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

Decision

Argued: September 20, 2018

Decided: December 12, 2018

Christina Blunda appeared on behalf of the Office of Attorney Ethics.

Scott B. Piekarsky appeared on behalf of respondent.

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

On June 21, 2018, this matter was before us on a recommendation for an admonition filed by a special ethics master. We determined to treat the matter as a recommendation for greater discipline, in accordance with R. 1:20-15(f)(4), and to bring it on for oral argument.

The formal ethics complaint charged respondent with violating RPC 1.15(a) and the principles of In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1985) (knowing misappropriation of escrow funds); RPC 1.15(a) (failure to safeguard property belonging to a client or third party); RPC 1.15(b) (failure to promptly disburse funds); RPC 4.1(a)(1) (making a false statement of material fact or law to a third person); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The Office of Attorney Ethics (OAE) urges respondent's disbarment for knowingly misappropriating escrow funds. Respondent contends that she did not knowingly misappropriate escrow funds, and, therefore, disbarment is not warranted. For the reasons set forth below, we determine to impose a three-month prospective suspension.

Respondent earned admission to the New Jersey bar in 1984. At the relevant time, she maintained a solo law practice in Scotch Plains, New Jersey. Since April 2014, she has been employed as an associate at the Law Offices of Peter N. Laub, Jr. & Associates, in Branchburg, New Jersey.

This matter constitutes respondent's second encounter with the disciplinary system. In 2015, she was admonished for nearly identical misconduct – the improper release of escrow funds, in violation of RPC 1.15(a). In that case, in June and August 2010, respondent improperly relied on

the instructions of clients, including the same client underlying this matter, and disbursed $32,500 in escrow funds. In the Matter of Annette P. Alfano, DRB 15-079 (May 27, 2015). Although respondent admitted that she neither sought nor received the authorization of the relevant third parties to disburse their escrow funds, she avoided harsher discipline because no express, written agreement governed the disbursement of those funds. Ibid.

We now turn to the facts of this case. During the relevant time period, respondent was a solo practitioner, prior to her association with Peter Laub. In 2010, she represented The Community Group, LLC (TCG), a company engaged in buying, renovating, and selling real estate. Kerry Gillon was the principal and authorized agent of TCG, which was located in the same office building as respondent's law office. Respondent also represented Community Development Resources Corporation, another of Gillon's entities, which engaged in the same business pursuits as TCG, in a non-profit capacity.

In February 2010, Gillon entered into an agreement with Jaswant Masson to purchase, rehabilitate, and sell a residential building in Hillside, New Jersey. Pursuant to the agreement, Masson would purchase the building, TCG would rehabilitate it, the property would be sold, and Masson and TCG would share in the profit.

During the same time frame, Gillon, acting in her capacity as principal of TCG, requested that Masson provide her with $40,000, to be held in escrow, in connection with a different real estate transaction, involving the purchase of property in Newark, New Jersey. Gillon would leverage the funds escrowed by Masson to "show the seller of the Newark property that she had $40,000 in escrow." After meeting respondent, Masson agreed to provide the $40,000, provided "it would be held in escrow" in respondent's attorney trust account.[1]

Respondent concedes that she "agreed to serve as the escrow agent" for the $40,000 that Masson advanced to Gillon. On February 22, 2010, respondent wrote to Masson, on her law firm letterhead, setting forth the terms of the escrow arrangement:

> This letter is to advise you that this firm will be holding the sum of $40,000 in regard to the purchase of a new construction, 2-family property, located at [] Newark, New Jersey. Upon receipt of these funds, same will be held until closing of title. If the closing does not take place within five weeks from date of this letter, the funds will be returned to you.
>
> It is further acknowledged that a service fee of $1,300.00 a week will be paid [by Gillon to Masson] until the funds are returned.

[1] The formal ethics complaint did not allege a violation of RPC 8.4(c) in respect of this deceitful conduct.

Masson testified that he relied on this letter, trusting that respondent would serve as the escrow agent for the $40,000, and that she would not release his funds to anyone but him.

