SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-020

IN THE MATTER OF :
JAMES E. HEINE, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: March 20, 1991

Decided: May 6, 1991

Thomas J. McCormick appeared on behalf of the District IX Ethics Committee.

Thomas F. McGuane and John M. Marmora appeared on behalf of respondent, who was also present.

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

This matter is before the Board based on a presentment filed by the District IX Ethics Committee. The complaint charged respondent with minor recordkeeping violations and knowing misappropriation, by the withdrawal of fees before closing of title in ten real estate matters (count one), and with gross neglect, lack of diligence, and failure to communicate with the beneficiary of an estate of which he was the executor (count two).

Respondent was admitted to the New Jersey bar in 1957. Following his graduation from law school, he worked for his father-in-law in the carpeting business and then for a title company. Thereafter, he worked for an attorney in Perth Amboy and then for a law firm in Plainfield, handling real estate matters. Since 1963, he has been associated with a law firm in Belmar. Approximately ninety-five percent of his practice consists of real estate matters.

Count One

On September 10, 1987, the Office of Attorney Ethics (OAE) conducted a random compliance audit of respondent's trust account records. The audit disclosed that respondent did not maintain cash receipts or disbursements journals and client ledger cards, as required by R.1:21-6. The audit also revealed that, between November 1986 and July 1987, respondent withdrew his fees from deposit funds entrusted to him in ten real estate matters, prior to closing of title.[1] The pertinent agreements of sale provided that all deposit monies were to be held in trust by respondent until closing of title.

[1] The time of the removal of fees ranged from five to sixty-seven days prior to closing.

Although respondent's entitlement to the fees is not in dispute,[2] he did not seek the parties' authorization for the premature removal of said fees. As respondent explained in his answer and at the district ethics committee hearing, he was not aware that his conduct was improper. It was his honest -- albeit mistaken -- belief that, once all the contract contingencies had been satisfied, the deposit monies automatically became the property of the seller. Respondent believed that, because at that juncture he had performed all of the work in behalf of the seller, except for the attendance at closing, his fee had been earned and, consequently, he was entitled to take it from funds that were now the property of the seller. This had been respondent's practice since the late 1970s, but only when he acted as the seller's attorney. Respondent explained that, when an attorney represents the buyer, there is still considerable work to be done after the buyer obtains a mortgage commitment. Under those circumstances, he did not consider his fee earned until closing of title.

Respondent did not recall receiving a December 1986 letter from the OAE enclosing the annual Clients' Security Fund/Ethics Financial Committee billing addressed to all New Jersey attorneys,

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[2] The record is silent about the nature of respondent's association with the other attorneys in the law firm and as to whether those fees were deemed respondent's personal property or the firm's. Respondent acknowledged not having discussed the early withdrawal of the fees with the other attorneys in the firm. As respondent testified ". . . I was associated with several other attorneys in the office I'm in and we all kind of had our own practice . . . I just didn't discuss anything with them nor did they with me" (T12/14/1990 217).

and making reference, among other things, to Matter of Hollendonner, 102 N.J. 21 (1985), and R.1:21-6 (Exhibit C-22). Respondent also testified that he was not familiar with the principle set forth in Hollendonner that an escrow agent acts as a fiduciary for both parties.

In no case were funds from one transaction utilized to advance a fee from another transaction.

Robert Prihoda, an auditor with the OAE's Random Audit Program, examined respondent's books and records in September 1987. At the district ethics committee hearing, Prihoda testified that, after he reviewed respondent's records, he brought to respondent's attention the impropriety of removing fees from escrow funds prior to closing of title and without the parties' consent. According to Prihoda,

> [respondent] said he felt he wasn't doing anything wrong, that he had been operating this way for a number of years. He said he would not take the fee until all his work had been performed, that he made sure that the mortgage commitment was in, basically everything was done other than attending the closing.
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> [T12/14/1990 28.]

Asked by the panel chair whether respondent's explanation had the "ring of truth," Prihoda replied that, although it was difficult to believe that an experienced real estate attorney such as respondent would think that it was proper to take fees in advance of closing of title, respondent seemed sincere about that belief.

