SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
DOCKET NO. DRB 97-425

IN THE MATTER OF

JAMES R. PICCIANO,

AN ATTORNEY AT LAW

Decision

Argued: February 5, 1998

Decided: November 2, 1998

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

Arthur Montano 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 discipline filed by special master David H. Dugan, III. The complaint charged respondent with knowing misappropriation of client funds, in violation of RPC 1.15(a) and RPC 8.4(c).

Respondent was admitted to the New Jersey bar in 1972. He maintains an office in Haddon Heights, Camden County. Respondent is also admitted to practice in Pennsylvania.

Respondent was reprimanded on May 22, 1996 for gross neglect, lack of diligence and failure to communicate in two matters. In addition, respondent misrepresented the status of a case to one client and failed to reduce the basis of his fee to writing. In re Picciano, 144 N.J. 82 (1996).

It is essentially undisputed that respondent took client funds for his personal benefit. However, respondent asserted as an affirmative defense that he had his client's consent to the use of the funds.

The facts are as follows:

On September 30, 1991 Mary Milanese retained respondent to represent her in a personal injury matter arising out of an accident on August 5, 1991. Two years later, on August 4, 1993, respondent filed suit in Milanese's behalf. In or about October 1993 respondent settled the suit for $27,000. The settlement was paid by three checks: one for $23,000 from Harleysville Insurance Company ("Harleysville"), dated October 29, 1993, and the other two for $3,000 and $1,000 from Gallagher Bassett Services, Inc. ("Gallagher"), dated November 3, 1993, but not received by respondent until on or about December 7, 1993. As seen below, respondent used $21,000 of the settlement funds for his personal needs.

On October 29, 1993 respondent deposited $20,000 of the $23,000 Harleysville check into his attorney business account with the notation "cash substitution." He did not then make any distribution to Milanese. He took the $3,000 balance in cash. Although respondent equivocated about whether the $20,000 deposit shown on his business account bank statement as of October 29, 1993 was a portion of the Harleysville check, according to the documentary evidence that was indeed the case. On December 7, 1993 respondent deposited the $1,000 Gallagher check into his attorney trust account and the $3,000 Gallagher check into his business account. On December 8, 1993 respondent replenished his trust account by depositing a $17,000 check from Tisket, Inc., a corporation owned by his

wife. This deposit was intended to replace the $17,000 Milanese funds that respondent had used for personal purposes.

Two days later, December 10, 1993, Milanese signed a settlement statement itemizing the disbursements of the $27,000. Exhibit C-18. According to that document, out of the $27,000, $17,000 would go to Milanese, $5,000 to respondent as his fee and the remaining $5,000 to Dr. David J. Houck, Milanese's treating physician. Specifically, the settlement statement read as follows:

> Since it appears that at the present time Dr. Houck is willing to settle his claim for no less than $5,000.00 I have held this amount and will continue, per your instructions, to see if he will lower his amount any more. I have also held and will be responsible for a medical bill in the approximate amount of $300.00. My attorney's fee is being set at $5,000.00[1] less the amount I have agreed to pay for that small remaining medical bill. If I can get Dr. Houck to agree to a lesser figure then you will receive the additional funds.
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> [Exhibit C-18]

Respondent admitted that, although he represented in the settlement statement that he was holding the $5,000 in escrow, in reality he had already utilized those funds for unrelated purposes.

On December 11, 1993, and at Milanese's request, respondent issued four trust account checks to Milanese totaling $17,000.

