XIV-91-13E
First Violation - 1989 OAE file
RAP

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-034

IN THE MATTER OF :
JAMES F. HOUSTON, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: February 26, 1992

Decided: April 14, 1992

Thomas J. McCormick appeared on behalf of the Office of Attorney Ethics.

Sidney I. Sawyer 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 on a recommendation for public discipline filed by the District XI Ethics Committee ("DEC").

Respondent is a single practitioner in Monmouth County, primarily involved in real estate matters. He was admitted to the New Jersey bar in 1969. In 1990, he was randomly selected for a compliance audit of his attorney records. The audit, which took place on July 18 and August 9, 1990, disclosed that, between February and April 1990, respondent advanced legal fees to himself in nineteen real estate matters, before the closing of title, in the total amount of $16,279.50. The number of days preceding the closing of title ranged from one to sixty. In seventeen of those

matters, there were no funds on deposit standing to the clients' credit. Hence, other clients' funds were invaded to pay these "fees." In the remaining two matters, the fees were prematurely drawn against funds on deposit, without the parties' knowledge and consent. Schedule A to Audit Report (Exhibit A to the Formal Complaint).

By way of example, the Vaccarella ledger card shows that, on December 6 and 26, 1989, respondent withdrew legal fees in the amount of $475 and $225, respectively, without having corresponding funds on deposit. The closing of title occurred on December 29, 1989. Thus, respondent withdrew a $475 fee twenty-three days prior to the closing and a $225 fee three days before the closing. Attachment C-1 to Audit Report.

Respondent did not dispute the auditor's conclusions. In fact, he admitted to the auditor that, for a period of approximately eighteen months, he engaged in a practice of advancing unearned legal fees to himself to pay for office expenses. According to respondent, when, in late 1986, his partner unilaterally dissolved their law practice, respondent was left "with what was on his back," because of the lack of a written partnership agreement. In early 1987, he was forced to start a law practice all over again, utilizing a small sum from his savings account and his home equity loan to buy office furniture, equipment and supplies. As respondent recounted:

> Well, when I went out in '87, basically 99 percent of my practice was real estate and what I took was clients from Miele and I had to foster new clients. It was difficult to

> foster new clients because when I was practicing with John, he would do all the reviewing of the contracts and therefore saw all the real estate brokers and I didn't have any contact with the real estate brokers and that is usually you're [sic] bread and butter, if you do a real estate practice to get referrals from them. I was doing all the closings but he was doing all the preliminary work and working with the brokers, etc. So he would reap the benefits of it and I didn't.
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> But initially the practice, I was okay for a little while and then the real estate in that year started to sour and in fact a great deal had soured, my practice went down I believe 20 percent the next year and then another ten or 20 percent the following year. Basically the practice has just now turned around a little bit and partly because of more belt tightening than anything else because I had to cut back on office staff. Presently I have my wife as my secretary who used to be my secretary in '75 when I went out on my own, so that saves a substantial amount of money. But basically business has not been good and that is not just for me, I'm sure that is for the whole economy, especially real estate.
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> [T66-67][1]

Respondent went on to say that, at the time of the premature withdrawals of legal fees, his financial position was "very poor" and that he was particularly concerned with his ability to pay the salary of his sister-in-law, who was working as his secretary. It appears that his sister-in-law had recently purchased her own house, using as collateral for the mortgage loan a $20,000 certificate of deposit belonging to respondent's mother-in-law. Respondent was concerned that, if the sister-in-law failed to pay

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[1] T denotes the transcript of the DEC hearing of December 4, 1991.

the mortgage, his mother-in-law would lose her lifetime savings. It was then that respondent began to advance fees to himself "one day or two" before the closings of title. When queried about the longer intervals between the withdrawal and the closing in most instances, respondent replied that that was due to the "fickleness of real estate closings. Unfortunately, some are scheduled and they don't take place." T78. Respondent conceded that he knew that his actions were wrong. He also testified that the last time he took an advance fee was in April 1990, prior to being notified of the random audit.

It is undisputed that respondent's withdrawals did not exceed the fees to which he would have been entitled. It is also undisputed that respondent's trust account was never overdrawn and that, immediately upon being apprised of the trust account deficiency by the OAE auditor, he deposited $8,000 in his trust account to cover the funds prematurely removed as legal fees. Ironically, a $2,500 certificate of deposit that respondent used, in part, to replace the funds was available to him during the period that the fees were advanced. Respondent explained, however, that he did not realize the extent of the shortage because he was not performing quarterly reconciliations of his trust account records, contrary to the requirements of R. 1:21-6.

