BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL Petitioner	:	No. 74 DB 2020
v.	:	Attorney Registration No. [ ]
[ANONYMOUS] Respondent	:	([ ])

ORDER

AND NOW, this 21st day of August, 2023, upon consideration of the Report and Recommendation of the Hearing Committee and the briefs filed by the parties; it is hereby

ORDERED that the charges against [ ], docketed at No. 74 DB 2020 are DISMISSED for the reasons set forth in the attached Opinion.

BY THE BOARD:

Board Chair

TRUE COPY FROM RECORD
Attest:

Marcee D. Sloan
Board Prothonotary
The Disciplinary Board of the
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, Petitioner	:	No. 74 DB 2020
v.	:	Attorney Registration No. [ ]
[ANONYMOUS] Respondent	:	([ ] County)

OPINION

This matter comes to the Board following the filing of a Hearing Committee Report recommending that the Petition for Discipline against Respondent, [ ], be dismissed and no discipline imposed. Upon our independent review of this matter, we agree with the Committee's conclusions that Petitioner failed to meet its burden to prove Respondent violated the Rules of Professional Conduct charged in the Petition for Discipline, and further agree that dismissal of this matter is warranted.

By Petition for Discipline filed on March 3, 2022, Petitioner alleged that Respondent engaged in misconduct in one client matter involving a residential real estate transaction, in violation of Rules of Professional Conduct 1.15(b), 1.15(e), 1.15(f), and 8.4(c). On May 16, 2022, Respondent filed an Answer to Petition for Discipline. The Hearing Committee held a hearing on January 31, 2023. Petitioner offered 40 documentary exhibits, all of which were admitted into evidence, and presented the testimony of two witnesses, [ ], Esquire, and [ ] County Detective [ ]. Respondent appeared pro se, offered 20 documentary exhibits, all of which were admitted into evidence, and presented the testimony of one witness, [ ], Esquire. Respondent did not testify. At the conclusion of the respective parties' cases in chief, the Committee

announced its conclusion that there was no violation of the Rules of Professional Conduct charged in the Petition for Discipline. The parties declined to file briefs to the Committee.

On May 30, 2023, the Committee filed its Report to the Board with a recommendation to dismiss the matter. On June 15, 2023, Petitioner filed a brief on exceptions, contending that there are facts of record that support findings of violations of the Rules charged in the Petition for Discipline, and requesting that the Board remand the matter for proceedings in accordance with Disciplinary Board Rule § 89.151. Respondent filed a brief in opposition to the exceptions on June 21, 2023. The Board adjudicated this matter at its meeting on July 25, 2023.

The record established the following facts. Respondent was born in 1954 and was admitted to practice law in the Commonwealth in 1985. His law practice is located in [ ] County. Respondent represented the seller, [ ], Esquire, in a real estate transaction with home buyers, [ ] and her parents, [ ] and [ ]. The subject of the real estate transaction was a residential property located at [ ]. Respondent had no attorney-client relationship with the buyers. This real estate transaction was a private matter between the buyers and seller and did not involve any real estate agents. Respondent drafted the original Agreement for Sale, which was executed by the buyers and seller on May 20, 2019. The Agreement for Sale called for a purchase price of $320,000, which included a payment of $10,000 in earnest or hand money by the buyers, payable to the seller, and the rest of the proceeds by cash at closing. The buyers had applied for a mortgage through a private lending company, and the law firm of [ ] acted for the title company to handle the closing on the transaction.

On May 20, 2019, Respondent also arranged for his client and the buyers to enter into an Escrow Agreement regarding the real estate transaction. In the Escrow

Agreement, the parties acknowledged and agreed that Respondent would act as special escrow agent with regard to the hand money payment and real estate transaction. At that time, the buyers wrote a check in the amount of $10,000 to Respondent as special escrow agent and gave that check to Respondent. Respondent later drafted a Special Power of Attorney for Real Estate, which gave him the authority to act on behalf of Mr. [ ], a resident of Florida, with regard to all matters concerning the real estate transaction, including the representation of the seller at the closing.

Upon receipt of the check of Ms. [ ] on May 20, 2019 in the amount of $10,000 payable to " [ ], Esquire (special escrow)," Respondent promptly deposited the money in his Key Bank special escrow account. The money remained there until the closing on August 13, 2019. As late as August 12, 2019, Respondent had not been told about the specific date and time of the closing, which prompted him to send an email to [ ], Esquire, at the [ ] firm. Therein, Respondent informed Ms. [ ] that the hand money was still in his escrow account, and he would be depositing it to Mr. [ ]'s account along with the net proceeds check after closing and asked where the closing would be taking place.