Ultimately, Dr. Houck did not agree to reduce his $5,000 bill. According to a member of Dr. Houck's staff, the bill had already been reduced from more than $11,000 and

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[1]Respondent had signed a one-third contingent fee agreement with Milanese, which entitled him to a larger fee. He had, however, agreed to reduce his fee to $5,000.

there had been no further discussions about another reduction. The $1,000 trust account deposit made by respondent on December 7, 1993 remained there until he issued a check in that amount to Dr. Houck on February 23, 1994. According to Dr. Houck's office, respondent proposed to make periodic payments until the $5,000 bill was paid off.[2] Respondent falsely told Dr. Houck's staff that the funds had been deposited into the wrong bank account and had been seized by the IRS. As to this, respondent testified that he had made the reference to the IRS in order to "buy more time" for Milanese to renegotiate Dr. Houck's bill. According to respondent, he had proposed to make periodic payments to allow more time for Milanese's son, Anthony, to participate in the negotiations with Dr. Houck's office. See Exhibit C-7. Indeed, Milanese confirmed that her son was planning to negotiate a further reduction in the bill.

According to Dr. Houck's staff, when they attempted to collect the $4,000 directly from Milanese, respondent intervened and declared that the payment was his concern.

Dr. Houck died in June 1994. His estate pursued the payment of the $4,000 balance of the bill, which Milanese thought had been paid. To date, the estate has not received the $4,000. The grievance giving rise to this proceeding was filed by Dr. Houck's estate.

In sum, of the $27,000 settlement respondent properly disbursed through his trust account, $1,000 was paid to Dr. Houck; $5,000 was used for respondent's counsel fee; the remaining $21,000 was the property of Milanese, with $4,000 of that amount designated for

[2]By letter to respondent, dated February 23, 1994, Dr. Houck confirmed the receipt of $1,000 and noted respondent's plan to pay the balance over the following months. Exhibit C-21.

Dr. Houck's bill. It is respondent's personal use of the $21,000 that forms the basis for the charges of knowing misappropriation. Until disbursed to Milanese and Dr. Houck, the $21,000 should have remained intact in respondent's trust account.

Respondent's bank statements for his business account show that the two October 29, 1993 deposits totaling $23,000 were quickly dissipated for purposes unrelated to Milanese's case. Within approximately one month, the $20,000 deposit from the Harleysville check was depleted; most of the $3,000 from the Gallagher check was disbursed within one week. Respondent admitted that none of the disbursements from his business account during this time were for the benefit of Milanese or linked to her case. As summarized by the special master,

> [i]f we consider this $17,000 [the Tisket check] to have been part of the Harleysville cash substitution, then respondent 'borrowed' $17,000 from Mary Milanese for 44 days (from October 29 through December 11, 1993). As to the other $4,000, $1,000 would relate back to the October 29 deposit and the other $3,000 relates to the December 7 deposit. This $4,000 has not been paid over to Dr. Houck, nor has it been distributed back to Mary Milanese, nor was it ever 'held' by respondent per his agreement with Mary Milanese (Exhibit C-18; Exhibit C-4; TI 84:6-86:21). This $4,000 has not been merely borrowed, it has been permanently appropriated by respondent.
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> [Special master's report at 5]

* * *

Respondent submitted the following explanation for the use of the $21,000 sum:

As to the $17,000

According to respondent, he borrowed the $17,000 due to Milanese with her consent, given through her son, Anthony:

Q: What is your basis for saying that you had the use - the right to use the money?

A: Well, a lot of things in my mind created and affirmed my belief that I had the use of the money starting with the approximately $3,500 plus costs that Anthony Milanese owed me for well over at least a year.

Q: Let's stop there. Because Anthony Milanese owed you $3,500 you thought you were entitled to take his mother's $20,000 and loan it to yourself for a period of time, is that a fair statement?

A: No.

Q: Okay.

A: No. What I'm saying is in light of my long-term representation of Anthony and his mother, in light of my securing a personal loan on behalf of Anthony, and in giving him the funds, in light of his failure to reimburse me or pay me back the loan and my legal fees, in one of my discussions with Anthony I mentioned to him that I could certainly use the monies that he owed me and the payment of the loan. At some point during that conversation I said you know, your mom is going to be getting a decent settlement. We didn't know at the time what the exact settlement was going to be, and I don't recall whether it was my suggestion or his suggestion or after he talked with his mom, her suggestion, but it evolved into the fact that he said look, if you can settle this case, and as long as my mom gets the money before Christmas, you're authorized to utilize those funds for approximately four to six weeks. That's how I came into the belief that I had the authority to use the funds.

