Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 20-090
District Docket No. XIV-2015-0268E

In the Matter of	:
Bruce M. Pitman	:
An Attorney at Law	:

Decision

Argued: September 17, 2020

Decided: March 3, 2021

Steven J. Zweig appeared on behalf of the Office of Attorney Ethics.

Andrew M. Epstein appeared on behalf of respondent.

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

This matter previously was before us at our March 19, 2020 session, as a post-hearing appeal from a determination of a special master to dismiss the ethics complaint. We determined to treat the matter as a presentment and to bring it on for oral argument. The formal ethics complaint charged respondent with having violated RPC 1.15(a) (failure to safeguard funds); RPC 1.15(b) (failure to promptly notify

clients or third parties of receipt of funds in which they have an interest); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons set forth below, we determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1971 and to the New York bar in 1977. At the relevant times, he was a partner at Pitman, Mindas, Grossman, Lee, & Moore P.C., in Springfield, New Jersey. He has no prior discipline in New Jersey.

In late 2014, Blanche Ryder retained the grievant, Keith N. Biebelberg, Esq., in connection with contemplated divorce proceedings against her husband, Christopher Ryder.[1] Christopher was the sole member of Beach Bum Tanning, LLC, which he had acquired during the marriage. On December 1, 2014, Biebelberg wrote to Christopher, identified himself as counsel for Blanche, and remarked that "the tanning salon in East Hanover which the two of you own as members of [BBT] is for sale."[2] Biebelberg informed Christopher that Blanche was in favor of the sale, but lacked details to which she had a right, and stated that there was a "substantial

[1] At the outset of the hearing, the Office of Attorney Ethics (OAE) called Biebelberg as a witness and moved to qualify him as an expert witness in matrimonial law. Despite several significant reservations, the special master qualified Biebelberg as an expert, but reserved the right to accept or reject his expert opinion. The special master chose to disregard Biebelberg's expert testimony.

[2] Although, at that time, Biebelberg believed that Blanche was an owner of BBT, Christopher was the sole record owner of the business. Blanche had worked at BBT.

amount of money at stake." Biebelberg further asked Christopher to provide contact information for any attorney representing BBT. He closed his letter by informing Christopher that, if Blanche's efforts to ascertain information were "delayed or thwarted," he would be forced to seek restraints in New Jersey Superior Court via an Order to Show Cause. On December 4, 2014, Christopher called Biebelberg and informed him that the sale had fallen through and that he had not yet retained an attorney to represent BBT. That same date, Biebelberg memorialized the telephone conversation in a letter to Christopher.

Biebelberg testified that getting information about BBT and its potential sale was very important to him. Blanche had informed him that the business had been acquired during the marriage and, in Biebelberg's view, because it was a marital asset, she would be entitled to up to fifty percent of BBT's sale proceeds.

Previously, on July 23, 2014, respondent had been introduced to Christopher through a client, Salvatore Perillo. Christopher, Perillo, and a third person were entering into a joint venture and had asked respondent's firm to handle lease negotiations in connection with a restaurant, and to draft an operating agreement for the joint venture. Respondent referred the joint venture transaction to his law partner, Marcia Moore.

In early December 2014, in connection with the operating agreement for the joint venture, Christopher contacted Moore regarding the capital contributions he

was required to make. Because Christopher did not have the required cash, he proposed raising capital by marketing his one-third interest in the venture to outside investors. Christopher asked Moore whether Blanche would have a claim to an interest in his share of the venture. At that time, he did not discuss with Moore his marital difficulties.

On December 5, 2014, Moore sent an e-mail to respondent, relaying Christopher's inquiry. She informed respondent of her opinion that, under the terms of the joint venture operating agreement, Blanche would not have such a right; however, Moore asked respondent to confirm that opinion from a matrimonial law perspective. Moore could not recall having received a reply from respondent.

In December 2014, Christopher filed a request for a temporary restraining order (TRO) against Blanche, requiring her to leave the marital home where she and Christopher were cohabiting. On December 24, 2014, the return date for the TRO, Christopher asked respondent to appear with him at the hearing and retained him for the divorce. Respondent appeared for the TRO hearing, which was adjourned to January 7, 2015.

Biebelberg met respondent at the TRO hearing and, on January 5, 2015, sent respondent a letter enclosing copies of all his previous correspondence with Christopher and requested an update regarding the sale of BBT. In his reply to the underlying ethics grievance, respondent denied having seen Biebelberg's January 5,

2015 letter until after the sale of BBT had occurred, on February 25, 2015. During his testimony, however, respondent admitted that he had received the letter on either January 5 or 6, 2015, and that the "letter told me that he was requesting that he be kept abreast of the sale. Of course, he could have no knowledge of my confidential communications with my client."

On January 7, 2015, the second return date for the TRO hearing, Alona Magidova, an attorney from respondent's office, appeared in behalf of Christopher. Biebelberg and Magidova negotiated a settlement whereby Christopher withdrew his request for a TRO; Blanche would not return to the marital home; and the couple would share custody of their children. The remaining details of the marital dissolution would be resolved in the pending divorce case. The settlement did not address the sale of BBT.

Meanwhile, still in early January 2015, respondent learned that Christopher intended to sell BBT for $400,000; to use most of the sale proceeds to pay off business and family debts; and to use the remainder of the proceeds to invest in the joint venture. That deal, however, fell through. Later, on January 22, 2015, Christopher informed respondent that he intended to sell BBT to the franchisor, for $200,000, and to use the sale proceeds to pay off business debts, including a loan from his mother. Respondent asked Moore to handle the BBT sale transaction.

Respondent advised Christopher that, because no divorce complaint was pending at the time, Christopher had the right to sell BBT, as its sole member.[3] Respondent also explained to Christopher that, when a spouse makes a payment to a family member from the sale of assets, the other spouse often challenges that payment and requests an order to show cause to prevent the sale or to freeze the sale proceeds. Christopher, thus, decided that he would not inform Blanche or Biebelberg about the impending sale of BBT.

