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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-097

IN THE MATTER OF :
WALTER L. ROTH, JR. :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: June 22, 1994

Decided: September 27, 1994

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

Charles J. Sprigman 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 David H. Dugan, III. The formal complaint charged respondent with four counts of knowing misappropriation (counts one, two, three and four), commingling of funds (count five), lack of diligence and failure to communicate (count six), and misrepresentation (count seven).

Respondent was admitted to the New Jersey bar in 1979. On November 27, 1991, he was privately reprimanded for misconduct in two separate matters. In one matter, he failed to keep his client reasonably informed about the status of the case and failed to reply to the disciplinary authorities' request for information about the grievance. In the second matter, he turned over subdivision plans to a third party without first obtaining

reimbursement for the cost of the plans, as instructed by his client.

At the time relevant to these proceedings, respondent maintained a law office in Pitman, Gloucester County, New Jersey. On November 16, 1988, the Office of Attorney Ethics ("OAE") conducted an audit of his attorney records, pursuant to the OAE's Random Audit Program. By letter to respondent dated January 10, 1989, the OAE listed four recordkeeping deficiencies disclosed by the audit and directed him to rectify those deficiencies within forty-five days of the letter. According to respondent's testimony at the DEC hearing, all four deficiencies were ultimately remedied.

One of the problems found by the audit was respondent's failure to prepare a schedule of client ledger cards and to reconcile it to the bank statements. That problem was corrected. According to respondent, his bookkeeping responsibilities were carried out by his secretary, Donna McClintock. After McClintock left his employment in January 1990, however, respondent's bookkeeping practices once again were overlooked. That specific task was not reassigned to another employee, nor did respondent personally undertake his recordkeeping obligations.

All of the trust account violations cited in the complaint, including the charges of knowing misappropriation, occurred after Ms. McClintock left respondent's office.

Prior to the DEC hearing, the OAE and respondent's counsel signed a Stipulation of Facts.

I. THE McCRACKEN MATTER (count one - knowing misappropriation)

Respondent represented Horace and Carol McCracken in negotiating a settlement of their outstanding debts owed to Debt Consultants, Inc. On or about July 27, 1990, respondent and Daniel C. Hoffman (the grievant in the McCracken matter), counsel for Debt Consultants, settled the matter for $1,300. By letter to respondent dated July 27, 1990, Hoffman confirmed the terms of the settlement and enclosed a stipulation of settlement to be executed by respondent's clients. Respondent received this letter a day or two later.

On July 30, 1990, the McCrackens gave respondent a check in the amount of $1,300, payable to "Walter L. Roth, Jr." Respondent deposited that check in his trust account on that same day. Exhibit C-4.

On August 27, 1990, respondent wrote to Hoffman, enclosing an executed consent order and assuring him that the McCrackens' check would follow within seven days. Exhibit C-10. On October 2, 1990, the court signed the stipulation of settlement. Although respondent acknowledged having received the signed stipulation in October or November 1990, he did not send Hoffman the $1,300 payment. Respondent had no explanation for his failure to send the payment after the receipt of the signed stipulation. His testimony was that "I just didn't do it * * *. I felt that basically everything was coming down around me." T1/25/1994 106. Respondent

was alluding to several personal problems that beset him at the time, detailed below.

By letter dated October 9, 1990, Hoffman complained to respondent that payment had not been made. Hoffman also informed respondent that he would be seeking the entry of a judgment in the amount of $2,771.30. Exhibit C-12. Indeed, on January 28, 1991, the court entered a judgment against the McCrackens in the amount of $2,331.16, together with pre-judgment interest in the amount of $349.67, for a total of $2,680.83 plus costs and counsel fees. Exhibit C-15.

During a telephone conversation with Hoffman, in March 1991, respondent claimed that his secretary had mistakenly deposited the $1,300 check in the wrong account, a fact of which he had become aware only after the receipt of Hoffman's letters complaining about the non-payment. Hoffman then agreed to accept the $1,300, if paid immediately. Once again, respondent did not send the payment to Hoffman. That fact caused Hoffman to write respondent a letter, on April 1, 1991, questioning respondent's earlier explanation of the misdeposit and also informing respondent that he would be notifying the disciplinary authorities of respondent's conduct, within seven days from the date of the letter. Exhibit C-17.

