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**OF THE**  
**SUPREME COURT OF NEW JERSEY**

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July 25, 2023

**VIA ELECTRONIC AND INTEROFFICE MAIL**

Johanna Barba Jones, Director  
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Re: **In the Matter of Scott Eric Diamond**  
Docket No. DRB 23-137  
District Docket No. XIV-2020-0315E

Dear Ms. Jones:

The Disciplinary Review Board (the Board) has reviewed the motion for final discipline filed by the Office of Attorney Ethics (the OAE) following respondent's guilty pleas and felony convictions, in the United States District Court for the Eastern District of Pennsylvania (the EDP), for mail fraud, in violation of 18 U.S.C. § 1341, and wire fraud, in violation of 18 U.S.C. § 1343. Following its preliminary review, pursuant to R. 1:20-13(c)(2), the Board determined to remand this matter to a trier of fact for a limited evidentiary hearing.

Specifically, the Board determined that the record supports the conclusion – consistent with both respondent's criminal convictions and his conceded position in connection with this pending disciplinary matter – that respondent knowingly misappropriated law firm funds, in violation of the principles of In re Siegel, 133 N.J. 162 (1993), RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). Pursuant to New Jersey disciplinary precedent, respondent's misconduct mandates disbarment unless he establishes a recognized defense. See R. 1:20-6(c)(2)(B) and (C), and In re Gifis, 156 N.J. 323, 359

n.8 (1998) (holding that respondent has the “burden of going forward regarding defenses . . . to charges of unethical conduct.”).

The Board noted that, both during his plea colloquy and in connection with the pending motion for final discipline, respondent has asserted that his criminal conduct was directly connected to a business dispute with his partners. In the Board’s view, however, on this record, respondent has not met his burden of establishing that business dispute.

The Court has explained that it had “construed the ‘Wilson rule, as described in Siegel,’ to mandate the disbarment of lawyers found to have misappropriated firm funds ‘[i]n the absence of compelling mitigating factors justifying a lesser sanction, which will occur quite rarely.’” In re Sigman, 220 N.J. 141, 157 (2014) (quoting In re Greenberg, 155 N.J. 138, 67-68 (1998)).

In Sigman, an associate with a Pennsylvania law firm kept legal and referral fees, over a four-year period, repeatedly violating the terms of his employment contract. In re Sigman, 220 N.J. at 145. The associate knew he was prohibited from handling client matters and referrals independent of the firm, but did so anyway, and instructed clients to issue checks for fees directly to him. Id. at 147-48. In total, he withheld \$25,468 from the firm. Id. at 145.

After the firm had terminated the associate’s employment, but prior to the imposition of discipline in Pennsylvania, the associate successfully sued his prior employer, resulting in the award of \$123,942.93 in legal and referral fees that the firm wrongfully had withheld from him. Id. at 151. During the Pennsylvania disciplinary proceedings, the associate did not raise the fee dispute with his firm as justification for his misappropriation. Id. at 162. For his violations of RPC 1.15(a) and (b), RPC 3.4(a), and RPC 8.4(c), the Pennsylvania Supreme Court, citing substantial mitigation, suspended the associate for thirty months. Ibid.

In New Jersey, our Court imposed a reciprocal thirty-month suspension, noting the presence of compelling mitigating factors, including the associate’s lack of prior discipline in Pennsylvania or New Jersey; his character references demonstrating his significant contributions to the bar and underserved communities; his admission of wrongdoing and cooperation with disciplinary authorities; the fact that he did not steal funds belonging to a client; the fact that his misappropriation occurred in the context of fee payment disputes and a deteriorating relationship with his firm, where he ultimately was vindicated; and the fact that his misconduct was reported only after the conflict over fees had escalated. Id. at 161.

Here, the Board has determined that the record is not sufficiently developed to determine whether respondent’s misappropriation of law firm funds arose out of a legitimate business dispute, given the posture of this matter as a motion for final discipline, along with respondent’s pending assertion that he could successfully mount the affirmative defense established pursuant to Siegel disciplinary precedent – a defense which was not available to him during the criminal proceedings before the EDP.