Prihoda also testified that respondent's recordkeeping

practices had not been in accordance with the rules. More specifically, respondent failed to maintain cash receipts or disbursements journals and client ledger cards. Although respondent had his own method of accounting for real estate transactions on the back of the check stubs, and although his accountant monthly reconciled his trust account records, his bookkeeping practices were deficient and violative of R.1:21-6.

William Lord, C.P.A., respondent's accountant, also testified at the district ethics committee hearing. He explained that he had been reconciling respondent's trust account records for a period of eight years, by utilizing the information contained on the back of the check stubs. Lord admitted that he was not familiar with the New Jersey recordkeeping rules.

At the conclusion of the district ethics committee hearing, the hearing panel found that respondent was guilty of recordkeeping violations, but not of knowing misappropriation of escrow funds. The panel based the latter finding on respondent's testimony and demeanor, which it found worthy of belief. As stated in the hearing panel report,

> [o]ur primary basis for this finding is that the respondent came across as believable when he said at the hearing that he did not think that what he was doing was anything wrong through his practice of taking his fee prior to closing but only after any contingencies were satisfied. His entire bearing tells us that he was telling the truth when he testified that he never would have taken his fee prior to a closing if he felt that this were wrong . . . we do not find that his explanation was at all contrived. To the

> contrary, the ten (10) matters cited by the OAE support the fact that respondent did follow a practice of taking his fee only after any contingencies were satisfied and only with respect to funds on deposit for that particular transaction.
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> [Hearing Panel Report at 9.]

The panel recommended that respondent receive a public reprimand for the misconduct described in count one of the complaint:

> We recognize that . . . we are not required to make a specific recommendation concerning the extent of public discipline to be imposed. Nevertheless, having had the opportunity to observe the demeanor of the Respondent and to hear and observe all of the testimony in this matter, we take this opportunity to recommend that the Respondent be publicly reprimanded. Based upon all of the testimony and evidence before us, we do not believe that a private reprimand is sufficient discipline for Respondent's unethical, albeit innocent, misconduct. However, we also strongly believe that the Respondent's violation does not warrant stronger discipline than a public reprimand in view of our finding that Respondent's misconduct did not arise from evil motive or from knowing disregard of his duties and obligations as to escrow funds, but rather from his misunderstanding of such duties and obligations.[3]
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> [Hearing Panel Report at 11.]

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[3] In his opening remarks, the presenter alluded to Exhibits C-7 and C-8, wherein respondent allegedly misrepresented to the lending institutions that the deposit monies were being kept intact until closing of title. This issue was not properly before the Board, inasmuch as that charge was not a part of the complaint. The Board was able to observe, however, that, at the time that respondent wrote those letters to the lending institutions, the deposit monies were still intact; respondent had not yet taken his fees from those transactions.

Count Two

Respondent was named executor of the will of Ruth Ginnane, who died on February 8, 1985, leaving an estate valued at $200,000. Respondent had known Ginnane for approximately five years. The sole beneficiary under the will was Ginnane's adopted niece, Phyllis Ginnane McDermott, of Glendale, Arizona, the grievant herein.

According to respondent's testimony, shortly after Ginnane's death, he had a conference with McDermott at his office, at which time he explained to her in detail the future course of action to be taken in administering the estate. Thereafter, respondent obtained bank statements and stock valuations, arranged for the stock to be transferred to McDermott, closed the sale on Ginnane's house, prepared -- but did not file on time -- the New Jersey inheritance tax return, and paid an estimated tax of $23,870 on behalf of the estate. According to respondent, by July 1986, "eighty to ninety percent of the estate was in McDermott's hands."