On May 6, 1991, upon receipt of the Hoffman grievance, the OAE conducted a second audit of respondent's books and records. When respondent failed to produce all the requested records, the audit was continued until May 20, 1991, at respondent's office. Several future visits to respondent's office were necessary. Prior to the

May 20, 1991 audit, by letter dated May 16, 1991, the OAE instructed respondent to submit a reconstruction of his trust account records, along with quarterly reconciliations as of certain specific dates. Respondent then engaged an accountant, Earl J. Kelly, to prepare the appropriate trust records and the quarterly trust account reconciliations. According to respondent, his accountant worked in conjunction with the OAE during the entire summer of 1991, in order to reconstruct his attorney records. After certain deficiencies were identified, respondent replenished the trust account by depositing $9,168.47 into his trust account on September 24, 1991. Attachment C-24 to Exhibit C-58. After a thorough review of the reconstructed records, the OAE determined that they were in compliance with R. 1:21-6. Exhibit C-58 at 11.

On October 11, 1991, respondent finally sent the $1,300 settlement to Hoffman. Exhibit C-18. According to respondent, he delayed sending the funds to Hoffman until his accountant had completed his trust account reconciliations. T1/25/1994 150.

In the interim, however, the $1,300 was not kept inviolate in respondent's trust account. Approximately two weeks after the July 30, 1990 deposit of the $1,300 check in his trust account, respondent invaded those funds. He did so by issuing trust account checks in excess of its available balance. Specifically, on August 13, 1990, respondent's trust account balance was $2,523.54, including the $1,300 McCracken funds and $1,223.54 in other funds. Stipulation, paragraph 17 and Exhibit C-9. On that date, two trust account checks totalling $2,620 were presented for payment: check

No. 4337, in the amount of $120, payable to "Clerk-U.S. Bankruptcy Court," and check No. 4339, in the amount of $2,500, payable to "Prudential Hillcrest Homes" ("Hillcrest"). On that date, August 13, 1990, there were no funds on deposit standing to the credit of Hillcrest. Respondent personally issued both checks, which were unrelated to the McCracken matter. Stipulation, paragraph 18 and Exhibit C-9. After those checks were cashed, the trust account became overdrawn by $121.46 and the $1,300 McCracken funds were invaded. Exhibit C-9.

By letter dated August 14, 1990, the bank in which respondent kept his trust account notified the OAE of the $121.46 overdraft. The bottom of that letter indicated that a copy had been sent to respondent. Although respondent acknowledged having received a copy of the bank's notice, the record is not clear as to the exact date on which he received it.

On August 14 and 17, 1990, respondent deposited $2,500 and $3,047 in his trust account, respectively. Exhibit C-9. On August 17, 1990, the trust account balance was $5,425.54, including the replenished $1,300 McCracken funds and $4,125.54 in other funds. Stipulation, paragraph 20. On that same date, however, respondent issued three checks totalling $4,500, which were unrelated to the McCracken matter: check No. 4340, in the amount of $500, payable to "W. Lundgraf;" check No. 4341, in the amount of $3,500, payable to "Fred and Marsha Johnson;" and check No. 4342 in the amount of $500, payable to "W.L. Roth, Esq." Stipulation, paragraph 21 and Exhibit C-9. After the payment of those checks on August 17, 1990,

the balance in the trust account dropped to $925.54. Once again, the $1,300 McCracken funds were invaded.

Respondent maintained that the invasion of the McCracken funds had not been intentional. According to respondent, he "had no idea" what his trust account balance was when the McCracken funds were invaded. As mentioned earlier, respondent conceded that, since Ms. McClintock's departure from his law firm, in January 1990, no one had tended to his bookkeeping responsibilities. Accordingly, respondent continued, he could not determine the exact balance of his trust account:

> Q. Okay. What was your balance in your trust account right before you wrote these two checks [the $120 check and the $2,500 check] and they are checks marked in evidence as C-5 and C-6 ?
>
> A. I don't know.
>
> Q. When was the last time before you wrote these two checks that you checked on what your balance was in the trust account?
>
> A. I haven't the faintest idea, it could have been up to a year.
>
> Q. When you wrote these two checks what did you think was the balance in your trust account?
>
> A. I have no idea.
>
> Q. Okay. Did you call the bank to ask what your balance was in your trust account before your wrote these two checks?
>
> A. No.
>
> [T1/25/1994 126-27]

Respondent contended that, after he became aware of the $121.46 trust account shortage, he attempted to identify its source:

Q. Okay. What did you do when you discovered that these two checks had caused an overdraft?

A. I tried to sit down and figure out what happened.

Q. And what did you determine?

A. I thought I had misdeposited something and I pulled $2500 out of my business account I think and put it into the trust account.