About a week later, on March 2, 2010, Gillon, in both her individual capacity and as the authorized agent for TCG, executed a promissory note memorializing a $40,000 loan from Masson. The terms of the note required weekly payments of $1,300, from Gillon to Masson, couched as a "service fee," with the full principal sum to be repaid on or before April 2, 2010. Respondent signed the note as a witness. The note did not contain any language modifying or contradicting the terms of respondent's February 22, 2010 letter to Masson.

Also on March 2, 2010, Masson issued a $40,000 check, payable to respondent's attorney trust account with Bank of America, which respondent immediately deposited into escrow. Masson testified that he specifically wrote the check to respondent's trust account, and noted "attorney trust account" on the "memo" line of the check, to memorialize respondent's role as the escrow agent for the $40,000. Moreover, he asserted that the promissory note did not modify the escrow arrangement, but, rather, provided him with additional security for the $40,000 he had contemporaneously placed in escrow with respondent.

Thereafter, between March 3 and March 15, 2010, respondent disbursed the entire $40,000 to various parties, pursuant to Gillon's instructions, for the benefit of Gillon. Respondent conceded that she neither sought nor obtained the consent or authority of Masson or his attorney, Alan Gottlieb, in respect of those disbursements.

On May 18, 2010, respondent wrote to Gottlieb, stating, in pertinent part:

> I have consulted with [Gillon] and wish to present the following information . . . Our respective clients entered into an agreement to become partners in the purchase of a three family property in Hillside, New Jersey. My client located the property and facilitated the purchase by Mr. Masson's wife . . .
>
> [A] management agreement was prepared [on behalf of Gillon] and presented to your client whereby [Gillon] would receive 30% of the net profits of the sale of the property in Hillside . . .
>
> In return for the loan from Mr. Masson, my client signed a promissory note and agreed to pay $1,300 per week until the closing of title for a property in Newark which was anticipated to close five weeks after the loan was made. Before the end of the five-week period, the parties met in person and agreed that the term would be extended until the property closed. It has not closed as yet; however, we expect the closing to take place in approximately two weeks. Your clients received payments for at least seven weeks, including [payments made] after the meeting, which would evidence their agreement to the extension . . .

> The situation became a problem when the payments of $1,300 stopped, due to the fact that your client refused to sign the management agreement or propose any changes thereto.

When Gillon stopped making the $1,300 weekly payments required pursuant to the note, Masson, through Gottlieb, requested the return of his $40,000. Respondent conceded that she could not return the $40,000 to Masson, because she had already disbursed it.

Respondent and Gillon both admitted that Gillon had made multiple $1,300 "interest" payments to Masson using his own money, in other words, using a portion of the $40,000 in escrow to pay Masson.

On May 20, 2010, Masson's attorney, Gottlieb, replied to respondent's letter, "reminding her of her obligations" pursuant to her February 22, 2010 correspondence:

> [My clients] advise me that there was no coupling between the Hillside [transaction] and the $40,000 that was given to you to be held in your trust account pursuant to the terms of your letter dated February 22, 2010, which specifically states that if closing does not take place within five weeks . . . the funds would be returned to Mr. Masson. In addition, I am sure you are aware, that service fee is at least seven weeks in arrears and you are in violation of your escrow agreement by not returning the funds.
>
> The escrow agreement does not require in any way the permission of your client and as an attorney you are bound by the terms of that correspondence. Furthermore, [the promissory note executed by Gillon

> in favor of Masson] does not tie the payment in any way to the Hillside property.

That same date, May 20, 2010, respondent replied to Gottlieb, stating, in pertinent part:

> Whether or not the two transactions are related . . . money was not loaned to me. I was designated as the escrow agent by my client. Your client did not sign any agreement with me. The payment of service fees is the responsibility of my client, not me.
>
> When my client advised me that the terms of the agreement between the parties had been extended . . . I was not in a position to release the monies. I would then be facing possible litigation from my client for violating my client's instructions.
>
> 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.

During the ethics hearing, respondent conceded that she had served as the escrow agent for both parties to the loan transaction, as she had acknowledged in the joint stipulation of fact underpinning this matter. Moreover, respondent admitted that, when she wrote her second letter to Gottlieb, she had already disbursed the entirety of Masson's $40,000, and, thus, could not have placed those funds with the court, unless Gillon had returned the funds. She further conceded the accuracy of the position taken by Masson and his attorney, specifically, that "the agreement [between Masson

and Gillon] was totally unrelated to the agreement with respect to the Hillside property."

