Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-065

IN THE MATTER OF :
LEE W. SHELLY, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: May 18, 1994

Decided: August 10, 1994

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

John T. Mullaney, Jr. appeared on behalf of respondent.

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

This matter was before the Board based on a recommendation for public discipline filed by Special Master Frank J. Dupignac, Jr. The formal ethics complaint charged respondent with three counts of knowing misappropriation of trust funds (counts one, two and three), conflict of interest (count four) and recordkeeping violations (count five).

Admitted to the New Jersey bar in 1973, respondent is a sole practitioner in Monmouth County. He has no history of prior discipline.

In 1983, respondent was retained by Concetta "Babe" Roden to represent her in several complex lawsuits and other legal matters involving substantial assets that were the subject of a bitter

dispute among Ms. Roden, her brother John Maimone, her sister-in-law Maureen Campbell Maimone, and her sister Domenica Maimone. It appears that Ms. Roden's father, Carmello Maimone, a real estate developer and builder in Monmouth County, had accumulated considerable fortune in his lifetime, including seventeen shopping centers. Some of those assets were the corpus of at least two trusts established by Carmello Maimone, of which Ms. Roden was one of the beneficiaries. These were the assets that were the subject of the family quarrel.

Ms. Roden was initially represented by John Wopat, III, Esq., the grievant in this matter. Because of a conflict of interest, however, Mr. Wopat referred Ms. Roden to Richard McManus, Esq., who represented her for approximately one year. After Ms. Roden became unhappy with Mr. McManus' representation, she consulted with respondent, of whom Ms. Roden's employer was a client.

At the time, Ms. Roden was in dire financial straits. She had not been able to pay the mortgage on her house in Little Silver, Monmouth County, for an extended period of time and also had other outstanding bills. In fact, shortly after she first saw respondent, a foreclosure action ensued.

According to respondent, Ms. Roden's employer told him that he would be advancing $1,500 to her for a retainer. The employer asked if respondent could represent her for that amount. Respondent replied that he would do what he could. At that time, however, respondent was unaware of the details and the complexity of the various lawsuits in which Ms. Roden was embroiled.

Respondent testified that, when he was first retained, he informed Ms. Roden that he would be charging her an hourly rate of $150 and that, because of her difficult financial situation, he would remove his fees from funds recovered in her behalf. Because she appeared very distraught at the time, respondent told Ms. Roden not to worry then about the payment of his fees. Respondent did not prepare a written fee agreement either then or during his nine-year representation of Ms. Roden's interests.

Ms. Roden admitted that, prior to respondent's involvement in her legal matters, there had not been many recoveries of assets or funds for her at all. She also conceded that, throughout the representation, respondent collected approximately $800,000 in her behalf, for which she paid him approximately $100,000 in fees. It is undisputed that, after the $1,500 retainer, respondent collected no fees from Ms. Roden for a period of two years. It was not until April 1986 that the first distribution of monies to Ms. Roden occurred, after respondent filed a partition action. That first distribution amounted to $120,000. After consultation with Ms. Roden, respondent kept $20,000 in fees for himself and disbursed the balance to her. Between April 1986 and April 1990, respondent accomplished eleven distributions of funds for the benefit of Ms. Roden. At times, they were substantial ($108,000 in April 1989, $83,000 in April 1990). Frequently, but not always, respondent deducted his fee prior to making disbursements to Ms. Roden, but only after obtaining her consent. Respondent did not keep time sheets for any of the Roden matters or send Ms. Roden a bill or

statement of services. According to respondent, the fee withdrawals generally reflected the time spent on each matter, but major considerations were also Ms. Roden's financial needs and ability to pay in each instance.

A complex lawsuit (Roden v. Franceze) that respondent was handling for Ms. Roden involved charges of fraud on the part of her sister-in-law. The suit alleged that the latter had fraudulently sold the asset of one of the trusts — a shopping center. In May 1991, respondent and Ms. Roden had a discussion about his legal fee for that matter. Respondent testified that, after Ms. Roden voiced her concern about the payment of due and future legal fees in connection with that lawsuit, he agreed to make his fee contingent on recovery. According to respondent, the fee was not to be calculated on a percentage basis but, instead, on his hourly rate of $150. Respondent further testified that he had informed Ms. Roden that, based on the time spent in that matter, the fee could easily total $50,000.

