

SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
DOCKET NO. DRB 89-212

XIV-87-71E

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IN THE MATTER OF :  
DONALD G. HOWARD :  
AN ATTORNEY-AT-LAW :

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Decision and Recommendation  
of the  
Disciplinary Review Board

Argued: October 20, 1989

Decided: December 6, 1989

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

2018487 Jan M. Schlesinger appeared on behalf of respondent, who also was present.

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

This matter is before the Board based upon a presentment filed by the District IIIB Ethics Committee. The presentment details misappropriation of client trust funds by respondent, between 1987 and 1989, in two separate matters.

Respondent is a sole practitioner, with offices in Browns Mills, New Jersey. In or about August 1987, he was experiencing financial difficulty: the Internal Revenue Service had imposed liens on his attorney business account for unpaid withholding taxes; he had not paid the 1986 property tax plus interest

totalling more than \$6,500 on his personal residence in Medford Township; he had not paid any of the 1987 property taxes also due on his personal residence; and his attorney business account was frequently overdrawn. Exhibits C-12 and C-23 in evidence. It is clear that he was not holding any significant amount of fees in his trust account because, as of August 31, 1987, that account balance was only \$118.40. Exhibit C-24 in evidence. Moreover, from September 1987 through December 1987, respondent made only four deposits to his trust account in excess of \$1,000. Exhibit C-24 in evidence. Three of these four deposits were fully disbursed within days of receipt. T134 - T139.<sup>1</sup>

In one case, a large check intended for deposit in the trust account was instead deposited in respondent's personal account at the Provident Bank in Philadelphia, Pennsylvania, on September 3, 1987. That check, in the amount of \$15,200, was given to respondent on September 1, 1987 by his client, Gerhard Kaufman, for payment to Marie Kaufman, the client's ex-wife, as final settlement of their divorce matter. Prior to this deposit, the balance in respondent's personal account was \$20.90. Exhibit C-6A in evidence. On the day the \$15,200 was deposited in this account, respondent began to use the funds to cover personal obligations, including the following payments, as recorded in respondent's check register (Exhibit C-6A in evidence):

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<sup>1</sup> "T" refers to the transcript of hearing before the District IIIB Ethics Committee on July 12, 1989.

<u>Check No.</u>	<u>Date</u>	<u>Payee</u>	<u>Amount</u>
234	9/3	Medford Township <sup>2</sup>	\$ 6,527.41
235	9/4	Bank of Mid-Jersey <sup>2</sup>	4,714.53
236	9/4	Rutgers University	322.25
237	9/4	Bank of Mid-Jersey Credit Line	125.00
238	9/4	Chase Manhattan Visa	75.00
239	9/4	GMAC	173.98
240	9/4	Citicorp	251.98
241	8/25 <sup>3</sup>	Atlantic Electric	500.00
242	9/1 <sup>3</sup>	Aetna Casualty	198.00
244	9/1 <sup>3</sup>	Selective Insurance Company of America	132.14

These payments and others, together with several additional cash withdrawals, reduced the balance of the Kaufman funds to approximately \$275 as of September 13, 1987.

During this same time period, respondent received \$45,000 from Yellow Freight Lines for his client, Robin Henrie Irving, in settlement of a personal injury matter. This check was deposited into respondent's trust account on September 2, 1987. Exhibits C-8 and C-9 in evidence. According to the September 8, 1987 Statement of Account (Exhibit C-11 in evidence) prepared by respondent and signed by the client, respondent was entitled to a total of \$14,000 in fees and costs. The sum of \$11,000 was to be held in trust by respondent to cover the estimated amount due on a workers' compensation lien. Mrs. Irving received the balance of \$20,000 in two separate checks. The first check, in the amount of

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<sup>2</sup> The check to Medford Township paid respondent's 1986 past-due property taxes, while check #235 was for mortgage payments then due on his residence.

<sup>3</sup> These three checks were apparently issued several days after the date referenced on the check register, given the chronology of the checks.