Respondent argued that, at this point, he was "confronted with a fundamental problem. My client disclosed something he wanted kept confidential. Under the law he had a right to sell that business, to receive the money, and to pay legitimate debts." Respondent maintained that, if he had informed Biebelberg of the impending sale, he "would have violated the attorney-client privilege."

Respondent then advised Christopher to open a new bank account for the purpose of depositing the net proceeds of the BBT sale. Respondent denied that he gave that advice to assist Christopher in concealing the sale of BBT or its sale proceeds from Blanche. Rather, he contended that a separate bank account would simplify the accounting for the disbursement of the sale proceeds. Moreover,

[3] The special master, without objection from the OAE, allowed respondent to testify as an expert in the area of equitable distribution and matrimonial cases. Respondent also prepared and submitted an expert report on his own behalf.

respondent maintained that a client with financial problems, such as Christopher, may be unaware of liens or lawsuits that could interfere with the disbursement of funds. When asked whether the family court had mechanisms available, on an emergent basis, for Christopher to receive and disburse such sale proceeds, respondent answered in the negative.

Respondent's testimony conflicted with earlier statements he had made during an OAE interview, when, in response to a similar question, he replied that he was not saying "it couldn't be done but it wasn't done." He added that a judge might have handled such an issue on an emergent application, or might have scheduled discovery and a hearing, which could take months or even a year. Respondent had so advised Christopher, leading to the decision to keep the sale confidential. Nonetheless, respondent acknowledged in his interview that there were measures he could have taken in family court for the release of some of those funds from his trust account to pay marital obligations, such as the money Christopher owed his mother.

Via a February 1, 2015 e-mail, respondent instructed Magidova to file a divorce complaint in behalf of Christopher. Respondent explained that, until a divorce complaint is filed, a party may claim an equitable distribution share of property acquired during the marriage. He admitted that the intent of filing a divorce complaint was to prevent Blanche from claiming any interest in Christopher's joint venture with Perillo.

In an e-mail dated February 2, 2015, respondent informed Magidova that Christopher was under contract to sell BBT; that the closing was scheduled to take place in two weeks; that Moore, whom he copied on the e-mail, would be handling the transaction; that the sale was confidential; and that Christopher "has not informed his wife nor will we. She is not the owner. There is no pending divorce action and certainly no court order controlling how the proceeds are used. We do not want her intervening in how the money will be used. Nothing nefarious."

Respondent conceded that, when he drafted the February 2, 2015 e-mail, the parties were contemplating divorce, although the divorce action had not been filed. Christopher had assured respondent that he had not represented to Blanche or her counsel that he would give them notice of an anticipated sale.

In his interview with the OAE, respondent stated:

> So -- and that was kind of that. You know? And in February, you saw the email. I sent an email to [Magidova] that we should file a complaint for divorce pretty promptly. And one of the reasons, and the principal reason I wanted to file the complaint for divorce was he was going after this business. And he -- and to the extent he went into the business during the marriage, it was potentially subject to -- well, it would be subject to equitable distribution. Whether it had any value at that point or not was a whole other issue. But there was no point in – in allowing it to continue to proceed.
>
> [OAEEx.1.][4]

[4] "OAEEx." refers to the OAE's exhibits admitted during the ethics hearing.

On February 13, 2015, Biebelberg sent a letter to respondent enclosing a complaint for divorce, asking him to sign and return the acknowledgment of service. Twelve days later, on February 25, 2015, Christopher closed on the sale of BBT, for a sale price of $225,000. The net proceeds of the sale were $203,577.33. Moore testified that the transaction included a return from the landlord of a $35,000 security deposit, as well as a release and assignment of the lease to the new buyer. Integral to this part of the transaction was a personal guaranty of the lease by both Christopher and Blanche. Moore obtained the release.[5]

At the close of the BBT sale, the net sale proceeds were wired into respondent's firm's trust account. Moore immediately wired the money from the trust account in accordance with the instructions that Christopher had given her. As stated, respondent admitted that, as of the date of his February 2, 2015 e-mail, he knew that the parties were contemplating divorce and that, as of February 25, 2015, the date of the closing on the sale of BBT, he had received Blanche's complaint for divorce.

At the end of February 2015, Blanche informed Biebelberg that Christopher had sold BBT. On March 11, 2015, Biebelberg sent a letter to respondent addressing

[5] The record does not refer to the apparent conflict of interest created by respondent's firm's representation of the interests of both Christopher and Blanche in connection with the personal guaranty of the lease, especially given that Blanche was never consulted about the sale. Further, there appears to have been no accounting of the $35,000 security deposit returned to Christopher, in which Blanche may have had an equitable claim, as a marital asset.

several divorce-related issues, including a request that respondent speak with Christopher to determine whether BBT had been sold to a third party or "taken over by corporate management," and to share those details with Biebelberg as soon as possible.

In early March 2015, Magidova learned of the sale of BBT when Christopher called the office, panicking because Blanche had learned of the sale. Christopher was very angry and was threatening to freeze bank accounts. Magidova explained to Christopher that both he and Blanche could pursue their remedies and that there was no reason to panic.

After March 11, 2015, respondent sent several letters to Biebelberg, none of which addressed the sale of BBT. On March 27, 2015, the day he returned from a month-long vacation, respondent called Biebelberg and finally told him of the sale and some of its details. Respondent failed to inform Biebelberg that his firm had represented Christopher in the sale but insisted that such information was implicit in the conversation. Respondent also failed to inform Biebelberg that the proceeds of the sale had passed through respondent's firm's trust account. He testified that, based on client confidentiality, at no point prior to the sale did he inform Biebelberg of the impending sale, or of his firm's representation of Christopher in connection with the sale. During his OAE interview, respondent stated that he had not informed Biebelberg of the sale of BBT prior to the transaction, because Christopher was

concerned that the money would be frozen, and his mother, who was living in a nursing home, needed funds immediately.