At the closing on August 13, 2019, Respondent received for the first time the HUD-1 document, which only showed the seller's side of the transaction. The document showed the amount of the fees, closing costs paid from the closing that would be the responsibility of Mr. [ ], and a specific amount of the net proceeds ($117,403.13) that would be tendered to Mr. [ ] as a result of the closing. Respondent provided the deed, signed by his client, and established that the closing officer saw that Respondent had a deposit ticket for Mr. [ ]'s personal bank account in his possession and that the deposit ticket showed the $10,000 hand money as well as the net proceeds check from [ ] payable to Mr. [ ], both of which Respondent deposited promptly into Mr. [ ]'s personal

bank account on August 13, 2019, after the closing occurred. The total deposit of funds to Mr. [ ]'s bank account amounted to $127,403.13. As it turned out, this was $10,000 more than it should have been, which led to the dispute that forms the basis of the instant disciplinary proceedings.

Twenty-two days later, on September 4, 2019, Respondent received an e-mail from an individual named [ ] at [ ], the successor law firm to [ ], claiming that an error had occurred in the closing and that Mr. [ ] had actually received $10,000 more than he should have and requesting reimbursement. Mr. [ ] admitted that the $10,000 hand money should have been accounted for in the closing but was not. At this point, the net proceeds and the hand money from the closing had been deposited into Mr. [ ]'s personal bank account and Mr. [ ] and Respondent had considered the matter closed.

As of September 4, 2019, Respondent was on notice that a claim was being made against Mr. [ ] that he had allegedly received funds to which he was allegedly not entitled. Respondent responded promptly to Mr. [ ]'s email and stated that he needed to review all of the documentation because the closing had occurred weeks ago. A separate email on September 4, 2019 from Respondent to Ms. [ ], Mr. [ ], and Mr. [ ] pointed out that Respondent had only received a copy of the seller's side of the HUD-1, which did not show any hand money deduction, claimed that Mr. [ ] should have received a full HUD-1 statement at least 24 hours before the closing rather than at the closing itself, and requested that a full HUD-1 showing both sides of the transaction be provided to him. Ms. [ ], both on September 5, 2019 and in follow-up emails at that time, admitted that the error was solely and completely that of the closing firm and the auditors were pushing to get the funds back.

As early as September 12, 2019, eight days after the initial claim of an overpayment, Ms. [ ] by email threatened to bring legal action against Mr. [ ] and/or Respondent and a threat was further made on September 13, 2019, regarding alleged criminal misconduct on the part of Respondent or his client. Respondent had been communicating with his client since the allegation of overpayment was made, and he advised Ms. [ ] that he would speak to Mr. [ ]. The matter did not progress, as Mr. [ ] expressed dissatisfaction with the way he believed he had been treated by Ms. [ ] prior to closing and certain delays which he believed cost him money, and wanted to try to settle the matter for $5,000. Mr. [ ] testified that his decision to offer $5,000 was the product of discussion with his brother, and not related to any discussion with Respondent. By email on September 12, 2019, Respondent offered Ms. [ ] $5,000, and she responded by email that the firm was not permitted to settle for less than the $10,000.

On September 28, 2019, Ms. [ ] filed a private criminal complaint against Mr. [ ] with the District Attorney of [ ] County, contending that he was holding the $10,000 arbitrarily and not returning the money back to the law firm, and charging him with theft under 18 Pa.C.S.A. § 3524. The District Attorney's office assigned Detective [ ] to investigate the claim.

Detective [ ] interviewed Respondent in-person in mid-October 2019, while Mr. [ ] was on the telephone with Respondent, had telephone conversations with Ms. [ ] and Mr. [ ], and assisted in bringing the matter to a resolution after several months of back-and-forth personal accusations between Ms. [ ] and Mr. [ ]. Detective [ ] credibly testified that Respondent cooperated with the investigation and did not attempt to delay it, though he referenced that "they" (meaning Respondent and Mr. [ ]) had expressed a dislike for Ms. [ ] and thought a delay "was likely." N.T. 162, 163, 164. However, Detective[

] credibly testified that he never got the impression that there was an intent to not return the $10,000.

Detective [ ] suggested and Respondent and Mr. [ ] agreed that they set a date of November 1, 2019, to have some movement in resolving the matter. By late October 2019, Mr. [ ] indicated that he would return the excess closing funds, but only upon a full release. On November 6, 2019, Mr. [ ] drew a check in the amount of $10,000 payable to Respondent as special power of attorney and specifically instructed Respondent not to release the money to Ms. [ ] until a Mutual General Release was signed by all parties. Respondent deposited the check into his IOLTA on January 6, 2020.

Although Ms. [ ] was of the view that Mr. [ ] should immediately turn over the $10,000, Mr. [ ] insisted that he would not turn over any funds to settle the matter until the parties executed the release, due to the action against him for alleged criminal misconduct and threatened legal action by Ms. [ ]'s law firm. The record established that it took several months to draft a release that was satisfactory to the parties. Between late October 2019 and February 2020, numerous drafts of the proposed release were exchanged between Mr. [ ] and Ms. [ ] and her law firm and the matter eventually settled on February 18, 2020. On that date, Respondent disbursed the $10,000 check out of his IOLTA account to Ms. [ ]'s firm to end the dispute. The criminal charges against Mr. [ ] then were dropped. No civil suit, which had been threatened as early as September 12, 2019 by Ms. [ ], was ever brought.