\$19,500, was given to Mrs. Irving on September 8, 1987. The second and final payment of \$500 was made on September 14, 1987.<sup>4</sup>

As reflected on respondent's client ledger for Irving, two days after depositing the Irving settlement check, respondent issued two checks to himself as fees, totalling \$1,500. Between September 8 and September 19, respondent took an additional \$3,700 as fees from the Irving funds. He also diverted \$15,200 of these funds to pay Marie Kaufman on September 17, 1987, more than two weeks after he received, deposited in his personal account, and misappropriated the \$15,200 in Kaufman funds. Following all of these payments, the balance of Irving funds being held to pay the workers' compensation lien in respondent's trust account was \$4,600, or \$6,400 less than the \$11,000 respondent had agreed to hold in trust to pay the compensation lien. Respondent contended that he had "sufficient equity" in the account to cover the disbursements. No proof of any kind in support of this position was provided.

In addition to this misappropriation, respondent failed to disclose the Irving settlement to Reliance Insurance Company (Reliance), which held the compensation lien. The action against Yellow Freight Lines was settled on August 21, 1987. Respondent was fully aware, at that time, of the compensation lien held by

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<sup>4</sup> It is not clear why respondent split the payment in this fashion. The Statement of Account (Exhibit C-11 in evidence) refers to the \$500 as "Reserve for compensation lien for final figures to be paid 11 September 1987." In fact, the compensation lien issue was not resolved until more than one year later.

Reliance, as evidenced by correspondence from respondent to Reliance on May 28, 1987 (Exhibit C-41 in evidence) and by the reference to the compensation lien in his Statement of Account (Exhibit C-11 in evidence). Nonetheless, when respondent spoke to a representative of Reliance on August 24, 1987, three days after the settlement was reached, he advised Reliance only that an offer had been made by Yellow Freight Lines. Respondent did not communicate further with Reliance. In fact, he failed to reply to letters sent by Reliance on January 6, 1988, March 30, 1988, and July 18, 1988, to ascertain the status of the case. Exhibits C-12, C-13 and C-14 in evidence. Additional telephone calls from Reliance to respondent were unsuccessful, although a check for \$11,000 was allegedly promised. Exhibit C-15 in evidence. The matter was then forwarded by Reliance to outside counsel on November 16, 1988. Id. Thereafter, respondent paid a total of \$11,707.67 to Reliance on January 2, 1989, sixteen months after the Irving settlement was deposited into respondent's trust account.

Respondent was first audited in the fall of 1987 by outside auditors retained by the Office of Attorney Ethics at the request of the District IIIB Ethics Committee.<sup>5</sup> As the result of a report filed by those auditors in March 1989, the Office of Attorney Ethics determined to review respondent's accounts further, utilizing staff auditors. During the course of that investigation,

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<sup>5</sup> That Committee requested the audit based on concerns raised during the investigation of two docketed matters then under review by District IIIB.

respondent's activities in the Kaufman and Irving matters came to light, despite respondent's less than forthright responses. For example, respondent advised the auditor that he had "no recall" of Kaufman. T28. Later, when asked if respondent's deposit of \$15,200 to his personal account was Gerhard Kaufman's money, respondent first claimed that the amount was coincidental, then refused to discuss the matter. Thereafter, respondent advised the auditor that he thought Kaufman may have agreed to lend respondent the \$15,200. T38. Respondent also told the auditor that the workers' compensation lien amounted to approximately two-thirds of the \$45,000 settlement and that the Irving ledger did not reflect respondent's fee of about \$15,200. T30.

Respondent revealed to the auditor that he owed approximately \$150,000 on a combination of federal income taxes, property taxes and loans on his property. T23. In response to the auditor's direct inquiry as to whether he had used incoming trust funds for business or personal expenses, respondent admitted: "I'm afraid I might have." T26.