When respondent admitted to Biebelberg, during a telephone conversation, that the sale had occurred, Biebelberg expressed concern that the business had been "sold out from under" Blanche. He asked for all the details of the sale, including the disposition of the proceeds. Respondent told Biebelberg that he would obtain the documentation and send it to him. This statement reinforced Biebelberg's belief that respondent's firm had not handled the sale of the business in behalf of Christopher, because respondent had implied that the documentation was not readily available.

By letter dated March 30, 2015, Biebelberg addressed with respondent several issues regarding the Ryders' divorce, including following up on his request for documentation from the sale of BBT. On April 17, 2015, having received no response, Biebelberg again wrote to respondent asking for a meeting to discuss the divorce case and the sale of BBT. He expressed his appreciation for respondent's recent assurance during a telephone call that the proceeds of the sale had been disbursed solely toward the payment of marital debts but requested proof of same. At about the same time, Biebelberg asked Magidova whether she knew when the business was sold; she answered that she did not.

On April 20, 2015, respondent replied to Biebelberg's previous letters, but again failed to provide any information regarding the sale of BBT. Rather, he simply

represented that he would be forwarding the documents and evidence regarding payments made from the proceeds of the sale by the end of the week, which respondent assured were "virtually all in payment of the business and family debts."

The next day, April 21, 2015, Biebelberg sent respondent two letters. The first letter addressed outstanding insurance issues and expressed concern that the business had been sold and that Blanche had received no information about the transaction. Biebelberg also complained that his requests for information about the sale pre-dated Christopher's retention of respondent. Biebelberg sent a second letter on the same date, demanding the return of the funds by the end of that week and threatening to sue Christopher's mother if the funds were not received. At this time, Biebelberg still believed that respondent's firm had not participated in the sale of the business.

On April 22, 2015, Biebelberg sent an e-mail to respondent, Magidova, and Moore, memorializing the expectation that documentation regarding the sale of the business would be provided within the week, and expressing Biebelberg's belief that Christopher had made misrepresentations regarding the sale. At that time, Biebelberg did not accuse respondent of having participated in the misrepresentations. Moore became aware of the pending divorce action when she received this e-mail from Biebelberg.

On April 23, 2015, respondent replied to Biebelberg's two letters of April 21, 2015, and his e-mail of April 22, 2015, via a letter which stated that Blanche is "lying

and perhaps pathologically so." He added that, if Blanche "wants to sue my client's eighty-nine-year-old mother, then good luck to her!" According to respondent, during telephone conversations with Biebelberg on March 27, April 20, April 21 (two conversations), and April 23, 2015, he disclosed to Biebelberg the fact that BBT had been sold, the price paid, and the distribution of the sale proceeds to satisfy particular debts.

Via an April 23, 2015 letter sent to respondent by facsimile and mail, Biebelberg accused respondent of ignoring the "meritorious concerns" that Biebelberg previously had expressed in writing and by telephone. He accused Christopher of selling the business during the pendency of the divorce after having lied that the deal had fallen through. Further, Biebelberg alleged that the payment of $102,000 to Christopher's mother, from the sale of the most valuable marital asset, was done "furtively." Biebelberg requested that Christopher's mother return the money and that it be deposited in respondent's trust account. At this point, Biebelberg still believed that respondent's firm had not handled the sale of BBT, and was not aware that the funds had been deposited in, and disbursed from, respondent's trust account.

On April 29, 2015, Biebelberg received a letter from respondent, via facsimile, without the listed enclosures, stating that respondent's firm had received the net proceeds of $203,577.33 from the sale of BBT, had received legal fees for

representation at the closing, and had wire-transferred $197,156.58 from the sale proceeds to a bank account held by BBT. This was the first notice to Biebelberg that respondent's firm had handled the sale of the business. The letter also summarized payments made to Christopher's mother for loans she had made to him.

Several days later, Biebelberg received the enclosure documents, including a HUD-1 statement that showed legal fees of $6,420.75 paid to respondent's firm outside of closing. Additional documents showed three checks written from the new bank account, payable to Christopher, which respondent explained as "catching up on family expenses," without further detail. Christopher also had issued a check to the United States Treasury for his taxes (he and Blanche filed separate tax returns). The three checks to Christopher and the check for taxes totaled $18,000 which, at the time, Biebelberg considered "flat-out misappropriated."

Respondent claimed that he tried to recoup the sale proceeds, as Biebelberg had requested, but Christopher declined to return the money. Respondent perceived that the controversy was escalating and thought that the return of the funds would help quell the conflict between the parties. Respondent insisted that his discussion of returning the funds was intended exclusively as a resolution of the conflict concerning the marital assets, and was not motivated by the desire to avoid any personal ethical responsibility.

At the hearing, respondent provided more detail about the disbursement of the BBT sale proceeds. Christopher wrote a $7,000 check to BBT's landscaping service, and three checks to himself, totaling $10,500, to cover necessary family expenses such as mortgage; utilities; lease payments on two automobiles; Blanche's student loans; and $2,000 toward his 2014 federal taxes. He also paid $17,296.79 to Barclays (business credit card), $5,517.73 to Capital One (business credit card), and $10,517.22 to Chase (joint personal credit card). Additionally, he paid $5,065.99 for BBT's utility bills; $3,678.86 to Verizon for BBT's telephone; and $507.88 to Allstate for car insurance. The rest of the money was paid to his mother: $50,000 on the original promissory note, plus two additional loans, totaling $45,000, that his mother had made. Although Christopher paid his mother $100,000 from the net proceeds, after respondent recognized the $5,000 overpayment, he informed Biebelberg. The funds were returned and held in respondent's business account.[6]

In the meantime, on April 30, 2015, after receiving respondent's letter the prior day, Biebelberg sent a letter to respondent expressing dismay that, although Biebelberg repeatedly had blamed Christopher for unilaterally removing money from the marital estate, and had demanded that the money be returned and held in respondent's trust account, he had since come to understand that respondent had

[6] The record does not explain why respondent deposited the funds in his business account, rather than his trust account.

participated in the sale of the business, and the proceeds had passed through his trust account. Biebelberg also reminded respondent that he had been inquiring about the sale of the business in connection with the marital estate since December 2014.