Amidst Ginnane's belongings, respondent found a document indicating the possible existence of a certificate of deposit (CD). When respondent contacted the bank, he was informed that the account had been closed. Thereafter, in or about March 1986, McDermott sent him a 1099 form listing her as beneficiary of a CD held by Ginnane in trust for her, McDermott. Upon further inquiry, respondent discovered that a CD in fact existed, in the approximate amount of $16,000. In April 1986, respondent filed the inheritance tax return previously prepared. Thereafter, he failed to comply

with requests for an accounting made initially by McDermott and, subsequently, by an attorney retained by her.

In August 1989, Prihoda, Thomas J. McCormick (the OAE's First Assistant Counsel), and Gerald Smith (the OAE's Chief Auditor) visited respondent's law office, prompted by McDermott's filing of the within grievance. Upon examining respondent's trust account records, Prihoda was satisfied that the recordkeeping deficiencies previously found had been remedied. In reviewing the Ginnane file, however, Smith noticed that the CD funds, as well as the proceeds from two insurance policies in the amount of $25,000, still had not been turned over to McDermott. Respondent admitted to Smith that he had developed a "mental block" about the estate matter, but assured Smith that he would complete the accounting and make all necessary disbursements in the near future. Smith was satisfied that all estate assets remained intact.

At the district ethics committee hearing, respondent candidly acknowledged his failure to communicate with McDermott and with her attorney, but denied having grossly neglected the administration of the estate. He explained that, as executor, he had no control over the distribution of the CD, a non-probate asset; in fact, the only person who could withdraw the CD funds was McDermott herself.

Respondent's testimony in this regard was corroborated by Francis X. O'Brien, a partner in the law firm of Carpenter, Bennett and Morrissey, who specializes in estate matters. According to O'Brien, title to the CD account should have passed directly to McDermott by operation of law. Respondent had no fiduciary duty to

account for those funds.

O'Brien's first involvement with the Ginnane estate occurred in the summer of 1990, after respondent asked him to complete the administration of the estate. O'Brien's review of the file revealed that the administration of the estate was virtually finished, with the exception of the distribution of a $2,600 life insurance policy. O'Brien found that respondent had administered "ninety-eight to ninety-nine percent of the estate not only in . . . a timely but in a fairly rapid basis . . . within two to two and a half years of the date of [Ginnane's] death "(T12/14/1990 225). O'Brien estimated that an estate such as Ginnane's ordinarily would take two years to complete.

As to the untimely filing of the New Jersey inheritance tax return, O'Brien testified that, as a matter of practice in New Jersey, it is not unusual to file a late inheritance tax return. Although respondent filed the return out-of-time, he paid the estimated taxes within the period contemplated by law, filed an amended tax return in June 1988, and assumed responsibility for the payment of interest thereon.

As noted above, respondent did not deny that he failed to communicate with McDermott and to complete the administration of the estate. In an attempt to mitigate -- but not justify -- his conduct, he explained that McDermott was an extremely difficult person, who was never satisfied with his services no matter how diligently and competently his obligations as executor were discharged. As respondent testified,

> [McDermott] was difficult, to say the least. At the outset we did all right but she was extremely demanding insofar that she would come in from Arizona maybe on very, very short notice maybe call me the night before, and say she was coming and expected me to be available to her the entire next day. Well, she wanted me to do things in connection with the estate and she was extremely critical. She used to write letters about what a poor secretary I had as far as her spelling was concerned and things like that. She was just a very contentious woman . . . . She became kind of unbearable . . . .
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> [T12/14/1990 151, 152.]

O'Brien, too, found McDermott very hard to please:

> . . . to buttress what Mr. Heine said, I would have to tell you when he says she is a contentious woman to deal with, he's being very gentlemanly. The fact of the matter is that we had resolved this matter with Mrs. McDermott and her counsel on or about last summer, I think, and we -- it was like pulling teeth to finally get her to sign off. She kept screaming she wanted an accounting. She agreed with it but she wouldn't sign off with the thing. In fact, the only thing that finally got her to give up the ghost was a call from Mr. McCormick to her counsel. She was not only contentious, she was oppressive, overbearing, wouldn't believe anything you told her when you put it under her nose right in front of her and very, very -- just a very difficult person to deal with.
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> [T12/14/1990 229, 230.]