The Franceze trial took place in September 1991. In January 1992, the court awarded Ms. Roden a $95,000 judgment and, in addition, a $900,000 judgment in favor of the trust, of which Ms. Roden was one of three beneficiaries. Because of certain problems not relevant to these proceedings, the judgment in favor of Ms. Roden was not satisfied right away — and, in fact, was not paid until the summer of 1993, long after respondent had been discharged from representation.

In January 1992, Ms. Roden was, once again, financially

strapped. By then, her house in Little Silver had been listed for sale for two years (Ms. Roden moved to Florida in 1988). During that period, there had been no reasonable offers to purchase the property. Shortly thereafter, however, in February 1992, she received an acceptable offer, whereupon a contract of sale was signed, on February 3, 1992, for $192,000. Exhibit J-3. Although the contract called for the $6,000 deposit to be held by the real estate broker, it is undisputed that the deposit was turned over to respondent, to be kept in escrow until closing of title. On February 5, 1992, respondent deposited the $6,000 deposit in his trust account. Exhibit OAE-19.

According to respondent, on or about February 6, 1992, he became aware that the termite inspection had revealed some termite damage to the house. The termite inspection report gave an estimate of $600 for the repairs. Aware that Ms. Roden had no money for the repairs and further aware of her strong desire that the sale go through, respondent discussed the matter with the attorney for the buyers, James Houston, on February 6, 1992. Mr. Houston informed respondent that his clients, too, were unable to assume financial responsibility for the repairs. According to respondent,

A. [a]fter a brief discussion, we decided to hold the contract together. He agreed to release the deposit, I agreed to do the repairs.

Q. Now what you're saying is he agreed to release the deposit. Now this is the six thousand dollars that has been testified to?

A. Yes, he was not -- it was in effect a thin deposit. The contract was something like a hundred ninety-two thousand dollars, as I recall the deposit was only for six thousand dollars, so they hadn't put that much money down anyway, so that was what we agreed to.

Q. Okay. When you spoke to Mr. Houston to this effect were you aware of the fact that another inspection was in the works as well?

A. Yes.

Q. All right. And do you know who undertook that inspection?

A. There was another -- there was a house inspection that they were doing.

Q. So you have a termite inspection and there's a house inspection as well?

A. Right. I think he had some preliminary indication with regard to the house inspection, but he definitely had the termite.

[T11/4/1993 70-71]

Mr. Houston did not testify at the DEC hearing. Respondent stated that there were no writings confirming Mr. Houston's authorization to release the deposit. He testified that he had informed Ms. Roden of Mr. Houston's consent to release the deposit, to which Ms. Roden had agreed in order to save the transaction. Respondent also testified that, pursuant to previous discussions with Ms. Roden, he intended to draw against the deposit for some of the outstanding legal fees owed by Ms. Roden. Respondent explained that, in January 1992, he had discussed with Ms. Roden the fact that, when her house was sold, if he still had not received his fee from the Franceze case, he would have to draw it from the real estate proceeds; because, however, he was not entitled to receive his fee until Ms. Roden's actual recovery of the monies, he told

her he would treat that transaction as a loan to him.

On the same day that respondent allegedly discussed the release of the deposit with Mr. Houston and with Ms. Roden, February 6, 1992, he disbursed to himself $1,000 from the deposit escrowed in his trust account. Exhibit OAE-20. The following day, February 7, 1992, he again disbursed to himself $3,000 from the balance of the deposit. Exhibit OAE-21. Lastly, on February 13, 1992, respondent made a final disbursement to himself of $2,000. Exhibit OAE-22. Respondent did not use those monies to pay for the house repairs. He admitted that he utilized the $6,000 sum for personal purposes.

On February 14, 1992, respondent and Mr. Houston agreed that the buyers would get a $9,500 credit at the closing for termite treatment and structural repair. Exhibits R-9 and R-10. According to respondent, the foregoing agreement had been worked out by either Ms. Roden or the broker directly with the buyers. In fact, respondent added, he learned of the agreement from Ms. Roden.