Nevertheless, in May 2015, having received no agreement from respondent regarding the return of the funds, Biebelberg filed a lawsuit in the Superior Court of New Jersey, Union County, Law Division, against respondent, his firm, and Christopher's mother. The complaint was dismissed without prejudice and the judge referred Biebelberg to the "panoply of remedies" available in the family court. Thereafter, the divorce action proceeded and eventually settled after mediation.

The settlement included a release of legal malpractice claims against respondent and his firm. The release was held in escrow until Christopher completed payments of $47,500 to Blanche, which he made just over one year later. By this time, Biebelberg had filed an ethics grievance and all the parties were aware that the OAE was holding its investigation in abeyance until the conclusion of the divorce action.

During the ethics hearing, respondent explained how the final settlement number was reached. Christopher wanted to purchase Blanche's share of the marital home, which had $70,000 in equity. Blanche agreed to the sale in exchange for $35,000. Christopher also agreed to assume one-half of Blanche's credit card debt and some of the interest she had paid on that debt, totaling $10,000, and to pay

Blanche one-half of the money – $2,500 – returned to respondent's business account from the sale of BBT. In total, Christopher agreed to a cash payment, to Blanche, of $47,500.

Biebelberg's position was that:

> there was litigation pending, and [respondent] knew of it when this transaction took place and the money was wired from his trust account to Mr. Ryder's new account for the corporation. And it's up to a Superior Court judge to determine whether the debts to his client's mother are valid and, if so, in what amount they are valid, and to determine how the debt should be allocated between the parties, whether it should be 50/50 debt or otherwise, and whether certain other debts of the marriage should take priority, such as credit card bills, because my recollection was Mr. Ryder left Mrs. Ryder holding the bag on high-interest credit cards that were in her name. He paid off the credit cards in his name. I think he may have paid off one credit card in her name as well. But she's saddled with debt. It would have been up to a Superior Court judge to decide this is the amount the mother gets, what is valid, when she gets it, what debts take priority, and not for this to be unilaterally done in a furtive way.

Biebelberg conceded that the majority of the debt payments Christopher had made were legitimate. In Biebelberg's view, however, the three checks Christopher issued to himself, the payment to the United States Treasury, and the $5,000 overpayment to his mother were improper. In support, he emphasized that $5,000 eventually was returned to respondent's business account. Biebelberg believed that,

as a result of the litigation he filed, Blanche received some funds, although she was not made whole.

As noted above, respondent prepared and submitted an expert report on his own behalf. In that report, he took the position that, when a divorce complaint is filed, no statute or case law explicitly imposes an automatic restraint against the disposition of an asset that may be subject to equitable distribution. Therefore, respondent opined, a spouse does not acquire an interest in the property of another until a court enters a Judgment of Allocation.

Further, respondent asserted that case law provides that there is no fiduciary duty owed between spouses. Quoting from Tannen v. Tannen, 416 N.J. Super. 248 (App. Div. 2010), respondent stated that "the obligation to deal fairly with each other and not dissipate assets . . . is not the equivalent of imposing a fiduciary duty" and therefore, neither he nor Christopher had a fiduciary duty to Blanche. Respondent, however, claimed that he had a duty of confidentiality to Christopher, under RPC 1.6, if Christopher's conduct toward Blanche was not fraudulent or an act of wrongful disposal or diversion of property assets.

Finally, respondent closed his report by asserting that "[c]andidly, in divorce cases, money is withdrawn from accounts after a complaint is filed. Stocks and bonds are sold and disposed of after a complaint is filed. Experienced practitioners

know that remedies exist within the courts, as referenced by Painter.[7] The appropriate remedy is an immediate application to the court . . . to restrain disposition of property or to secure such property's deposit to the court or an attorney's trust account."

In its post-hearing submissions to the special master, the OAE argued that respondent was aware that Blanche wanted details regarding the sale of BBT, given Biebelberg's January 5, 2015 letter. He also knew, from the same correspondence, that Biebelberg would seek restraints through the courts if the information were not forthcoming. Therefore, respondent was on notice that Blanche made a claim to the business as a marital asset. Any concerns respondent may have had about these claims easily could have been discussed by reaching out to Biebelberg. The OAE, thus, analogized respondent's conduct to willful blindness.

The OAE further argued that respondent's knowledge of the competing claims of Christopher and Blanche to the sale proceeds created a duty to safeguard the funds until distribution was settled by the court or by agreement. According to the OAE, even if a court had ruled in Christopher's favor, respondent remained obligated to notify Blanche of the sale and to safeguard the BBT sale proceeds in his attorney trust account.

[7] Painter v. Painter, 65 N.J. 196, 216 n.5 (1974).

The OAE claimed that respondent's reliance on language in Painter was out of context. The OAE contended that the Painter footnote provides that the equitable distribution statute, N.J.S.A. 2A:34-23, does not authorize the distribution of marital assets until divorce. See, also, Carr v. Carr, 120 N.J. 336, 342 (1990). Painter holds that one spouse may not dissipate marital assets in anticipation of divorce and that "all property, regardless of its source, in which a spouse acquires an interest during the marriage shall be eligible for distribution in the event of divorce" (citing Painter, 65 N.J. at 217, 218 n.6).

The OAE further cited Lavene v. Lavene, 162 N.J. Super. 187 (Ch. Div. 1978), and Gerson v. Gerson, 148 N.J. Super. 194 (Ch. Div. 1977), which follow the holding in Painter – that a spouse's interest in a closely held corporation, business, or partnership acquired during the marriage is subject to equitable distribution. Nothing in Painter or any other case purports to allow what occurred here. The OAE, thus, alleged that respondent's failure to safeguard the proceeds from the sale of BBT, as a marital asset subject to equitable distribution, violated RPC 1.15(a), and that his failure to notify Blanche, through her counsel, about his firm's receipt of the sale proceeds, violated RPC 1.15(b).