John P. Motley, M.D., a doctor with a specialty in psychiatry, testified in respondent's behalf. Dr. Motley first saw respondent in November 1990. His diagnosis was "dependent personality disorder superimposed by a major depressive disorder," both of which became progressively worse. According to Dr. Motley's report,

> Mr. Heine's unusual pattern of functioning has been that of a dependent personality with limited ability to achieve or strike out on his own. A characteristic of this type of personality is that they will go to great lengths to avoid controversy or cause anger in others . . . they have a perception of themselves as being inadequate and [are] also fearful of alienating others so they became indecisive for fear of doing the wrong thing, which could result in their being criticized by others.
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> [Exhibit R-1 at 6.]

Dr. Motley went on to say that, approximately five or six years ago, respondent began to exhibit a distressed mood, to suffer from sleep disorders, and to experience a loss of interest or pleasure, a feeling of worthlessness, guilt, and indecisiveness, all symptomatic of a depressive disorder. As he became more depressed, he gave up such support systems as friends and peers, and became a loner. This was so, according to Dr. Motley, because respondent felt inadequate as a person for having limited monetary means to care for his wife and their seven children. Respondent was burdened with heavy financial obligations. In addition to supporting his large family, he supported his elderly mother-in-law, who lived at his home. Also, respondent's married son, daughter-in-law, and two grandchildren had been forced to move in with respondent's family, because of straitened financial circumstances. As Dr. Motley testified,

> [Mr. Heine] felt this limitation of his resources was a reflection on [sic] his inadequacy as a person in that he was not as successful as his peers. He felt more and more guilty and began to feel burdened, that he had failed his wife, in particular, and his

> family, in general. This, again, of course, reinforced his feelings of inadequacy.
> [T12/14/1990 88.]

According to Dr. Motley, respondent's development of a "mental block" about the Ginnane matter is characteristic of a dependent personality:

> They avoid conflict. They avoid making decisions. They don't want to do the wrong thing. If they do the wrong thing, they'll be in trouble, more anger, that sort of thing.
> [T12/14/1990 73.]

Dr. Motley pointed out that, even after respondent had the "added impetus of officialdom," represented by the OAE's instructions, respondent still could not bring himself to complete the administration of the estate, which is characteristic of the disorder.

Dr. Motley opined that, although respondent is able to function as an attorney, it might be better for him to practice under the supervision of a proctor in matters other than real estate.

At the conclusion of the district ethics committee hearing, the panel found that respondent had exhibited lack of diligence in the handling of the estate matter, and had failed to communicate with McDermott, in violation of RPC 1.3 and 1.4(a). The panel rejected a finding of gross negligence.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusions of the district ethics committee in finding respondent guilty of unethical conduct are fully supported by clear and convincing evidence.

Respondent violated R. 1:21-6, by not maintaining cash receipts or disbursements journals and client ledger cards. Although the figures that respondent kept on the back of the check stubs provided his accountant with sufficient information to perform monthly reconciliations, respondent's failure to keep the required accounting records violated R. 1:21-6 and RPC 1.15(d). It is no excuse that respondent's own accountant, who was unaware of the recordkeeping provisions of R. 1:21-6, did not advise respondent of the violation of the rules. It is well established that an attorney has the ultimate responsibility for maintaining proper trust account records. Matter of Barker, 115 N.J. 30 (1989); Matter of Fleischer, 102 N.J. 440 (1986).

As to the premature withdrawal of real estate fees, the Board concurs with the committee's conclusion that respondent did not intentionally misuse escrow funds. The committee found credible respondent's explanation that he honestly, but mistakenly, believed that he was entitled to remove his fees upon the fulfillment of all the contract contingencies. The committee based its finding on the fact that, in all ten real estate matters, the withdrawal of the fees took place after the contingencies had been satisfied; on Smith's and Prihoda's testimonies that respondent had told them, in

the investigative stage of this matter, that he believed that he could take his fees prior to closing once the contingencies had been satisfied; and, primarily, on respondent's demeanor and credibility as a witness.