The Court previously has addressed the potential procedural obstacles of the application of the principles of Siegel via motion. See In re Barrett, 238 N.J. 517 (2019). In that matter, which came before the Board and Court as a motion for reciprocal discipline versus final discipline, the OAE sought an attorney's disbarment pursuant to Siegel and the Court issued an opinion, imposing a one-hundred-and-fifty-day suspension on an attorney who for an attorney who had, unbeknownst to his law firm, traded legal fees earned for his law firm, in two separate client matters, in exchange for construction work performed at his Utah residence. Id. at 520. The attorney's actions deprived his law firm of more than \$20,000 in legal fees. Ibid.

The Barrett Court declined to disbar the attorney and, instead, imposed a one-hundred and fifty-day suspension. In its written opinion, the Court explained that, in New Jersey, "evidence of a business dispute may be a defense to the misappropriation of law firm funds." Id. at 523 (citing Sigman, 220 N.J. at 162). However, no such business dispute defense existed in Utah, the original jurisdiction underlying the reciprocal discipline matter. Id. at 519. Hence, during the Utah proceedings, the Utah judge permitted the attorney "to elicit testimony regarding a business dispute [. . .] only to assist the [judge] in assessing the testifying law firm partner's credibility." Id. at 524. Because the Utah judge limited the presentation of business dispute evidence between the attorney and his law firm, and because evidence that may have existed in Utah could not "be compelled" by the attorney or the OAE, our Court could not find clear and convincing evidence, based solely on the Utah record, that the attorney "knowingly misappropriated law firm funds under circumstances justifying greater discipline than" the one-hundred and fifty-day suspension "imposed in Utah." Id. at 525.

Here, although respondent was not limited by the EDP in his presentation of evidence of a business dispute with the firm, such a business dispute does not serve as a defense to the federal crimes of mail and wire fraud, to which respondent pleaded guilty. Regardless, respondent clearly asserted that alleged business dispute as a mitigating factor for consideration in crafting his appropriate criminal sentence. Moreover, in reply to the instant motion for final discipline, and during oral argument before the Board, respondent expressly maintained that he could mount such a defense.

In our disciplinary system, the OAE bears the burden of proving, by clear and convincing evidence, that respondent knowingly misappropriated law firm funds. In turn, respondent can mount a defense to disbarment under Siegel. R. 1:20-6(c)(2)(B) and (C). Specifically, respondent has the burden to prove such a business dispute in accord with precedent. Accordingly, applying the Court's logic in Barrett, and considering both the record before the EDP and the representations made by respondent in his brief to the Board, the Board is not in a position, on this record, to determine whether respondent had a valid business dispute with the firm. See In re Gallo, 178 N.J. 115, 120 (2003) (finding that the imposition of discipline premised on an incomplete record "would not be fair" absent the opportunity for further testimony); cf. In re Gipson, 103 N.J. 75, 77 (1986) (imposing discipline where "the procedures afforded respondent accorded with principles of fundamental fairness.")

Thus, on this record, the Board determined that, given the due process considerations underpinning the New Jersey disciplinary system, as discussed in Barrett, it cannot reach a determination regarding whether respondent should be disbarred for violating the principles of Siegel by knowingly misappropriating law firm funds. Thus, the Board determined to remand this matter to a trier of fact for a limited evidentiary hearing and report focused on respondent's claimed business dispute with his prior firm.

In connection with the limited evidentiary hearing, respondent should specifically address the application of Siegel and its progeny to the unique facts of this case, and endeavor to prove that he should not be disbarred because he was engaged in a business dispute with his firm. Moreover, respondent should directly address the effect of his admitted scheme with Cohen – who was not a partner with the firm – on the application of the established Siegel case law regarding business disputes. Stated differently, respondent must address why disbarment is inappropriate when, as part of the admitted scheme, he split the misappropriated law firm funds (at least in connection with the joint scheme) with Cohen, an associate.

The Board retains jurisdiction. This office promptly will request the appointment of a Special Ethics Master consistent with the Board's above-described determination. In directing the parties to develop the record on this issue, the Board takes no final position on the merits.

Very truly yours,

**/s/ Timothy M. Ellis**

Timothy M. Ellis  
Acting Chief Counsel

TME/res

c: Hon. Maurice J. Gallipoli, A.J.S.C. (Ret.), Chair  
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