[T6/24/97 96-97]

Mary Milanese, who is seventy-two years old, testified at the DEC hearing. The special master called her testimony "confused and very imprecise" on the issue of her consent to the loan. In essence, all that Milanese testified was that, before the first insurance check arrived, her son had asked her if she would do respondent a favor and that she had replied "fine."

Anthony Milanese, in turn, testified that he had given respondent permission to use the settlement funds as long as they were returned to his mother by Christmas. Anthony Milanese confirmed that he owed respondent money.

It was only at the DEC hearing that respondent first raised his defense that he had Milanese's consent to the use of the funds. It was not mentioned in his reply to the grievance, his answer to the complaint or during a February 14, 1996 interview conducted by the Office of Attorney Ethics ("OAE"). In fact, during that interview, the following exchange took place:

> [INVESTIGATOR] Okay, why didn't you take the twenty- why didn't you take the money from the business account and put it over into the trust account? I mean you had that money in the business account from October 29th and you didn't disburse to Mary till December.
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> [RESPONDENT] Because all the checks weren't in.
>
> [INVESTIGATOR] All the checks for what weren't in?
>
> [RESPONDENT] All the - two little checks had not arrived as yet. If I - if I recall. . .
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> [INVESTIGATOR] But you had a check for $23,000.00 and all you had to do was give Mary seventeen.
>
> [RESPONDENT] No, you can't do that with people.
>
> [INVESTIGATOR] Okay.
>
> [RESPONDENT] I mean she would - she wouldn't take [sic] unless it was all there. I wouldn't . . .
>
> [INVESTIGATOR] Okay.
>
> [RESPONDENT] I didn't think at the time. . .

[PRESENTER]: Let me go back. Why does the money go into your business account? Why did the two checks, the 23 and the three, why were they deposited to your business account?

[RESPONDENT]: Probably because I was expecting another check, a business -a-a-a personal related check to come in in November, toward the end of November. So this was toward the beginning of November or end of October. I put it in my business account waiting for the other check to come in, knowing that these two smaller checks weren't able to be processed by the smaller insurance company for like 30 days so I may - may have made - I did make an error in judgment by utilizing those funds in my business account where it was needed rather than a - I knew money was coming from another source so I put that money into the business account instead of just letting it lay in the trust account. And then . . .

[PRESENTER]: From the time you deposited the checks, the $23,000.00 check and the $3,000.00 check into your business account until December 14th or so . . .

[RESPONDENT]: 11th.

[PRESENTER]: . . . 11th when disbursement was made to Mary, what happened to the funds in your business account?

[RESPONDENT]: A lot of the funds in my business account were given to my wife because that was her busy season and supplies and things came in. I was like financing her - her business for that six week period until she got her monies in and - and other source - from other sources.

[INVESTIGATOR]: So - so you're basically saying you used the $23,000.00 . . .

[RESPONDENT]: As a float.

[INVESTIGATOR]: Okay. As a float.

[RESPONDENT]: As a float.

[PRESENTER]: You basically then loaned yourself your client's money for a period of five or six weeks.

[RESPONDENT]: You can phrase it that way. I more or less looked at it as it wasn't completed until the final checks came in and I wanted to do it all in one shot and that's the reason why I thought I had - you know it was an error. I thought I had the opportunity until the case was closed to utilize the money and not just let it sit so that's why I put it in my business account.

[PRESENTER]: That, Mr. Picciano, is a very serious error. Extremely serious error.

[RESPONDENT]: I realize that. I really - I realize that. [Emphasis added]. [Exhibit C-5 at 14-18]

Respondent and the presenter then went on to discuss the seriousness of respondent's conduct and the possibility of his disbarment. The February 14, 1996 OAE interview is referenced in the complaint.