Additionally, the OAE emphasized that Biebelberg repeatedly had requested information about the transaction and asked for the name of the attorney representing BBT. The OAE argued that respondent had an obligation either to share that

information with Biebelberg, or to inform Biebelberg that he would not produce the information, so that Biebelberg could take the appropriate action in court. Biebelberg believed that respondent would provide information about the sale, and respondent did nothing to correct this misconception.

Moreover, respondent admitted that he kept secret the sale of BBT, and his firm's role in it, because he was concerned that, if Biebelberg were made aware, he would obtain a court order restraining the sale proceeds pending the divorce. The OAE alleged that respondent's silence and deception in this regard violated RPC 8.4(c).

In respondent's post-hearing submission through counsel, he raised several defenses against these allegations. First, citing case law he deemed dispositive, respondent argued that neither the Ryders' marriage nor Blanche's filing for divorce gave Blanche any membership or property interest in Christopher's solely owned business or in the proceeds from its sale. While denying any wrongful conduct by Christopher, respondent contended that, if Blanche believed otherwise, she could have sought judicial relief. Respondent observed that Biebelberg sought no such relief in behalf of Blanche.

Further, respondent argued that Christopher had no fiduciary duty to Blanche that precluded him from disposing of the BBT sale proceeds as he did. Quoting Tannen v. Tannen, 416 N.J. Super. 248, 262-263 (App. Div. 2011) aff'd 208 N.J.

409 (2011), respondent asserted that "the obligation to deal fairly with each other and not dissipate assets . . . is not the equivalent of imposing a fiduciary duty upon a party." Therefore, respondent argued, Christopher did not dissipate the proceeds and respondent had no reason to believe he would. According to respondent, Christopher properly used the sale proceeds and respondent's firm properly wired the funds to Christopher to pay these obligations. Respondent further emphasized that, "[g]enerally speaking, in dividing marital assets the court must take into account the liabilities as well as the assets of the parties." Monte v. Monte, 212 N.J. Super. 557, 567 (App. Div. 1986). Christopher paid marital liabilities with the proceeds of the sale.

Respondent also pointed out that:

> New Jersey is an equitable distribution state, not a community property state. N.J.S.A. 2A:34-23(h) recognizes that property acquired in a marriage may be held by both parties jointly or by one party separately. Nothing about a divorce complaint gives one spouse a property right in another spouse's property. Rather, a divorce complaint gives a spouse a claim that the other spouse's separately held property is an asset which is eligible for equitable distribution.
>
> [Rb34 citing Painter v. Painter, 65 N.J. fn.5 at 216, Rothman, 65 N.J. at 230; Carr, 120 N.J. at 342).][8]

[8] "Rb" refers to respondent's June 25, 2019 summation brief.

Respondent conceded that a spouse has an obligation to refrain from wrongfully or dishonestly diverting or dissipating marital assets, but claimed that this obligation does not rise to the level of a duty to act primarily for another's benefit. He further admitted that, "[t]his is not to say Blanche did not have a possible equitable distribution claim regarding the proceeds of the sale in the divorce proceeding. She did, and Biebelberg had the right to press such a claim in many ways in the family court, which he chose not to do." Respondent contended that, because Blanche had no property right in the proceeds of the BBT asset sale at the time of the sale, he was not required to safeguard the proceeds for her. Further, Biebelberg filed a complaint for divorce in behalf of Blanche with no specific reference to BBT or any other asset. He did not apply for restraint of the sale of BBT or for any specific relief regarding the sale or the disposition of the sale proceeds.

Finally, respondent claimed that RPC 1.2 and RPC 1.6 imposed on him a duty not to disclose to Blanche his receipt of the sale proceeds, because Christopher had instructed him to keep this information confidential. Further, he denied that he concealed the firm's representation of Christopher in connection with the sale. Respondent contended that he mistakenly assumed that Biebelberg was aware of his representation of Christopher, and asserted that such a mistake does not equate to dishonesty under RPC 8.4(c). Similarly, respondent denied any dishonesty in connection with his advice that Christopher open a new bank account for the BBT

sale proceeds. Rather, respondent claimed that the new bank account allowed Christopher to pay his debts without "interference" from any liens or lawsuits, and simplified the subsequent accounting for all disbursements.

The special master determined that, in order to prove a violation of RPC 1.15(a) or (b), the OAE was required to prove that Blanche was entitled to a portion of the BBT sale proceeds, or that respondent had received property in which Blanche had an interest and had failed to notify her of its receipt. He further noted that it was not his "task to determine issues of law regarding the disposition of property in a matrimonial case." Considering the conflicting testimony and the case law presented on these issues, the special master found that the OAE failed to meet its burden.

Additionally, the special master chose to disregard the testimony Biebelberg had offered as an expert witness and did not find persuasive his testimony that Blanche had a property interest in the proceeds from the sale. Although he explicitly disregarded Biebelberg's testimony as an expert, the special master made no mention of respondent's testimony or his expert report.

The special master analyzed the alleged violation of RPC 8.4(c) as stemming from respondent's failure to correct Biebelberg's erroneous belief that respondent would provide information about the sale of BBT. The special master determined that respondent had made no promises or misrepresentations in response to Biebelberg's inquiries regarding the sale or potential sale of BBT. Rather, the special

master found that respondent simply protected the interests of his client and abided by the client's instructions to keep the sale confidential. The special master found that the perception of deception arose from Biebelberg's own assumptions and his own failure to act.

Therefore, the special master determined that the OAE failed to prove that respondent committed any misconduct and dismissed the complaint in its entirety.

Following a de novo review of the record, we are satisfied that the record clearly and convincingly establishes that respondent was guilty of unethical conduct. Specifically, we determine that respondent violated RPC 1.15(a) and (b), and RPC 8.4(c).

At the outset, consideration must be given to New Jersey law pertaining to the dissipation of marital assets, which is a factor relevant to the distribution of marital assets. N.J.S.A. 2A:34-23.1(i). In such an analysis, a court will identify the assets and liabilities acquired during a marriage. Assets expended during the marriage are not considered, however, where one spouse has "dissipated the marital assets, or otherwise disposed of them in fraud of the other;" a court will impose a debt on the dissipating spouse, to the benefit of the other. Kothari v. Kothari, 255 N.J. Super. 500, 510 (App. Div. 1992).