During respondent's cross-examination by the presenter, the following exchange took place on the issue of the release and use of the $6,000 deposit:

Q. Okay. And what was your agreement again than[sic] with Mr. Houston?

A. That we would do repairs.

Q. How much was the estimate to do the repair work?

A. The total estimate hadn't been determined. The only number I think that I was aware of on [February 6, 1992] was termite.

Q. Well, let me confine my question then to termite damage. It was an estimate of repair work that was necessary that was in the termite report, is that correct?

A. Yes, I believe so.

Q. What was the estimated amount to repair termite damage?

A. Six hundred dollars.

Q. Six hundred dollars. At that time you had in your trust account a six thousand dollar deposit?

A. Yes.

Q. And you asked Mr. Houston if you could take that six thousand dollar deposit to make a six hundred dollar repair, is that right?

A. No.

Q. What was the conversation?

A. It was a situation where his clients wanted to go through with the purchase, we had a hundred dollar cap and my client wanted to go through with the purchase. The only contract she'd received I think in two years of having the house on the market. My client did not have money to make repairs, apparently their financing was at whatever limit they had, they only had so much available money, they were not going to make the repairs.

So we had to make a compromise. He said his clients were not going to exercise their option under the contract to make the repairs. I told him okay, I said, we'll make the repairs, you release the deposit. That was it, it was not, release the deposit so that I can pay for six hundred dollars of repairs. We were going to do the repairs, I was going to arrange for the repairs. I was going to take care of whatever it was, we were going to get our own reports and our own experts or contractors and that was it.

It was, they release the deposit, we do the repairs, period. It was that simple and it was a very thin deposit, a hundred ninety-five or hundred ninety-six thousand dollar deal, I had six thousand dollars.

* * *

Q. So Mr. Houston said that you could use the deposit to make termite repairs, is that correct?

A. No. Mr. Houston agreed to release the deposit, what we were talking about was repair, he didn't say, you could use the deposit for repairs and I didn't ask, can I use the deposit for repairs, what I said was, we'll do the repairs, you release the deposit.

Q. And correct me if I'm wrong, but at that point all you had was an estimate showing that six hundred dollars worth of repairs were necessary?

A. At that point, what I had, I don't think I had the report, I think I had his statement or -- it either came from himself or from the broker that there was a termite problem, it was six hundred dollars. I had a previous estimate in regards to repairs on the house that was part of the appraisal from USA Mortgage. I think that report showed something like three thousand dollars in repairs necessary to the house. I had my own knowledge of the house, I had been there, I had been there after it was closed and vacant so I knew what the condition of the house was.

Q. Where are those estimates? Did [the buyers] have a home inspection report done?

A. I believe so, yes.

Q. When was that done?

A. I believe it was done sometime before February 13, sometime between February I guess 1st and February 13.

Q. Did you receive a copy of that?

A. No.

Q. Did you receive a letter from Mr. Houston indicating what the repairs were that were required by that report?

A. No.

Q. Did you receive a telephone call from Mr. Houston regarding that report?

A. I don't recall if I got a call from Mr. Houston about that report.

Q. In any event, the report indicated, and correct me if I'm wrong, there was some ninety-five hundred dollars worth of repairs that were necessary?

A. I have no idea.

Q. You don't know. You agreed with Mr. Houston that the sellers would take a deduction of ninety-five hundred dollars against the net purchase price, didn't you?

A. Yes.

Q. Do you recall when that agreement was arrived at?

A. Yes. That was, I believe, on February 13 or 14.

* * *

Q. Okay. So as of the 6th you had six hundred dollars in repairs that were necessary that were demanded by Mr. Houston and you had asked for the release of the six thousand dollar deposit, is that correct?

A. No, I wouldn't put it that way. He did not call me up and say, I demand that you do six hundred dollars worth of repairs, and I did not say, I demand the release of the deposit. It was like, we've got six hundred dollars in termite, we don't have the report in from the building inspector yet but there may be damage there and my clients do not wish to do repairs, they can't. And I said, well, my client can't either, so we were either going to kill the deal at that point or make the deal fly.