At the DEC hearing respondent testified that, at the interview, he did not mention the Milaneses' consent to the use of the funds because he "wasn't asked," because he was cut off at least once and because he did not realize how serious this matter was.

With regard to his failure to mention the loan in his reply to the grievance, respondent stated that the issue had not been raised in the grievance and that he did not understand that he was being accused of taking his client's money. In fact, according to the grievance by Dr. Houck's staff, respondent had told them that "he had spent his clients [sic] settlement money because of some trouble with the IRS. . . ." In his reply to the grievance, respondent acknowledged that he had mentioned problems with the IRS to Dr. Houck's staff, but denied stating that he had spent Milanese's funds.

The OAE challenged respondent's defense, suggesting that it had been "concocted" at the last minute and pointing out that it had not been raised before the hearing. In its brief

to the Board, the OAE pointed out that respondent misrepresented to the OAE investigator, at a November 30, 1995 interview, that $18,000 of the $23,000 settlement check had been deposited into his trust account and that the remaining $5,000 had gone into his business account. In reality, respondent deposited $20,000 of the $23,000 funds in his business account. The OAE also highlighted respondent's statement, made at the February 14, 1996 interview, that he had loaned himself the money. Furthermore, the OAE argued that, if respondent had permission to use Milanese's funds, it would not be necessary for him to deposit the $17,000 reimbursement check from Tisket into his trust account. In other words, he could have issued a repayment check to Milanese from his business account or handed her the Tisket check itself. Respondent's explanation in this regard was that he "thought it would look better for [Milanese] to see a trust account check" and that, inasmuch as $1,000 of the settlement proceeds was already in his trust account, he wanted to be consistent.

The OAE urged the Board to question the credibility of respondent and Anthony Milanese, a friend of respondent. Finally, the OAE argued that, because Anthony Milanese was not the client, respondent could not have reasonably relied on his consent to the loan.

As to the $4,000

As of the DEC hearing, the remaining $4,000 owed on Dr. Houck's bill had not been paid. Respondent claimed that the Milaneses had instructed him not to pay more than $1,000 because Anthony Milanese was planning to negotiate a reduction in the bill. Anthony Milanese's testimony corroborated respondent's explanation in this regard.

Respondent tied his retention of the $4,000 to the $4,000 that Anthony Milanese owed him for legal fees and for a personal loan. The following exchange took place at the DEC hearing:

> [PRESENTER]: There was $5,000 that Mr. Picciano was supposed to be holding to pay Dr. Houck's bill.
>
> . . .
>
> [PRESENTER]: It was either supposed to go to Dr. Houck, right, or where, where else was it supposed to go?
>
> . . .
>
> [RESPONDENT]: It was supposed to go to Dr. Houck period.
>
> [PRESENTER]: If it didn't go to Dr. Houck, shouldn't it have been paid back to Mrs. Milanese?
>
> [RESPONDENT]: No.
>
> [PRESENTER]: Were you entitled to keep it?
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> [RESPONDENT]: Yes.
>
> [PRESENTER]: You were entitled to keep it?
>
> [RESPONDENT]: Well, you're trying to put words in my mouth. My philosophy on this or not my philosophy, but my stance is that Anthony Milanese owes me $4,000. When he pays me the $4,000, then that $4,000 is immediately going to the estate of Dr. Houck. Now, if I were in sufficient financial means to pay this $4,000 off prior, I would do it, but I haven't been able to, and that I would take care of Anthony Milanese myself. I do not dispute the fact that the estate of Dr. Houck is owed $4,000. I never disputed that fact. Mary Milanese doesn't get that $4,000, Dr. Houck's estate gets it, and I will pay it. If I have to pay it selling aluminum siding, I'll pay it, but I would rather have it paid by Anthony Milanese.
>
> [PRESENTER]: But under any scenario are you entitled to the money?
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> [RESPONDENT]: Absolutely not.