Despite the admissions contained in the stipulation, respondent testified that she was under a belief, based on conversations with Gillon, that the promissory note had changed the terms of the arrangement between Masson and Gillon and, thus, allowed Gillon to use the $40,000 as she saw fit. She conceded, "in hindsight," that the other arrangement should have been formally "voided," but had not been. Respondent asserted that she was not "privy" to the details of the new agreement, but, rather, simply relied on Gillon's representations. Respondent testified that she was not paid any legal fees in respect of these matters, and never received any portion of Masson's $40,000, but, rather, had assisted Gillon as an "accommodation."

Gillon also testified that the original arrangement with Masson regarding the $40,000 was ultimately modified, that the promissory note was a novation, and that she was allowed to use the $40,000 as she saw fit. She conceded that she had no documentary evidence to support her position regarding Masson's agreement to such a modification.

Ultimately, Masson filed a lawsuit and obtained judgments, for more than $160,000, against Gillon and respondent. Masson testified that, as of the

date of the ethics hearing, he had not received any funds from Gillon or respondent toward satisfaction of those judgments.

The special master determined that respondent committed violations of RPC 1.15(b), RPC 4.1(a), and RPC 8.4(c). She made those findings summarily, based on the facts in the stipulation submitted by the parties.

The special master determined, however, that respondent had not knowingly misappropriated escrow funds. Specifically, the special master erroneously interpreted disciplinary precedent, stating that, in order for an attorney to be guilty of a Hollendonner violation, the attorney must take the escrow funds for himself or herself. She, thus, concluded that, because respondent had not taken Masson's money for her own benefit, she did not violate Hollendonner. Further, the special master failed to address the allegation of the complaint, separate from the Hollendonner charge, that respondent had failed to safeguard Masson's funds, in violation of RPC 1.15(a).

In mitigation, the special master noted respondent's cooperation with disciplinary authorities and lack of pecuniary gain. No aggravating factors were cited.

The special master recommended that respondent receive an admonition.

Following a de novo review, we are satisfied that the record clearly and convincingly establishes that respondent was guilty of unethical conduct. Specifically, we determine that she violated RPC 1.15(a) and (b), RPC 4.1(a), and RPC 8.4(c). We determine to dismiss the allegation that respondent knowingly misappropriated escrow funds, in violation of RPC 1.15(a) and the principles of In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1985), as there is insufficient evidence to support that charge.

The record contains sufficient facts for us to find that respondent failed to properly safeguard Masson's escrowed funds. Respondent stipulated that she agreed to serve as the escrow agent for the $40,000 that Masson advanced in behalf of Gillon, memorializing that arrangement in her February 22, 2010 letter to Masson. She then failed to fulfill her fiduciary duties to Masson, however, and disbursed those funds at Gillon's direction, without seeking authorization from Masson, or confirmation from him that the business arrangement between Masson and Gillon had been modified.

Respondent's wholesale reliance on the representations of her client, Gillon, whereby she proceeded to disburse the entirety of Masson's escrow funds, without seeking or obtaining his prior consent or authorization, was reckless. Respondent admitted that, by making the disbursements, she violated the escrow terms set forth in her February 22, 2010 letter to Masson, on which

he relied, in conjunction with the promissory note, in advancing the $40,000 in escrow monies to respondent. She also acknowledged that she should have taken measures to confirm Gillon's representation that the promissory note superseded the escrow agreement, and, therefore, that a meeting of the minds existed between Masson and Gillon in respect of Gillon's use of the $40,000 as a pure loan.

Respondent's failure to hold Masson's funds, inviolate, unless he authorized their disbursement to another party, resulted in her inability to return his funds to him when he made a proper demand for them. Respondent, thus, violated RPC 1.15(a) and (b). As a result of her misconduct, Masson suffered serious economic injury.

Moreover, the record contains clear and convincing evidence that respondent made blatant misrepresentations in her second letter to Masson's attorney, in violation of RPC 4.1(a)(1) and RPC 8.4(c). Specifically, when Gottlieb requested the return of Masson's $40,000, respondent already had disbursed those funds at Gillon's direction. Yet, she claimed that she was "not in a position to release the monies" without incurring potential liability, and, thus would need to "place the money with the court" if the parties could not resolve the matter.