The Board's independent review of the record amply supports the finding that respondent's misuse of the escrow funds was the result of an "innocent misunderstanding," as found by the panel, and not of respondent's conscious, deliberate design to violate the duties of an escrowee.

Nevertheless, respondent's actions were improper. It is well settled that an escrow holder acts as an agent for both parties. Matter of Hollendonner, 102 N.J. 21, 26 (1985). "An escrowee cannot use [escrow] funds without permission of both parties." Id. at 27. Although respondent contended that he was operating under the erroneous belief that his withdrawal of the fees was proper, ignorance of the rules is no excuse. Matter of Eisenberg, 75 N.J. 454, 456-57 (1978). Respondent's conduct was unethical and in violation of RPC 1.15.

Respondent's actions, however, do not even remotely approach those exhibited by the attorney in Matter of Warhaftig, 106 N.J. 529 (1987), as initially alleged by the presenter at the district ethics committee hearing.[4] In Warhaftig, the attorney continually took advance real estate fees before he received any deposits in connection with the relevant real estate transactions. Asked

[4] At the Board hearing, the presenter conceded that respondent's conduct did not rise to the level of a knowing misappropriation.

whether he knew that this advance fee scheme was unethical, the attorney replied, "I was aware that what I was doing was wrong . . . ." Id. at 531. He explained that his withdrawal of premature fees was necessitated by the "gigantic cash flow burden" he experienced for a few years. Finding that the attorney's conduct constituted knowing misappropriation, the Court ordered his disbarment.

Here, the record clearly and convincingly shows that respondent's taking of the fees was the product of his sincere belief that he was entitled to do so. Although respondent's explanation was "at first blush, incredible," the committee, after hearing respondent's testimony, was convinced that his "story was true. In deference to its firsthand opportunity better to access respondent's demeanor and attitude," In re Stern, 92 N.J. 611, 617 (1983), the Board accepts the committee's conclusion in that regard. The Board's de novo examination of the record also persuaded it that respondent was sincere.

While far less serious, respondent's conduct is analogous to that of the attorney in Hollendonner. There, the attorney received a deposit in a real estate transaction where he represented the seller. When the attorney realized that he had insufficient cash to buy a used car, he proposed to his client that he take the deposit monies as his fee. The client agreed. The attorney, however, did not explain in detail to his client that the deposit was subject to the sales contract. He also did not obtain the buyer's authorization to the use of the funds. The Court agreed

with the Board's finding that the attorney's conduct had not risen to the level of misappropriation under In re Wilson, 81 N.J. 451 (1979). The Board reasoned that there had been no surreptitious conduct by the attorney, who had the consent of his client. The Board concluded, nevertheless, that the attorney's actions had been improper because an escrow holder acts as an agent for both parties. The Court adopted the Board's findings and imposed a one-year suspension. The extent of the discipline, however, was not based solely on the misuse of escrow funds. Respondent had committed other serious ethical violations, including very poor recordkeeping, no trust account reconciliations -- causing a succession of negative bank balances and the return of checks for insufficient funds -- the drawing of checks against uncollected funds with consequent trust account shortages, and the use of the trust account for personal obligations, none of which is present in this matter. The Court concluded that the attorney's "appalling disregard of proper recordkeeping procedures . . . demonstrate[d] an entirely unacceptable insensitivity to basic ethical consideration." Matter of Hollendonner, supra, 102 N.J. at 28.

Here, respondent's recordkeeping violations were minor. Although he did not maintain cash receipts or disbursements journals and client ledger cards, information was available at all times to enable his accountant to perform monthly reconciliations. There were never any trust account shortages. Moreover, his removal of the real estate fees was the result of an innocent misunderstanding on respondent's part, with no detriment to any

party.