Further, as the court in Kothari explained:

> When one party to a divorce proceeding spends marital funds extravagantly, or merely for his or her own benefit,

> that obviously diminishes the amount of property which is available for distribution by the divorce court. On the other hand, *until such time as the parties are contemplating a divorce, they are generally vested with the authority to spend marital funds for their own enjoyment* . . . . The question of dissipation of marital assets thus involves an attempt to accommodate these two conflicting interests in the marital estate.
>
> [Id. at 506-07 (quoting Annotation, Spouse's Dissipation of Marital Assets Prior to the Divorce Court's Determination of Property Division, 41 A.L.R. 4th 416, 419 n.1 (1985)) (emphasis added).]

Contrary to respondent's contention otherwise, Christopher was no longer vested with the authority to spend marital funds as he saw fit when the sale of BBT closed. Not only had the parties been contemplating divorce since January 2015, when respondent began representing Christopher in earnest, but Blanche filed a divorce complaint twelve days prior to the sale of BBT. Thus, there can be no dispute that BBT, and the proceeds from its sale, were marital assets subject to possible equitable distribution.

Nevertheless, we are not confronted with whether Christopher dissipated marital assets fraudulently in anticipation of divorce in order to diminish the amount of property available for distribution between Blanche and himself. That question was for the family court to address. We determine that, in a scenario where marital assets are being dissipated by way of sale, fraudulently or otherwise, there is an asserted interest or claim to equitable distribution from the proceeds of that sale, and

when the proceeds from the sale are deposited in an attorney's trust account, that attorney has a duty to (1) safeguard those proceeds because of the potential equitable distribution claim of the adversary/spouse; and (2) notify that other party of the receipt of those proceeds.

In his December 1, 2014 letter to Christopher, Biebelberg, for the first time, made it clear that Blanche would not oppose the sale of the business, but asserted that a substantial amount of money was at stake in connection with the sale, in which she claimed an interest. Biebelberg also made clear that any impediment to Blanche's access to information regarding the sale would be met with an Order to Show Cause seeking restraints. On January 5, 2015, Biebelberg sent a letter to respondent, enclosing his previous letters to Christopher, and asking respondent for an update regarding the sale of BBT. Therefore, by January 5, 2015, respondent had full knowledge that Blanche sought not only information regarding the sale of BBT, but also her share of any sale proceeds. Undoubtedly, respondent, as a matrimonial practitioner for forty-three years at the time, recognized that the business was a marital asset subject to equitable distribution.

Two days later, on January 7, 2015, the parties entered into a settlement agreement resolving their TRO matters, their living arrangements, and the short-term custody of their children. The parties also agreed that the remaining issues would be resolved in the divorce proceeding. Therefore, at this point, despite

respondent's repeated argument that no divorce complaint had been filed, all involved knew that the parties were beyond the point of contemplating divorce and that all the Ryders' assets would be subject to division either by a court or through a property settlement agreement.

Nevertheless, it is fair to say that respondent did not know about the sale of BBT until January 2015. The events of that month are crucial in understanding the extent of respondent's misconduct. In early January 2015, Christopher informed respondent that he planned to sell BBT for $400,000 and to use the proceeds to pay business debts, while investing the remainder in his new business venture. Then, on January 22, 2015, Christopher told respondent that he intended to sell BBT to the franchisor for $200,000, and to use the proceeds to pay business debts, including the loans from his mother.

First, respondent referred the matter to Moore. It is on this date, or soon thereafter, that he should have informed Biebelberg that his firm was representing Christopher in connection with the sale of BBT.

Second, upon learning of the sale to the franchisor, respondent explained to Christopher that, because no divorce complaint was pending at the time, as the sole member, he could sell the business. Respondent cautioned Christopher, however, that a payment to a family member from the proceeds of the sale could generate a challenge to the sale or an application to freeze the proceeds. Respondent claimed

that, at that time, Christopher decided that he did not want to tell Blanche or her counsel about the sale. Instead of reminding Christopher that Biebelberg already had sought information regarding the sale, because of Blanche's interest in the business, and that it was proper to inform them, respondent agreed to keep the sale confidential. Respondent argued that he was required to do so under RPC 1.6.

Third, respondent proceeded, in the same conversation, to advise Christopher to open a new account for BBT in order to receive the proceeds from the sale. This advice is suspect, especially coming on the heels of the agreement to hide the sale from Blanche. Nevertheless, respondent asserted that his advice in this vein was sound for two reasons. One, it would be easier to account for all the payments in later proceedings because there would be no other transactions in the account to sort through. This argument ignores the fact that respondent's trust account would serve a similar purpose. Two, the new account would hide the proceeds from any unknown liens or judgments that might have existed, given Christopher's financial distress. Respondent, therefore, counseled his client to conceal assets from creditors, a potential violation of RPC 8.4(c), although the complaint did not charge a violation based on this conduct. Moreover, respondent clearly advised Christopher to actively hide the proceeds of the sale from Blanche. That was what Christopher wanted and that is what respondent helped him accomplish. Respondent repeatedly explained that his intent was to prevent Blanche from "going after the business."

Respondent's explanation for his actions is an unwitting roadmap to his misconduct. Respondent and Christopher conspired to surreptitiously hide the sale of BBT and its proceeds from Blanche and her counsel in order to facilitate Christopher's unimpeded use of those funds as he saw fit – specifically, to ensure quick and full repayment to his mother, who was in a nursing home and needed funds immediately.

Respondent's arguments to the contrary are further belied by the fact that, on February 1, 2015, he sent an e-mail to Magidova, directing her to file a divorce complaint. Respondent explained that the intent in filing the complaint at that time was to prevent Blanche from asserting any claims she might have to Christopher's new business venture with Perillo. The next day, February 2, 2015, respondent sent another e-mail to Magidova, informing her of the sale of BBT and directing her to keep that information confidential. Referring to Blanche, respondent added that "[t]here is no pending divorce action and certainly no court order controlling how the proceeds are used. We do not want her intervening in how the money will be used. Nothing nefarious."