Respondent realized that she had committed misconduct by releasing the escrowed funds in reliance on Gillon's representations, without first having obtained Masson's authorization. Respondent's false statements, thus, were calculated to create the appearance, to both Masson and his attorney, that she was holding Masson's funds in escrow, as she had agreed to do. Respondent, therefore, violated both RPC 4.1(a) and RPC 8.4(c).

Attorneys have received admonitions or reprimands for the improper release of escrow funds, in violation of RPC 1.15(a) and (b). In In the Matter of Joseph Jerome Fell, DRB 10-328 (January 25, 2011), the attorney received an admonition after improperly releasing $325,000 in escrow funds to his client, the seller of a one-third interest in a business, without verifying that certain contingencies had been satisfied. There, no written agreement governed the release of the escrowed funds. Rather, the buyers had verbally instructed the attorney not to release their funds to his client until all contracts and operating agreements had been fully executed and approved by the buyers' attorney.

Based on his review of a document provided to him by his client, the attorney mistakenly believed that the required contingencies had been completely satisfied. He, thus, prematurely disbursed the escrow funds to his client.

In In the Matter of Michael D. Landis, DRB 09-395 (March 19, 2010), the attorney received an admonition after improperly releasing $86,500 in escrow funds to his client, the buyer under a contract of sale to purchase residential property. When his client failed to appear for the closing, the seller sent the attorney a letter claiming that his client was in breach of the contract; the attorney sent a reply, maintaining that the contract was null and void. The contract stated that, in the event of a disagreement between the parties over the disbursement of the escrow, the deposit monies could be placed with the court, until the dispute was resolved.

Despite the express language of the agreement, the attorney unilaterally set a two-week deadline for the sellers to challenge the contract. At the expiration of the two-week period, the attorney improperly disbursed the escrow monies to his client.

The following cases also provide some guidance in this matter: In re Spizz, 140 N.J. 38 (1995) (admonition for attorney who, against a court order, released to his client funds escrowed for the fees of a former attorney, and misrepresented to the court and to the former attorney that the funds remained in escrow; the attorney asserted that the former attorney had either abandoned or waived her claim for the fee, and that, thus, his obligation to hold the funds had ended); In re De Clement, 214 N.J. 47 (2013) (motion for discipline by

consent; reprimand for attorney who failed to safeguard funds in which a client or third party had an interest, and released a portion of $75,000 he had agreed to hold in escrow, in connection with a joint venture agreement between his client and a third party, without first obtaining the third party's consent; no escrow provision governed the attorney's actions, but the $75,000 check deposited by the attorney included a notation identifying it as an escrow deposit, and the joint venture agreement identified the attorney as the "escrow attorney;" the attorney, however, was never provided a copy of the joint venture agreement, and improperly relied on his client's assurance that he was allowed to use a portion of the escrow funds to cover expenses associated with the joint venture); In re Holland, 164 N.J. 246 (2000) (reprimand for attorney who was required to hold, in trust, a disputed fee in which she and another attorney had an interest; instead, the attorney took the fee, in violation of a court order; the attorney claimed that she believed that a subsequent court order had entitled her to the entire fee, and, thus, she had made a mistake, rather than knowingly defied a court order; those defenses were rejected); and In re Milstead, 162 N.J. 96 (1999) (reprimand for attorney who disbursed escrow funds to a client, in violation of a consent order).

As we summarized in De Clement, in the cases cited above, the attorneys held reasonable, although mistaken, beliefs that, for one reason or another, the

release of escrow funds was appropriate. In the Matter of David M. De Clement, DRB 12-390 (June 11, 2013). Stated differently, the above cases can be characterized as fact patterns where "premature disbursement," or disbursement under a colorable dispute occurred.