In attorney discipline matters, evidence is sufficient to prove unprofessional conduct if a preponderance of the evidence establishes the conduct and the proof of such conduct is clear and satisfactory. *Office of Disciplinary Counsel v. John T. Grigsby, III*, 425 A.2d 730, 732 (Pa. 1981). Based on the facts as set forth above, we find that

Petitioner failed to satisfy its burden. It is undisputed that the overpayment of funds occurred solely as a result of the error of [ ] in failing to account for the down payment in the HUD-1 Closing Disclosure document. This failure had nothing to do with actions by Respondent or Mr. [ ]. It is also undisputed that this matter does not involve any misappropriation or commingling of entrusted funds by Respondent. Rather, Petitioner contends that Respondent failed to hold entrusted funds separate from his own and failed to appropriately safeguard funds, failed to promptly deliver property to a third person that the person was entitled to receive, failed to keep funds separate when two or more persons claimed an interest, and engaged in conduct that constituted dishonesty, fraud, deceit or misrepresentation.

The first time Respondent saw the settlement statement, according to the uncontroverted evidence, was at the closing itself, despite a prior request for the document. While Respondent did sign a document stating that he had reviewed the document and it appeared to be in order, he relied upon the closing attorneys to have properly done their job and have prepared the settlement statement correctly. As it turns out, the settlement attorneys had not prepared it correctly and had not set forth on the document the previous hand money payment that had been made by the buyers. Respondent's role with regard to the closing was to attend, provide the [ ] closing attorney with the original deed signed by Mr. [ ], receive the net proceeds check from the closing, review the documents the closing agent gave him, and deposit the hand money check and net proceeds into Mr. [ ]'s account. Respondent did all of this.

Evidence at the hearing established that prior to the August 13, 2019 closing, Respondent had specifically advised Ms. [ ], in response to a specific question she had asked in an email, that he had the hand money check and intended to deposit it

to the credit of Mr. [ ] at the closing. No document, including the Agreement of Sale, the Escrow Agreement or the Special Power of Attorney, obligated Respondent to give the hand money check to the settlement attorney at the time of the real estate closing. Nor did any witness testify that the settlement attorney asked Respondent anything about the hand money at the actual closing.

Following the September 4, 2019 claim of [ ] to a $10,000 overpayment, Ms. [ ]'s position was that Respondent should have immediately arranged for his client to turn over the $10,000. Respondent took the reasonable position that because a claim was being made against his client twenty-two days after closing, he had to make sure that it was accurate. Respondent was not obligated to accept at face value a claim against his client for $10,000 without ensuring he received proper documentation of the alleged amount due, and without ensuring that he had time to confer with his client about the claim.

This record established that Respondent did not engage in misconduct during his representation of Mr. [ ] in the real estate transaction and the aftermath that involved settling the overpayment. The party threatening the litigation against Mr. [ ] and/or Respondent caused the dispute by its error in failing to properly handle the transaction. Respondent and Mr. [ ] were entitled to assume that the closing documents had been correctly prepared by the closing officer and that the net proceeds check given to Respondent at the closing was proper. The record demonstrates that once the claim of overpayment was made against his client, Respondent promptly responded to the emails from Ms. [ ] or her firm, investigated the matter with his client, fully cooperated with Detective[ ], and followed the instructions of his client, who was facing a criminal charge and threats of civil litigation, to hold the $10,000 payment until the mutual release was

signed. Respondent did not cause the delay in signing the release, but communicated frequently with Ms. [ ] and her firm during the approximately four months that the parties exchanged drafts of a proposed release. Once the parties executed the release and the matter was settled, Respondent promptly disbursed the funds to Ms. [ ]'s firm. On this record, it is our conclusion that Respondent's handling of entrusted funds did not fall afoul of the ethical rules. While arguably this matter could have been dealt with differently by the involved parties, the record does not evidence that Respondent played an unethical role in the events.

CONCLUSIONS OF LAW

1. Petitioner failed to meet its burden to establish violation of Rule of Professional Conduct 1.15(b), which requires that an attorney "hold all RPC 1.15 Funds and property separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded."
2. Petitioner failed to meet its burden to establish violation of Rule of Professional Conduct 1.15(e), which requires in relevant part that "except as stated in this rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any property that the client or third person is entitled to receive and upon request by the client or third person shall promptly render a full accounting regarding the property."
3. Petitioner failed to meet its burden to establish violation of Rule of Professional Conduct 1.15(f), which requires that "when in possession of funds or property in which two or more persons, one of whom may be the lawyer, claim an interest, the lawyer shall keep the funds separate until the dispute is resolved."

4. Petitioner failed to meet its burden to establish violation of Rule of Professional Conduct 8.4(c), which prohibits an attorney from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."

DETERMINATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously determines that the charges filed against the Respondent, [ ], be dismissed.

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: _____
Joshua M. Bloom, Member

Date: 8/21/2023