These facts further support a finding that respondent's intention was to actively frustrate Blanche's access to information to which she was otherwise entitled. Ironically, respondent recognized in his statement to Magidova that a pending divorce action would have an impact on the propriety of keeping the sale

confidential and preemptively reassuring Magidova that, because no action was pending, they were free to proceed. It begs the question, however, as to why on February 1, 2015, respondent wanted a divorce complaint filed and the very next day he used the lack of a complaint as justification for his demand of confidentiality and assurances that nothing "nefarious" was afoot.

On February 13, 2015, twelve days before the sale of BBT, Biebelberg served respondent with the divorce complaint, which respondent admitted he received. There can be no question in respondent's mind, at that point, that BBT was a marital asset and became eligible for equitable distribution by a court. Nevertheless, respondent cited Painter in support of his contention that Christopher was free to dispose of BBT, as its sole owner. The relevant footnote in Painter states that "[i]t is important to bear in mind that nothing in our statute effects any change with respect to the ownership of property as between husband and wife prior to the entry of a judgment of allocation. Prior to that event neither spouse, by virtue of this statute, acquires any interest in the property of the other." The OAE is correct that respondent took this footnote out of context. That same seminal case clearly holds that, "[t]he courts are now empowered to allocate marital assets between the spouses, regardless of ownership." Painter, 65 N.J. at 213. Therefore, "regardless of ownership," Christopher acquired BBT during the marriage and the business was eligible for allocation by the court as a marital asset.

The special master erroneously ruled that, to establish unethical conduct on respondent's part, the OAE was required to prove that Blanche was entitled to a portion of the BBT sale proceeds or that respondent received property in which Blanche had an interest and failed to notify her of its receipt. It is beyond doubt that Blanche had such an interest in the sale proceeds and that respondent received those proceeds, failed to so notify Blanche, and then failed to safeguard the proceeds from their eventual disbursement. In his own words, respondent confirmed Blanche's interest, which is the linchpin to the entire analysis.

In explaining the reason that he directed Magidova, on February 1, 2015, to file a complaint, respondent said "the principal reason I wanted to file the complaint for divorce was she was going after this business. And he -- and to the extent he went into the business during the marriage, it was potentially subject to -- well, it would be subject to equitable distribution." Respondent was referring to the new business with Perillo. The very next day, however, he sent a second e-mail with similar intentions, instructing Magidova to keep the sale of BBT confidential because they did not want Blanche interfering. It is evident that respondent's overall strategy was to hide business-related assets from Blanche. He admitted that she was "going after the business" and that she had an interest that "would be subject to equitable distribution." It matters not which business he was referencing, because the same legal principles apply to both. Respondent was reluctant to apply that same logic to

BBT, because it would undermine his entire strategy. The only business that Blanche was "going after" was BBT. Nevertheless, respondent clearly acknowledged, at the time, that Blanche had made a claim against BBT and that her claim was cognizable.

Furthermore, in his summation brief, counsel for respondent conceded that respondent had an obligation to not wrongfully or dishonestly divert or dissipate assets. A diversion of assets is exactly what was accomplished here. He further admitted that Blanche had an equitable distribution claim and that "Biebelberg had the right to press such a claim in many ways in the family court, which he chose not to do." This contention raises form over substance. Respondent was aware that Blanche made repeated attempts to obtain information about BBT and that she considered BBT a marital asset in which she had an interest. Respondent actively thwarted her attempts until Christopher was able to sell the business and divert the proceeds. Respondent cannot use Biebelberg's failure to appropriately pursue remedies in family court as a sword and he cannot use his duty of confidentiality to Christopher as a shield.

Although it is difficult to discern the difference between respondent's testimony as a fact witness and his testimony as a purported expert witness, his self-authored expert report shows that there is not much difference between the two. That document further undermines his position. First, although respondent stated that no statute explicitly imposes an automatic stay on the disposition of property when a

complaint for divorce is filed, it is implicit in the entire equitable distribution process and in respondent's own words. In his e-mail to Magidova, respondent cited the lack of a divorce complaint as justification for keeping the sale of BBT secret from Blanche. In addition, he referenced the lack of a divorce complaint in other writings and in his own testimony. Second, Blanche filed the divorce complaint twelve days before BBT was sold; yet, respondent took no action to disclose the sale to Biebelberg or Blanche. Third, although respondent argued that there is no implicit restraint as of the filing of the divorce complaint, he repeatedly asserted that, among the remedies available to Blanche was an emergent action seeking restraints on the property.

Respondent also undermined his position by citing Tannen, which explicitly refers to the duty of fair dealing and to not dissipate assets. His position weakens further when he claims there was no fiduciary duty owed to Blanche but that he had a duty of confidentiality to his client so long as there was no "act of wrongful disposal or diversion of assets." This statement inherently acknowledges that he was required to inform Blanche, through her counsel, that Christopher was diverting assets by covertly selling his business. At a minimum, Blanche had a right to know about the sale of BBT, considering the personal guarantee she attached to the lease for the premises in which the building operated.

Ultimately, however, respondent's closing statement summarizing his expert opinion exposed his position as specious. Respondent remarked that assets routinely are diverted in divorce actions, post-complaint. His admission in this regard inherently acknowledged that such diversion is inappropriate. In his expert opinion, he excused this misconduct by pointing out that remedies are available to the injured party after the fact. This comment ignored the fact that, by concealing the sale of BBT, respondent and his client actively thwarted Blanche and her counsel from availing themselves of those remedies. This is not an expert opinion; this is an attempt to obfuscate respondent's complicity in hiding the sale of a marital asset from an opposing spouse and her counsel to prevent her from either stopping the sale or freezing the sale proceeds.

Therefore, by failing to notify Blanche that he was in possession of property in which she claimed an interest and, thereafter, by failing to safeguard that property, respondent violated both RPC 1.15(a) and RPC 1.15(b).