Q. That deal was right on the verge of dying at this point?

A. Well, no, because neither his client nor my client wanted to kill the deal, they wanted to go ahead with the purchase, they had a good buy on the house. My client wanted to go ahead with the sale but we had to overcome what the problem was and that is --

Q. Six hundred dollars worth of damage?

A. No. It was six hundred dollars that he had for a termite inspection and it was pending, they had a house inspection pending, I already knew that there were going to be other repairs so that idea was, what do we do? He suggested we do the repairs, I said, we can't, we don't have the money. I said, we'll do the repairs, you release the deposit. There has to be give and take here, that was it.

Q. And as a result of that the deposit was released to you?

A. Yes.

Q. Okay. And you spent the money?

A. Yes.

Q. Okay. You didn't spend it on termite repairs?

A. No.

Q. When Mr. Houston agreed to release the deposit according to you did you tell him you were going to take the money and put it in your business account and spend it?

A. No.

Q. And do you think that that's what he was consenting to, the release of the money to your business account and your spending it?

A. Yes. I had thought --

Q. You think he consented to your releasing the money to your business account and spending it?

A. He consented to the release of the deposit.

Q. To you so that you could spend it on your own personal purposes?

A. Did I think he was consenting to that?

Q. Yes.

A. No, I thought he was consenting to the release of the deposit, period. What happened after he released the deposit is my responsibility and not his responsibility.

Q. So Mr. Houston did not consent to releasing the deposit to you to your personal account so that you could -- so that you could spend that money for your personal purposes, is that right?

A. He consented to the release of the deposit.

Q. Did he consent to the release of the deposit to your personal account so that you could spend it on your personal purposes?

A. No.

[T11/4/1993 123-133]

Closing of title took place on Friday, March 27, 1992. As the RESPA statement indicates, the net proceeds of sale that should have gone to Ms. Roden amounted to $167,488.57 ($161,488.57 plus the $6,000 deposit). Exhibit OAE-5. Ms. Roden did not attend the closing. On the following Wednesday, March 31, 1992, respondent sent a certified check to Ms. Roden for $124,671.57. Exhibit OAE-3. That check was accompanied by the following handwritten note:

> Babe,
>
> I had the checks certified so you won't have to wait for it to clear.
>
> I have to borrow 40,000 dollars for two weeks at 12%. I'll call you tomorrow.
>
> Lee
>
> [Exhibit OAE-2]

The $40,000 consisted of $34,000 taken from the net closing proceeds plus the $6,000 deposit.

As mentioned earlier, respondent testified that, in January 1992, he had had a discussion with Ms. Roden about borrowing his contingent fee in the Franceze matter from the closing proceeds:

> As I'd spoken to her before the closing, we had previously discussed what the fees were and conclusion on the judgment was, where the levy was, etcetera. I told her since I had agreed to make my fee contingent I needed to draw against funds, I needed to draw against the closing proceeds. And I said, however, since I had made my fee contingent I'll treat it as a loan. She asked how much I needed, I said it wouldn't be anymore than what I have for the legal fees or what's approximately due me as the legal fees. We discussed what the number was, I said around fifty thousand dollars. I told her I'd pay her interest on the loan until we did collect. She was in effect delighted by that idea, she was finally going to be earning money on her money in effect reducing my legal fees.

Prior to the closing I told her I was going to borrow forty thousand dollars against the closing proceeds. She said, fine. I went to the closing, disbursed the moneys, had the check, she needed money right away, I had the disbursements certified, when the funds cleared I sent it, I believe overnight mail to Mrs. Roden on the 31st.

Q. And that was accompanied by the note that has been marked in evidence, correct?

A. Yes, I sent her the closing statement, I sent her the bill that I prepared for the closing and I sent her the check. I think I sent it out on the 1st.

Q. Was your conversation with her about the money the same format as all the other ones that you previously testified to when you took disbursement against proceeds that she -- that had come into your possession for her?

A. Yes.

[T11/4/1993 85-87]

Respondent testified that, either on April 1 or April 2, 1992, he had telephoned Ms. Roden to discuss his retention of the $40,000 as a loan. T/11/4/1993 145-146. The record is silent about the substance of that telephone conversation. Respondent further testified that, when it became apparent to him that he would be unable to repay the loan in two weeks, he had several conversations with Ms. Roden.