A formal complaint was subsequently filed by the Office of Attorney Ethics on June 12, 1989. At hearing before the Committee, respondent was unable to support his claim of equity in the trust account. He was unable to answer whether he reviewed his trust account bank statements in the latter part of 1987 (T153) or whether he remembered the deposit of trust funds to a personal account as an unusual event. T146. The following colloquy ensued:

- Q. You want us to take on faith that you had this impression, based on those facts, that you had equity in your account?
- A. Yes.
- Q. That's what you want us to accept here?
- A. Right.

[T153.]

Following hearing, the Committee found misappropriation of trust funds, in violation of R.P.C. 8.4(c) and R.P.C. 1.15, in both the Kaufman and Irving matters. The Committee termed respondent's explanation of his actions in these cases as "...at best, ambiguous" (Panel Report at 3) and noted further that respondent had "no plausible or credible explanation" (Panel Report at 4) for the taking of more than \$5,200 in fees above his agreed upon fee in the Irving matter. Public discipline was recommended.

#### CONCLUSION AND RECOMMENDATION

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

Misappropriation is defined as "...any unauthorized use by the lawyer of client's funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." In re Wilson, 81 N.J. 451, 455 n.1 (1979).

The record before this Board established conclusively that respondent misappropriated trust funds. Both Kaufman and Irving

trust funds were used by respondent without the knowledge or authorization of the client. Given this finding, the Board must assess the record to determine whether these were knowing misappropriations.

Respondent's position appears to be that the Kaufman check was taken in lieu of taking his fee directly from Irving. He intentionally deposited the Kaufman check in his personal account in Pennsylvania to avoid attachment of these funds. Moreover, because the check was from the same bank where he had his personal account, he had immediate access to the funds, rather than having to wait for the check to clear his trust account before writing a check to himself. The funds due to Marie Kaufman could then be paid out of the Irving proceeds.

Respondent's position is fatally flawed. Although fees and costs were due him from the Irving account, he knew that these totalled \$1,200 less than was owed to Marie Kaufman. Moreover, prior to deposit of the Irving settlement funds, his trust account held only \$118. Additionally, he began to siphon off fees from the trust account two days after deposit of the settlement check -- allowing just enough time for the check to clear before withdrawing funds. Finally, respondent failed to disclose the settlement in Irving to Reliance, both during a telephone conversation three days after the settlement was reached and for more than sixteen months thereafter.

The Board does not accept respondent's unsupported claim that he believed he had "equity" in his trust account. This is not



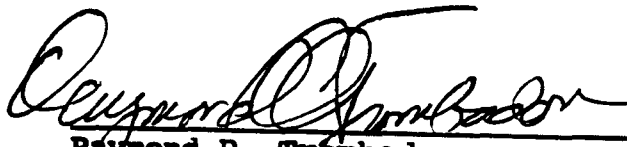
simply a trade-off between Kaufman and Irving of fees due. To the contrary, the facts demonstrate clearly and convincingly that respondent, who was in dire need of funds to cover personal expenses, knowingly misappropriated client funds. Respondent intentionally used the Irving funds, intended to cover the Reliance lien, as a float. The Board is convinced that respondent knew that he was misappropriating client funds when he deposited the Kaufman funds in his personal account and drew on those funds, when he drew fees from the Irving trust funds, and at each step thereafter.

The Board notes further that respondent was less than candid and forthright both with the Office of Attorney Ethics auditor and in his testimony before the District IIIB Ethics Committee. Rather, he was indirect and evasive and, as remarked by the Committee, was "at best, ambiguous." Given this fact, the Board attaches no weight to respondent's unsupported and self-serving claims that he believed he had equity in the trust account at the time of the misappropriation of funds.

Thus, in the face of respondent's knowing misappropriation of client funds, the Board unanimously<sup>6</sup> recommends his disbarment.

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

Date:

12/6/1983


Raymond R. Trombadore  
Chair

Disciplinary Review Board

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<sup>6</sup> Three Board members did not participate in this hearing.