With regard to the Ginnane estate, the record is clear that respondent discharged his duties as executor within a period of time normally expected of an estate of that size, with one minor exception: the distribution of the proceeds from a $2,600 life insurance policy. Nonetheless, respondent's conduct was unethical when he failed to arrange for a prompt distribution of that asset and when he failed to reply to beneficiary's -- and her attorney's -- requests for an accounting.[5] Indeed, it was not until June 1990, nearly five and one-half years after Giannane's death, that respondent presented an accounting to McDermott (Exhibit C-17).

As noted above, respondent had no legal explanation for his conduct; he claimed that he developed a "mental block" about this case and "just didn't get it done." His psychiatrist, in turn, testified that respondent's conduct was typical of individuals who suffer from a dependent personality disorder superimposed by a major depressive disorder. Because of his depressed mood and feelings of worthlessness, coupled with his fear of alienation and criticism, respondent could not bring himself to cope with McDermott, who, by all accounts, was an extremely contentious and critical person. Respondent dealt with this situation by avoiding any confrontation, which included avoidance of decisions that could

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[5] It matters not that respondent was acting as the executor rather than an attorney in this matter. Conduct by an attorney that engenders disrespect for the law calls for disciplinary action even in the absence of an attorney-client relationship. In re Carlsen, 17 N.J. 338 (1955), citing In re Howell, 10 N.J. 139 (1952).

lead to confrontation.

As Dr. Motley pointed out, respondent's fear of criticism and conflict surfaces when he is called upon to take certain risks or to make independent decisions. Respondent is, therefore, more comfortable with his real estate practice than with other legal areas. He is more experienced in real estate matters and feels more relaxed because most of the functions are stereotyped and require little independent decision-making or risk-taking.

Motley's analysis may shed some light on respondent's receipt of two prior private reprimands, in 1985 and 1989. Both instances involved estate matters; in both cases, respondent failed to act diligently and to communicate with the estate beneficiaries. In at least one matter, the beneficiary was also a difficult person.

There remains the issue of appropriate discipline. To recapitulate respondent's ethical misdeeds, he committed minor recordkeeping violations and, in addition, withdrew his real estate fees prior to closing of title as a result of an innocent misunderstanding (count one); he also failed to act diligently in distributing the proceeds of a small insurance policy and did not reply to the beneficiary's requests for an accounting (count two).

Respondent's ethical infractions, however, are tempered by numerous mitigating circumstances; (1) respondent sincerely believed that the withdrawal of the real estate fees was proper; (2) he discontinued this practice immediately after Prihoda notified him of its impropriety; (3) he took prompt action to bring his accounting records in full compliance with the rules; (4) his

lack of diligence and failure to communicate in the Ginnane matter were not the product of sloth or indifference to the beneficiary's interests but, rather, the result of his abnormal fear of conflict and confrontation in situations demanding independent action; (5) McDermott was a difficult, distrustful person who was never satisfied with his services, no matter how competently performed; (6) there was no financial injury to any client or party, including McDermott: not only did she receive the interest generated on the CD up to the time of the distribution of the funds but, in addition, respondent assumed full responsibility for the interest on the late inheritance tax return, remitted $1,000 to her to compensate her for retaining an attorney, and settled a malpractice suit claim by her against him for $7,500; and (7) respondent expressed genuine regret for his misconduct and showed great candor during the disciplinary proceedings.

The Board is cognizant that its 1989 letter of private reprimand cautions that any future ethical transgressions will lead to more severe discipline. The circumstances of this case, however, indicate that respondent's personality disorder and depression may have had some bearing on the instances of misconduct that culminated with the imposition of the two private reprimands. These factors were not considered in mitigation at that time, as they were unknown to the Board.

After a careful balancing of respondent's ethical offenses and the numerous and weighty mitigating circumstances present in this matter, the Board is convinced that a public reprimand is

sufficient discipline for respondent's unethical conduct. The Board unanimously so recommends. The Board further recommends that respondent practice law under the supervision of a proctor approved by the Office of Attorney Ethics for a period of three years; this proctorship shall apply to all matters, including real estate. In addition, the Board recommends that respondent submit competent psychiatric proof that he is fit to practice law. One member did not participate.

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

Dated: May 6th 1991

By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board