On May 8, 1992, Ms. Roden sent the following handwritten note to respondent:

Dear Lee,

Having been in similar positions myself at times, I anticipate you have not yet procured a loan.

Extending the length of time to what ever is comfortable is no problem.

Please give me a call so we may discuss this.

Babe

[Exhibit OAE-33]

Respondent testified that he first learned of a problem with his retention of the $40,000 in early June 1992, when Mr. Wopat, with whom Mrs. Roden had consulted, contacted him. Indeed, by letter dated June 5, 1992, Mr. Wopat advised respondent that Ms. Roden had not agreed to lend him $40,000 and demanded prompt restitution. That letter also directed respondent not to contact Ms. Roden directly under any circumstances. Exhibit OAE-6. Following a telephone conversation with respondent, on June 12, 1992, Mr. Wopat sent him a letter confirming that respondent would restore the $40,000 to Ms. Roden by 4:00 p.m. on Monday, June 15, 1992. Exhibit OAE-7. When respondent found himself unable to raise the $40,000, he proposed to Mr. Wopat that Ms. Roden accept an assignment of certain legal fees to be received in the course of eighteen or twenty-four months. Respondent, in fact, sent Mr. Wopat a copy of the settlement stipulation, but Mr. Wopat rejected his proposal. According to Mr. Wopat, by the end of the day, on June 15, 1992, not having received a check from respondent for $40,000, he telephoned the district ethics committee to report respondent's conduct.

Ms. Roden's version of the events differed substantially from respondent's. She testified that, one or two days after the March 27, 1992 closing, she had telephoned respondent to inquire whether

he had already sent her the closing proceeds. On or about April 1, 1992, she had received a check from respondent for $124,671.57, instead of $167,488.57, along with respondent's handwritten note about keeping $40,000 from the closing proceeds. Asked about her reaction when she received $124,000, instead of $167,000, Ms. Roden replied: "Well, I was a little surprised. But, you know, the note explained where the balance of the moneys were." T11/3/1993 30. She had interpreted respondent's statement of "I'll call you tomorrow" to mean that "he'd call me and tell me what he borrowed -- why he borrowed the money or why it wasn't the full amount of the check." T11/3/1993 30.

According to Ms. Roden, despite his promise, respondent did not call her the following day. She testified that, not having heard from respondent, she got in touch with him "that day or the day after," at which time respondent told her that he had to borrow the money to pay taxes. Asked numerous times by the presenter whether she had been able to reach respondent "that day or the next day," Ms. Roden reconsidered her previous answer and testified that, in fact, she had reached respondent only on April 6, 1992, or five days after she received his handwritten note. Ms. Roden was queried about the tenor of that telephone conversation:

A. It's kind of difficult to recall the exact conversation. He said that he was working on it and that - - on getting the moneys to send me back.

Q. What did you say?

A. I said fine.

Q. Okay. What was your thinking at that point?

A. I was a little unnerved at the time but I had no reason to doubt that he wouldn't send it back to me at the time.

Q. You believed that he would send it back.

A. Yes, I did.

Q. Okay. So what did you do at that point?

A. Well, I gave him the benefit of the doubt and I didn't bother him about it for two weeks. I guess, you know, if there were any occasions to talk to him about other matters I did so and I didn't raise the issue of it because I figured, you know, I'm giving him the benefit that he has two weeks and that he'll replace it.

Q. Okay. And what happened at the end of that two week period?

A. Well, at the end of the two weeks I started calling -- you know, I believe I wrote him a little note and asked him that, you know, I understood that, you know, if he was in the situation where he was having a problem that I understood, you know, to please contact me so we could work out some kind of arrangement so I would know how the monies would be paid back to me and that, you know, it could be done in such a way that it was comfortable to him and me both.

* * *

Q. Okay. What was your thinking in sending that note?

A. Well, I was unable to get ahold of him by phone so, you know, he was either not in, with a client, in depositions or would call me back. So I sent him the note hoping that, you know, something in writing would, you know, he would have it there so that he would contact me.

