respondent testified that she believed, based on conversations with her client, Gillon, that the promissory note had changed the terms of the escrow arrangement stated in her February 22, 2010 letter. Likewise, Gillon also testified that the original escrow arrangement was modified by the promissory note and that she believed she could use the $40,000 as she saw fit. Masson, however, testified that the promissory note was an "extra guarantee for escrow agent" with the escrow agreement still in effect. On this point, the special master found that respondent "believed, based on confusing facts, to many of which [respondent] was not privy, that she had Gillon's authorization to disburse the funds in question, and that Gillon had authority to direct the disbursement of those funds." The special master also "found respondent to be credible, although in many instances uninformed and confused, largely because her own client did not keep her informed" and found aspects of Masson's testimony and Gillon's testimony to be "incredible."

Nonetheless, respondent stipulated that she violated the escrow terms stated in her February 22, 2010 letter when, from March 3 to March 15, 2010, she disbursed the entire $40,000 to various parties, pursuant to Gillon's instructions, without obtaining Masson's permission to do so. She also stipulated that she should have confirmed with Masson Gillon's representation that the promissory note superseded the escrow agreement and that the $40,000 was actually a loan. It was based on this stipulation that the special master found a violation of RPC 1.15(b).

When Gillon stopped making the $1,300 payments, Masson's attorney wrote to respondent requesting return of the $40,000 and, on May 20, 2010, respondent answered, saying in part, "If the parties are unable to resolve this matter amicably, I will have no alternative but to place the money with the court for the parties to resolve in litigation." This was a misrepresentation because, by then, respondent had released the money as per her client's instructions and could not have placed the money with the court.

Despite the ethics lapses that it found, the majority recognizes that "tangled facts" exist here. It is these tangled facts that lend support to respondent's claim, despite her stipulation, that the promissory note constituted a novation of the prior escrow agreement.

Most important from our point of view is the fact that the majority cites not a single case where more than a reprimand was imposed for the RPC violations found here. As it states (at p.13), "[a]ttorneys have received admonitions or reprimands for the improper release of escrow funds, in violation of RPC 1.15(a) and (b)" and (at p.16), "[a] reprimand is the typical discipline for violations of RPC 4.1 and RPC 8.4(c)...."

While the majority says (at p.19) that respondent "has shown a propensity to violate the RPCs," there is no support for this statement, which appears to be a weak attempt to justify the enhanced discipline. Indeed, respondent was admitted to the New Jersey Bar in 1984, over 30 years ago, and was subject discipline only once before, in 2015, when she was admonished for identical misconduct as occurred here — improperly releasing escrow funds. But it is noteworthy that the 2015 admonition was for conduct involving the same client that occurred in June and August 2010 — after the events in this case. She has not been subject to discipline for any misconduct occurring since mid-2010, almost nine years ago. And, as the majority acknowledges, because the conduct in this matter occurred prior to that for which she was earlier admonished, it cannot be said that she didn't learn from her mistakes. Thus, there is simply no basis to enhance discipline based on her minor and subsequent disciplinary infraction.

Finally, we note that the majority credited respondent with no mitigation although noteworthy mitigating factors should have been considered. For one, it is significant that respondent's misconduct occurred long ago, in early to mid-2010. By the time the Court renders its decision, nine years likely will have passed since respondent improperly released Masson's escrowed funds. The complaint was not even filed until June 19, 2017, more than seven years after the events in question. Passage of time has been considered a mitigating factor, one not mentioned by the majority. See, e.g., In re Verdiramo, 96 N.J. 183 (1984) (finding mitigation where events occurred more than eight years earlier, noting "the public interest in proper and prompt discipline is ... irretrievably diluted by the passage of time"); In the Matter of Robert B. Davis, 230 N.J. 385 (2017) (imposing significantly lesser discipline than otherwise warranted since, as stated in the Order, there was "extraordinary delay in initiating disciplinary proceedings").

In addition, respondent's response to the ethics system has been respectful and cooperative. As the special master found, she "has cooperated with ethics officials from the beginning of this matter, underscored by her stipulations to all facts asserted by the Office of Attorney Ethics." Her cooperation and admission of wrongdoing is a second mitigating factor omitted by the majority.

Importantly too, while respondent used poor judgment, her actions were, as found by the special master, not motivated by personal gain. Rather they seem to have been motivated by a desire to assist her client. Indeed, respondent charged no fee for any of her acts in this matter and realized no personal benefit at all.

In short, even though the release of the escrowed funds caused Masson to suffer economic harm, the majority's decision to increase what would normally be a reprimand by two "levels" to a three-month suspension is not warranted by the facts or the precedent under the relevant RPCs. We recommend that respondent be censured, but not suspended.

Disciplinary Review Board
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