[PRESENTER]: And yet you're the one who had it and spent it?

. . .

[SPECIAL MASTER] . . . What is your answer to that question? The 4,000 is gone and you spent it, correct?

[RESPONDENT]: Yes, but I view it as permission to use it because -

[SPECIAL MASTER] I understand. But the basic fact aside from that is you received it and you spent it, and it is part of paragraph nine in the Complaint.

[RESPONDENT]: Right. On the basis that Anthony said when his settlement check comes in, I'll get the money to pay it back.[3]

. . .

[RESPONDENT'S COUNSEL] Did Anthony Milanese relate to you that he was attempting to further reduce the bill -

[RESPONDENT]: Yeah.

[RESPONDENT'S COUNSEL]: - of Dr. Houck?

[RESPONDENT]: Yeah.

[RESPONDENT'S COUNSEL]: Did he acknowledge to you that he would make good that money that was owed, whatever amount, to Dr. Houck?

[RESPONDENT]: Absolutely.

. . .

[SPECIAL MASTER]: So what you're saying is that you made a settlement with Dr. Houck for $5,000, but you did not have the consent of your client? You made a settlement with Dr. Houck?

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[3]Anthony Milanese was expecting a settlement from a disability claim.

[RESPONDENT]: I made a settlement with Dr. Houck with the consent of the client knowing that I was successful in reducing it to five, but they said don't pay him anything more than a thousand, we're going to try to further reduce this. That's what I typed into the settlement sheet, and I used the word wrong because the funds weren't there, but I basically wanted her to know that if they weren't successful in getting it down, then that $4,000 had to be paid somehow. It wasn't just going to disappear.

[SPECIAL MASTER]: But didn't you indicate also on the settlement sheet that you were reserving that $5,000 or holding it in some fashion so that if it was needed, it could be applied toward the full $5,000?

[RESPONDENT]: Yes, but I took that, Mr. Dugan, in the same sense as the float, that I was reserving it somewhere in the future that if it was needed, then it would be paid, and Anthony realized that that money that he had owed me was basically the $4,000 that was going to be paid, so it was going to behoove him if he could reduce Dr. Houck's bill, that would be less that he would have - that he would owe me.

[T6/24/97 162-169]

During his summation, respondent's counsel reiterated respondent's position:

[RESPONDENT"S COUNSEL] . . . In any event, the money that was owed to Dr. Houck was to come from Anthony Milanese, so that if it's owed at all, yes, as a conduit perhaps, whatever, but essentially it's Anthony Milanese's responsibility because of the money that he owes to Mr. Picciano.

[SPECIAL MASTER] So in effect we're substituting a different situation for C-18.

[RESPONDENT"S COUNSEL] Yes.

[SPECIAL MASTER] In effect we're saying here that the $4,000 can go to the respondent but not as counsel fee from Mary, but as payment from Anthony.

[RESPONDENT'S COUNSEL] Anthony.

[SPECIAL MASTER] With Anthony being liable to pay the $4,000 or whatever they can agree upon?

[RESPONDENT"S COUNSEL] Yes.
[T7/23/97 129-130]

* * *

The special master found that Anthony Milanese's testimony corroborated respondent's claim that he was given permission to borrow the $17,000 until Christmas. The special master also found that, although Mary Milanese's testimony was "vague," she testified that she trusted her son and that she was willing to do respondent a favor, if needed. The special master was, therefore, unable to conclude by clear and convincing evidence that respondent's use of the $17,000 for forty-four days was unauthorized. As the special master noted,

> here, though belatedly, respondent has raised the defense of client consent, and has gone forward with evidence to support it. . . . In my view, the testimony of Anthony and Mary Milanese, weak as it was, is sufficient to neutralize the contrary impact of respondent's having waited so long to assert his defense. OAE has failed to carry its burden of proof that respondent's use of the $17,000 was unauthorized.
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> [Special master's report at 7]