Q. All right. What's the date of that note?

A. May 8.

Q. Okay. And had you talked to him from April 6 to May 8?

A. Yes, I had talked to him on other matters, I remember talking to him around Easter time, you know, we talked about -- mostly it was Roden/Franzese [sic] situation about things that I had heard that were going on with my family and my sister and stuff like that.

Q. Was the subject of the forty thousand dollars raised at all?

A. On May 8 I had called him and I asked him if he had the money yet, and he said, I'm working on it. And I said, fine.

Q. Okay. That's the same date as the date of your note?

A. I believe it was. See, now I know it was in May, it might have been right after this note and he said he was working on it. And at that point is when I became a little uneasy because I had been having, like I said, problems contacting him by phone, he was either not in, was in depositions, and I got the feeling that he was trying to avoid me.

Q. So what did you do?

A. Well, I was talking to my cousin about it and I was really upset and she said, you know, this is not right. Why don't you -- she said, why don't you call John and talk to him about it.

Q. Who is John?

A. John Wopat, who is now my attorney.

[T11/3/1993 35-38]

Ms. Roden denied having had any conversations with respondent about his need to borrow monies from the closing proceeds. She testified that she had first become aware that respondent had kept a portion of the proceeds as a loan when she received his handwritten note. Similarly, she was unable to recall any discussions with respondent about the release of the deposit monies for house repairs.

As of the date of the DEC hearing, November 3, 1993, respondent had not repaid the $40,000 to Ms. Roden.

* * *

Count three of the formal ethics complaint charged that respondent had informed Ms. Roden that he had escrowed $1,250 from the sales proceeds until the closing figures could be verified and that he had, instead, deposited that amount in his business account, thereby knowingly misappropriating client funds.

Respondent's explanation was that the title binder had showed an outstanding $1,125 judgment against Ms. Roden and in favor of her sister-in-law, Maureen Campbell Maimone. Because respondent thought that the judgment had already been paid — in fact, with his own funds — he had written a letter to Ms. Maimone's attorney, prior to the closing of title, requesting a warrant to satisfy judgment. The attorney had taken, however, approximately two months to send the warrant. Accordingly, in the interim, respondent had withheld $1,250, at the suggestion of the buyers' attorney, Mr. Houston. Respondent added that there was no written agreement governing the escrow of the $1,250, which had been the subject of an informal discussion only with Mr. Houston:

> * * * I was at [Houston's] office perhaps five or ten minutes, I walked in and walked out, I gave him the deed, affidavit of title and the closing statement, he cut me the check, we shook hands and had that discussion about the open judgment.
>
> [T11/4/1993 82]

To corroborate his testimony that he believed that the judgment in favor of Ms. Maimone had already been satisfied, respondent produced business account check number 5603, dated January 26, 1990, in the amount of $1,125, payable to Maureen Maimone. Exhibit R-12. He similarly submitted a copy of a letter

to Ms. Maimone's attorney, Andrew Kimmel, Esq., enclosing a $1,000 payment for sanctions imposed by the court against Ms. Roden in the Roden v. Franceze matter, which payment had also been made out of respondent's own funds. Exhibit R-11.

Respondent testified that, after he assured himself that those two payments had, indeed, been made, he had kept the $1,250 for himself, as a reimbursement.

* * *

Count four of the formal ethics complaint charged respondent with a conflict of interest by not advising Ms. Roden to seek the advice of independent counsel in connection with the $40,000 loan transaction, in violation of RPC 1.8(a). Presumably, that count was pleaded in the alternative, should it be found that Ms. Roden had agreed to lend $40,000 to respondent. At the DEC hearing, Ms. Roden testified that at no time had respondent urged her to consult with another attorney about the transaction.

* * *

Count five of the formal ethics complaint charged respondent with recordkeeping violations by not maintaining all of his attorney trust account deposit slips, not maintaining cash receipts or cash disbursement journals, and not keeping running balances on the client ledger cards, all in violation of R. 1:21-6 and RPC

1.15(d). That count also charged respondent with making disbursements in excess of the balance on deposit in a matter involving Ms. Roden, thereby knowingly misappropriating client funds.