In addition to the improper advance of legal fees, numerous recordkeeping violations were uncovered by the audit, as follows:

1. A running balance was not kept in the trust account checkbook.

2. Clients' ledger cards were not fully descriptive.

3. A separate ledger card for each client was not maintained.

4. Trust receipts and disbursements books were not maintained.

5. The clients' ledger cards were not reconciled quarterly to the trust account bank statements.

At the conclusion of the DEC hearing, the panel found that respondent had violated the recordkeeping provisions of R.1:21-6 and had knowingly misappropriated trust funds by his early removal of unearned legal fees. The panel, however, urged the Board to recommend to the Court that the concurring opinion in In re Konopka, 126 N.J. 225 (1991), be considered in imposing the appropriate discipline in this knowing misappropriation case. The panel believed that this respondent should be spared from the ultimate sanction of disbarment because of the special circumstances present in this matter, as follows:

1. Respondent has implemented all recommendations made by the OAE and cured all recordkeeping deficiencies.

2. Respondent has fully cooperated with the OAE.

3. No clients suffered any monetary loss.

4. No closings were delayed as a result of respondent's advancement of legal fees.

5. Respondent had no intent to conceal or to cover up his actions.

6. Respondent ceased advancing legal fees to himself before being notified of the random audit.

7. After a drop in respondent's real estate practice from 1987 through 1989, it has improved somewhat in 1991 with the reduction of certain office expenses, including the fact that respondent's wife is acting as his secretary, without pay.

8. Respondent was in dire financial straits in February 1989.

9. In March 1989, respondent's family suffered a tragedy when the motor vehicle in which their sixteen-year old daughter and nine other children were riding flipped and hit a tractor trailer, killing one child. Respondent's daughter blamed herself, in part, for the accident, necessitating psychological help.

10. Respondent spared his wife and child from his financial troubles, placing himself under considerable pressure. As a result, respondent suffered with high blood pressure, gout and depression.

11. Respondent voluntarily ceased the practice of advancing legal fees to himself in April 1990.

12. Respondent is willing to practice law under supervision.

13. Respondent did not replace the sums withdrawn sooner because he did not realize the extent of the shortage.

14. Respondent is a good citizen and a good family man.

[Hearing Panel Report at 7-10]

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board finds that the DEC's conclusions that respondent's conduct was unethical are fully supported by clear and convincing evidence.

Like the DEC, the Board finds that respondent knowingly misappropriated trust funds by his premature withdrawal of unearned legal fees. Respondent's conduct was analogous to that displayed by the attorney in In re Warhaftig, 106 N.J. 529 (1987), who was disbarred for removing legal fees in advance of real estate closings, thereby invading other clients' funds. In that case, a random audit of the attorney's records disclosed that he continually issued trust account checks to his order as advances on

fees in pending real estate matters. The attorney would replace the funds advanced upon receipt of the closing proceeds. Like this respondent, the attorney explained that his withdrawal of advance fees was necessitated by the "gigantic cash flow burden" that he experienced at the time. Such pressures were the result of a decline in his real estate practice, combined with his wife's treatment for cancer and for his son's extensive psychiatric counselling. The attorney contended that, while he knew that what he was doing was wrong, he also knew that no client would be hurt by his actions because he advanced to himself only those sums to which he had a colorable interest. In that case, the Board considered numerous mitigating factors, such as (1) respondent's discontinuance of the practice at issue; (2) his cooperation with the OAE; (3) his acknowledgement of wrongdoing; and (4) the absence of injury to clients. The Board recommended a public reprimand. Concluding that the attorney had knowingly misappropriated trust funds through the use of the advance-fee mechanism, the Court disbarred the attorney. The Court reasoned that, under the Wilson rule, this was the only appropriate result, despite the lack of subjective intent to steal and the absence of harm to clients.

Here, too, disbarment is the required sanction. In re Warhaftig, supra, 106 N.J. 529 (1987); In re Wilson, 81 N.J. 451(1979). Although not devoid of a sense of compassion, the Board was not persuaded, as urged by the DEC, that the circumstances of this case are so unique, so special, so compelling, as to deserve a relaxation of the Wilson rule. See In re Konopka, supra, 126

N.J. 225 (1991) (Stein, J., concurring). Accordingly, the Board unanimously recommends that respondent be disbarred. Four members did not participate.

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

Dated: 4/14/92 By: Raymond R. Trombadore
Chair
Disciplinary Review Board