The special master determined, however, that respondent's use of the funds was a violation of RPC 1.8(a) (prohibited business transactions with clients). Under that rule, a transaction with a client must be fair to the client, its terms must be reduced to writing, the attorney must advise the client to seek independent counsel and the client must give written consent to the transaction. Respondent complied with none of those requirements. Moreover, as the special master pointed out, the transaction was not fair to Mary Milanese. There was no promissory note to evidence the loan or collateral to secure the debt. In

addition, respondent did not supply a financial statement to demonstrate his ability to pay. Indeed, respondent filed for bankruptcy in November 1993, the month he was using the $17,000 as a "float." Furthermore, the special master concluded, respondent's loan to himself with no safeguards for Milanese and no disclosure to her that he was filing for bankruptcy was a violation of RPC 8.4(c).

As to the $4,000, the special master noted that, according to the settlement statement, respondent had agreed to hold the funds in escrow, while he negotiated for a reduction in Dr. Houck's bill, and, as well, to turn over to Mary Milanese whatever was left. Respondent was unable to further reduce Dr. Houck's bill. Thus, the special master remarked, under the agreement with Milanese, respondent should have paid over the $4,000 to Dr. Houck. Instead, he took the funds for his own use and left Mary Milanese responsible for the bill. In finding respondent guilty of knowing misappropriation of $4,000 of client funds, the special master reasoned as follows:

> Respondent's defense to this is convoluted. Essentially, he admitted that he is under obligation to pay Dr. Houck's estate, but he had delayed doing so in hopes that Anthony Milanese would pay the debt as a way of paying past due legal fees and a loan owed to respondent. In effect, respondent's defense is that he took the $4,000 with the understanding of his client that he would cover her Dr. Houck debt, one way or another. He may not have done so yet, but he fully intends to, eventually, if Anthony does not. (TI 163:8-23).
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> Respondent's position is not consistent with the agreement he made with his client, Exhibit C-18. In that agreement, he committed to holding the money to cover her doctor's bill, to pay that bill or a lesser sum if Dr. Houck would agree, and to refund any difference to her. There is nothing in that agreement to suggest that respondent was free to take any part of that money for himself and substitute his promise to pay the doctor in its place. Respondent's taking of the $4,000 was unauthorized and constitutes a misappropriation of client funds in violation of RPC 1.15, R.1:21-6, In re

Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1985). [Special master's report at 9]

The special master also found that respondent violated RPC 8.4(c) when he represented in the settlement statement that he would hold the $5,000 designated for Dr. Houck until the bill was resolved. In fact, when the statement was signed respondent had already disbursed all or nearly all of the $5,000 for his own purposes. Furthermore, the special master found that respondent violated R.1:21-6(b)(2) and RPC 1.15(d) by failing to maintain a client ledger card for Milanese. Lastly, the special master concluded that respondent violated RPC 1.15(a) and R.1:21-6(a)(1) when he deposited the $20,000 and the $3,000 in his attorney business account, rather than his trust account.

The special master recommended that respondent be disbarred.

* * *

Upon a de novo review of the record, the Board is satisfied that the conclusion of the special master that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

The Board, however, disagrees in part with the special master's findings. In addition to the finding of knowing misappropriation, the special master concluded that respondent had engaged in an improper business transaction with Mary Milanese, in violation of RPC 1.8(a). Although under In re Logan, 70 N.J. 222 (1976), pleadings may be amended to conform to the proofs, a violation of this rule was neither charged in the complaint nor litigated during the hearing. Accordingly, the special master's finding in this context was inappropriate. The

special master also found respondent guilty of recordkeeping violations, in violation of RPC 1.15(d) and R1:21-6(b)(2). This, too, was neither charged nor fully litigated at the hearing. Hence the special master's finding of a violation in this regard was improper.