Further, in repeatedly ignoring inquiries regarding the business and failing to identify himself and his firm as counsel for Christopher in the sale of the business, respondent made misrepresentations by silence. His argument that Biebelberg was mistaken and that the notice of his representation was inherent in all their conversations is disingenuous. His silence on the matter was by design. If respondent had identified himself or his firm as counsel of record, it would have undermined all

the other machinations he undertook with Christopher. It would have slowed Christopher's ability to sell the business or to use the proceeds as he saw fit. Respondent has admitted this was the intention. Respondent wanted Biebelberg to believe there was no sale and, therefore, he deliberately remained silent about his firm's representation.

In addition, respondent was facing a conflict of interest. His firm may have been required to withdraw as counsel, or, at a minimum, to obtain a conflict waiver from Blanche. Christopher and Blanche had provided a personal guaranty for the lease on the property that BBT rented. Moore admitted that she negotiated a release from that guaranty in behalf of both Christopher and Blanche. Although the complaint failed to charge respondent with a conflict of interest, the conflict waiver would have been yet another roadblock to Christopher's ability to sell the business quickly.

Nevertheless, despite knowing that BBT was a marital asset subject to equitable distribution, and despite knowing that Biebelberg had requested to be informed about the status of the business, respondent deliberately failed to disclose his firm's representation of Christopher in the sale of BBT; the impending sale of the business; the deposit of the net sale proceeds into his firm's trust account; and the disbursement of the entirety of those proceeds to Christopher. As an aside,

respondent's deposit of Christopher's funds in his business account, rather than his trust account, raises concerns about his intent to conceal those funds.

A violation of RPC 8.4(c) requires intent. See, e.g., In the Matter of Ty Hyderally, DRB 11-016 (July 12, 2011). Here, respondent's intent is clear. He remained silent about the sale and his firm's representation of BBT in connection therewith, in the face of multiple inquiries regarding same, by design, to keep Blanche from preventing the sale or freezing the sale proceeds. Respondent's façade continued, even beyond March 27, 2015, when he acknowledged to Biebelberg for the first time that BBT had been sold but reinforced, via his silence through April 29, 2015, the false impression that Christopher had sold BBT on his own. In so doing, respondent made misrepresentations by silence, in violation of RPC 8.4(c).

In sum, we find that respondent violated RPC 1.15(a), RPC 1.15(b), and RPC 8.4(c). The sole issue left for us to determine is the appropriate quantum of discipline for respondent's misconduct.

Attorneys found guilty of misrepresentations to third parties have received reprimands. 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 4.1(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 and received, but ultimately returned, reimbursement for payment of the annual fee required of Pennsylvania attorneys; compelling mitigation considered); and 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).

Cases involving an attorney's failure safeguard funds, in violation of RPC 1.15(a), and to promptly deliver funds to clients or third persons, in violation of RPC 1.15(b), usually result in the imposition of an admonition, even if accompanied by other infractions. See, e.g., In re Sternstein, 223 N.J. 536 (2015) (after the attorney had received five checks from a bankruptcy court, representing payment of his clients' claim against the bankrupt defendant, he failed to deposit the checks in his attorney trust account, choosing instead to place the checks in his desk, a violation of RPC 1.15(a); the attorney also failed to inform his clients of his receipt of the funds, and, only after numerous inquiries, first from the clients and then from an attorney retained by them to pursue their interests, did he finally take the steps necessary to receive the funds from the bankruptcy court, which he then turned over to the clients, a violation of RPC 1.15(b); despite two prior suspensions, we did not enhance the discipline because those matters were remote in time and involved unrelated conduct) and In the Matters of Raymond Armour, DRB 11-451, DRB 11-

452, and DRB 11-453 (March 19, 2012) (in three personal injury matters, attorney neither promptly notified his clients of his receipt of settlement funds nor promptly disbursed their share of the funds; the attorney also failed to properly communicate with the clients; we considered the attorney's lack of prior discipline).

Although no cases are directly analogous to the facts of this matter, the general guidance and precedent set forth above suggest that the appropriate baseline discipline for respondent's misconduct is a reprimand or censure.

In aggravation, respondent failed to obtain a conflict waiver from Blanche prior to representing Christopher in the sale of BBT and negotiating a release of her personal guaranty of the lease.

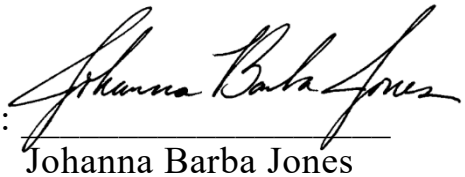
In mitigation, respondent has had an unblemished record in forty-nine years at the bar. This factor cuts both ways, however, because his vast experience undoubtedly made him aware that his conduct was unethical. The passage of time since the misconduct took place serves as additional mitigation.

Therefore, although the baseline discipline is on the cusp between a reprimand and a censure, because respondent is a self-described expert in equitable distribution and matrimonial law, the mitigation of his otherwise unblemished career fails to tilt the scale in his favor. Thus, we determine to impose a censure.

Chair Clark voted for a reprimand. Members Boyer and Singer voted to dismiss the matter and filed a separate dissent. Members Joseph and Rivera did not participate. Member Hoberman was recused.

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
Bruce W. Clark, Chair

By: 
Johanna Barba Jones
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

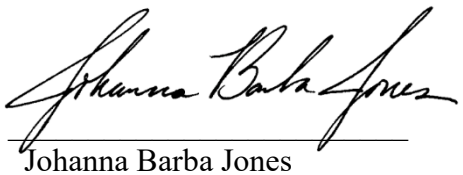
In the Matter of Bruce M. Pitman
Docket No. DRB 20-090

Argued: September 17, 2020

Decided: March 3, 2021

Disposition: Censure

Members	Censure	Reprimand	Dismiss	Recused	Did Not Participate
Clark		X			
Gallipoli	X				
Boyer			X		
Hoberman				X	
Joseph					X
Petrou	X				
Rivera					X
Singer			X		
Zmirich	X				
Total:	3	1	2	1	2



Johanna Barba Jones
Chief Counsel