* * *

At the conclusion of the ethics hearing, the Special Master found that the evidence clearly and convincingly established that respondent had knowingly misappropriated the $6,000 deposit and $34,000 from the proceeds of sale, in violation of RPC 1.15 and RPC 8.4. The Special Master also found that "respondent's borrowing of his client's money without advising her to seek independent legal counsel constituted a conflict of interest in violation of RPC 1.8(a) (Count Four)." Special Master's Decision at 13.

The Special Master further found that the proofs were insufficient to allow a conclusion that respondent had knowingly misappropriated the $1,250 escrow. Lastly, the Special Master concluded that, although respondent had violated the recordkeeping requirements of R. 1:21-6 and RPC 1.15(d), "the proofs of a knowing misappropriation of funds as a result thereof are less than clear and convincing." Special Master's Decision at 13.

CONCLUSION AND RECOMMENDATION

Upon an independent de novo review of the record, the Board is satisfied that the Special Master's conclusion that respondent acted unethically is fully supported by the record. The Board is unable to agree, however, with the Special Master's conclusion that respondent knowingly misappropriated $34,000 from Ms. Roden's closing proceeds. In the Board's view, the evidence did not clearly and convincingly establish that respondent removed the $34,000 without Ms. Roden's consent. Although Ms. Roden had no recollection of conversations with respondent, in January 1992 and just before the closing, about his borrowing certain monies from the proceeds of sale, respondent testified that she had agreed to the removal of those monies as a loan, in anticipation of the payment of his legal fees in the Franceze matter. According to respondent's testimony, those fees had already been earned. In January 1992, the court had entered a $95,000 judgment in favor of Ms. Roden as well as a $900,000 judgment in favor of the trust, of which Ms. Roden was one of the beneficiaries. Although the judgment remained to be satisfied, respondent was entitled to a legal fee, contingent only upon Ms. Roden's actual receipt of the court's award. Because the judgment still had not been paid, respondent testified, he had suggested to Ms. Roden that the $40,000 be treated as a loan, instead of a fee payment.

Furthermore, respondent's action in setting aside for himself $34,000 from the closing proceeds — albeit this time in the form of a loan — was consistent with the practice he had followed in

the nine years of representing Ms. Roden; with her prior consent, her outstanding fees were paid out of monies respondent successfully recovered in her behalf in each matter. There is also respondent's close relationship with Ms. Roden to be considered. Based on the parties' informal and friendly relationship over the years, it is plausible that Ms. Roden agreed to lend respondent some monies, especially if the loan was to be for a short term, as in this instance.

In light of the foregoing, the Board cannot conclude, to a clear and convincing standard, that respondent kept the $34,000 without Ms. Roden's consent or, otherwise stated, that he knowingly misappropriated those funds for his own purposes. On the other hand, his failure to document the loan and to advise Ms. Roden to consult with another attorney violated RPC 1.8.

Similarly, like the Special Master, the Board cannot find that respondent knowingly misappropriated $1,250 (Count Three) or other client funds in one of the Roden matters, as a result of his poor recordkeeping (Count Five).

The Board was convinced, however, that respondent knowingly misappropriated the $6,000 deposit for his own purposes. Even if it were true that respondent obtained the buyers' attorney's and Ms. Roden's consent to the release of the deposit escrowed in his trust account, by respondent's own admission he did not have the buyers' attorney's consent to use those monies for his personal purposes. And although respondent, at times, appears to assert that the release itself of the deposit was the consideration for

his and Ms. Roden's agreement to take care of the repairs and that, once released, "what happened to the deposit was his responsibility," the evidence clearly shows — and respondent so admitted — that he did not have the buyers' attorney's consent to spend the $6,000 for his personal expenses. Under those circumstances, respondent must be disbarred. In re Hollendonner, 102 N.J. 21 (1985); In re Wilson, 81 N.J. 451 (1979). A four-member majority of the Board so recommends. Three members would have imposed a six-month suspension for respondent's violations of RPC 1.8, R.1:21-6 and RPC 1.15(d), believing that the evidence did not clearly and convincingly show that respondent's use of either the $34,000 or the $6,000 was unauthorized. Two members did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 8/10/94 By: Elizabeth L. Buff
Elizabeth L. Buff
Vice-Chair
Disciplinary Review Board