The significant question in this case is whether respondent knowingly misappropriated $21,000 in client funds. There is no dispute that respondent used $17,000 for himself. The issue is whether he had his client's consent. Obviously, Anthony Milanese's consent to the use of the funds would be meaningless without Mary Milanese's consent. Therefore, the focus of inquiry must be on Mary's alleged consent.

Mary Milanese testified that her son asked her if she would do respondent a favor and that she replied "fine." From Anthony's vague request and Mary's terse reply it must be determined if there was consent. The focus of inquiry is whether Mary understood what was being specifically asked of her and, if not, whether her answer constituted a blanket agreement to do any favor for respondent.

The most damaging evidence against respondent is the OAE interview, during which he acknowledged that he had made a bad error in judgment in using the funds as a "float." Contrary to respondent's assertion to the special master that he did not understand how serious this matter was, a reading from the interview transcript makes it clear that he knew otherwise. Indeed, at the close of the interview, the OAE presenter told respondent that respondent's error was a "very serious error. Extremely serious error." Respondents reply was "I realize that. I really - I realize that." See Exhibit C-5 at 18. Respondent's claim of consent by the client is further harmed by the absence of any mention of a loan until the DEC

hearing. The above factors must be weighed against Mary Milanese's testimony that she agreed to do respondent "a favor." After conducting a balancing test, a five-member majority of the Board was clearly convinced that respondent did not have Mary Milanese's consent to use the funds. Three members were unable to agree with that conclusion.

As to the $4,000, there is no question that the money was owed to Dr. Houck, no question that respondent admitted that the money was owed and no question that respondent used the money for himself. Consent is not at issue. There was no contention that either Mary Milanese or the doctor allowed respondent to use the money. Indeed, respondent threw a red herring into the mix when he brought up Anthony Milanese's plans to negotiate a reduction in Dr. Houck's bill. That circumstance, however, goes only to the question of the delay in the payment to Dr. Houck and the amount of the payment. The impropriety in this instance was that respondent availed himself of the funds without consent. Respondent did not have the freedom to use the money for his own purposes even if the amount of the bill had been in dispute. He should have held the $5,000 in escrow until the billing dispute was resolved. Respondent clearly misused escrow funds that had been earmarked for a specific purpose, that is, to pay Dr. Houck's bill.

Because of the escrow nature of the funds, In re Hollendonner, 102 N.J. 21 (1985), is controlling (escrow funds are to be treated like trust funds; knowing misuse requires disbarment). In fact, respondent's conduct was more serious than attorney Hollendonner's. In that case, the attorney had the consent of one of the parties to use escrow funds for his own purposes. Here, there is no question that respondent did not have the consent of either party

to respondent's use of the $4,000. Respondent took the $4,000 with full knowledge that his conduct was prohibited. There is no claim that he mistakenly believed that he could utilize the funds for his own benefit, à la In re Rogers , 126 N.J. 345 (1991) (attorney not guilty of knowing misappropriation of escrow funds because of mistaken, but reasonable, belief that his promise to repay a mortgage at a later time superseded his obligation to repay the mortgage out of closing funds). Here, Dr. Houck never agreed to release Milanese from her responsibility to repay her debt and to personally obligate respondent instead. Anthony Milanese's debt to respondent was entirely unrelated to Mary Milanese's matter and to her obligation to pay Dr. Houck's bill. It is, thus, to a unanimous Board undeniable that respondent knowingly misused funds that should have remained in escrow, in violation of Hollendonner and In re Wilson, 81 N.J. 451 (1979), as well as RPC 1.15 and RPC 8.4(c). Accordingly, although disagreeing in part as to whether respondent knowingly misappropriated the $17,000, for respondent's knowing misappropriation of the $4,000, the Board unanimously determined that he must be disbarred. One member did not participate.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 11/2/98

By: _____
LEE M. HYMERLING
CHAIR
DISCIPLINARY REVIEW BOARD