A reprimand is the typical discipline for violations of RPC 4.1 and RPC 8.4(c), absent other serious ethics infractions or an ethics history. See, e.g., In re Walcott, 217 N.J. 367 (2014) (attorney misrepresented to a third party, in writing, that he was holding $2,000 in escrow from his client as collateral for a settlement agreement; violations of RPC 4.4(a)(1) and RPC 8.4(c)); In re Chatterjee, 217 N.J. 55 (2014) (for a five-year period, the attorney misrepresented to her employer that she had passed the Pennsylvania bar examination, a condition of her employment; she also requested, received, but ultimately returned, reimbursement for payment of the annual fee required of Pennsylvania attorneys; compelling mitigation considered); In re Liptak, 217 N.J. 18 (2014) (attorney misrepresented to a mortgage broker the source of the funds she was holding in her trust account; attorney also committed recordkeeping violations; compelling mitigation); In re Egenberg, 211 N.J. 604 (2012) (attorney was guilty of engaging in a conflict of interest in a real estate transaction and making misrepresentations on a RESPA statement, in violation of RPC 4.1(a) and RPC 8.4(c); we found, as significant mitigating factors, the

attorney's unblemished twenty-three-year career at the time of his misconduct, and the thirteen years that had passed, without incident, before the grievance was filed); and In re Frey, 192 N.J. 444 (2007) (attorney, while representing a purchaser, misrepresented to a real estate agent that he had received an additional deposit of $31,900; when the attorney received from his client an $11,000 installment toward the deposit, he later released those funds to his client, despite his fiduciary obligation to hold them and to remit them to the realtor).

Here, whether respondent's alleged knowing misappropriation of Masson's escrow funds was not for her personal benefit but, rather, for the benefit of Gillon, is simply not relevant. Attorneys are disbarred for knowing misappropriation without regard to such motives, and the Court has generated no decision so anchoring a Hollendonner violation to the personal use of the escrow funds by the attorney. See In re McCue, 153 N.J. 365 (1998) (as trustee of a trust with considerable assets, the attorney transferred $500,000 to another trust unrelated to the first trust; the attorney was found to have knowingly misappropriated trust funds, although the record contained no evidence that the attorney used those funds for his personal benefit; he was ordered, by a court, to return compensation he had distributed to himself, as trustee, in light of his fraud and negligence in administering the trust).

In this matter, respondent is again guilty of the improper release of escrow funds. Like the attorneys in De Clement, Holland, and Milstead, who were reprimanded, respondent improperly released escrow funds without first performing the diligence required of an attorney serving as an escrow agent. After specifically representing to Masson that she would hold his funds, inviolate, until the release deadline, she disbursed his funds without making any effort to confirm whether her client's business arrangement with Masson had truly morphed into a pure loan. Although the tangled facts of this case – specifically the novation argument - spare respondent from disbarment under Hollendonner, her serious misconduct beckons more than an admonition.

Moreover, realizing that she had acted improperly, respondent made egregious misrepresentations to Masson and his attorney. Those misrepresentations were made in an effort to conceal her wrongdoing or to salvage the situation, by implying that she was still holding Masson's $40,000, inviolate, in her attorney trust account. In aggravation, Masson suffered serious economic harm as a result of respondent's misconduct.

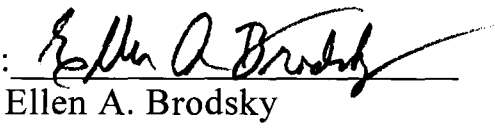
Finally, we evaluate this case in the context of respondent's prior admonition for nearly identical misconduct. This second instance is almost contemporaneous with the misconduct for which she was previously sanctioned. Although it cannot be said that respondent has failed to learn from

her past mistakes, she has shown a propensity to violate the RPCs. Based on the disciplinary precedent set forth above, and considering the harm to Masson, we determine that a three-month suspension is the appropriate quantum of discipline for respondent's violations of RPC 1.15(a) and (b), RPC 4.1(a), and RPC 8.4(c).

Vice-Chair Clark and Members Boyer and Singer voted to impose a censure. Member Hoberman 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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Annette P. Alfano
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Decided: December 12, 2018

Disposition: Three-Month Suspension

Members	Three-Month Suspension	Censure	Recused	Did Not Participate
Frost	X			
Clark		X		
Boyer		X		
Gallipoli	X			
Hoberman				X
Joseph	X			
Rivera	X			
Singer		X		
Zmirich	X			
Total:	5	3	0	1

Ellen A. Brodsky
Chief Counsel