Q. What was it that made you think you had misdeposited something?

A. I don't know. I was not thinking clearly, I went in, I had a pile of records, unopened bank statements, I went through a few deposit slips, saw one that was -- saw one about the same number and said oh, this must have been it, I must have put it in the wrong spot and wrote a check to switch it over and forgot about it.

Q. So what did you do then to correct the situation?

A. I just moved the money from my business account to my trust account.

Q. How much?

A. I don't know, I think it was $2500 or something in that area.

Q. It was $2500. When you moved the $2500 into your trust account did you realize at that point that the $2500 check that you had written three days before was the cause of the overdraft?

A. No.

* * *

Q. So the fact that you wrote the $2500 check to your trust account didn't have anything to do with the $2500 check that you had written out?

A. I truly don't know. I sat down, I tried to figure out what I did and I switched, I switched the money over.

* * *

Q. On August 14 when you were sitting down trying to review the trust records to determine what went on, did you call the bank up and say look, what's my balance, what do I have in this account?

A. I didn't need to.

Q. Why not?

A. Because they just sent me a notice that said [the] $120 check had just bounced, that meant I had nothing, gives me a pretty good idea.

Q. That incident you had minus $121.46?

A. There was nothing there.

Q. Had you made any deposits to cover that?

A. Whatever the records say. I don't know what I did. If the records say I did, that is a reconstruction that I paid for, that we had to completely rebuild the records from the checks, the bank statements and deposit slips, if I made a deposit, I made a deposit, I can't tell you from --

Q. You know you made a deposit of $2500?

A. Well, yeah, that I know.

Q. Okay. And the bank statement seems to indicate that you made a couple of other deposits, okay?

A. Okay.

Q. Do you recall when you received this bank statement, C-9?

A. No.

Q. In the Stipulation it indicates that on August 17th you issued three trust account checks, $4500 -- I'm sorry, totalling $4500, check in the amount of $500 to W. Lundgraf, check in the amount of $3500 to Fred and Marsha Johnson and a check in the amount of $500 payable to yourself? Do you remember that?

A. No. I remember Mr. Lundgraf, who is a friend of mine who had moved from his home, had given me funds to hold for him, that was the $500 and he asked me for them back, and Fred and Marsha Johnson were a bankruptcy claim, I don't remember the checks.

Q. This was three days after you had bounced a check on your trust account and you had made certain deposits in the three days there and then you wrote out checks totalling $4500, do you have any idea of what you thought your trust account balance was on the 17th when you wrote this check, when you wrote this series of checks?

A. No.

[T1/25/1994 26-29, 32-34]

When questioned by the Special Master, respondent continued to claim that, on August 13 and August 17, 1990, when the $1,300 McCracken funds were invaded, he was unaware that there were insufficient funds in his trust account:

Q. And there were some disbursements, in other words, in your trust account between July 30, '90 when the $1,300 went in and the August 13, '90 when it shows a negative balance?

A. Yes.

Q. All right. Now, when those disbursements were made against the $1,300, what ever other money was in the account, did you know when you were making those disbursements that there were insufficient funds to cover them all?

A. I hadn't the faintest idea in the world what was in my account.

Q. Then would it be true to say that you didn't know what was in your account, follow my double negative, that what you're saying is you didn't know whether there was [sic] sufficient funds in the account to cover those checks you were writing or not, correct, you said you didn't have any idea?

A. Oh, okay, yes, I did not know what was in my account, therefore, I couldn't have known whether the checks were good or not.

Q. Okay. But you didn't know that you didn't know, in other words, as you sat there and wrote the checks you could have said to yourself, I don't know if I've got money in these accounts right now or not, I don't know, I don't have the records to enable me to know and I know that, correct, how many alternatives are there, another possibility would be to say I think there may have been?

A. Well, I just hadn't the faintest idea what the condition was.

Q. All right. So my point is really very simple, that as you wrote those checks you did not know what was in your account and whether those checks would be sufficient funds to cover those checks?

A. Under those, yes, I will agree with that statement.

[T1/25/1994 150-52]

Respondent contended that he was unaware of his trust account balance because, for a substantial period of time prior to these incidents, he had neglected his bookkeeping duties as a result of a major depression that affected his ability to carry out his daily affairs. According to respondent, he had been experiencing serious marital problems for a long time, which detrimentally affected his

work performance. That statement was corroborated by Ms. McClintock, respondent's secretary of eleven years. According to Ms. McClintock, starting in mid-1987, she began to notice a marked change in respondent's behavior:

Q. During the period of time that you worked for Jay [respondent] did you find that there was a change in his attitude?

A. Definitely.

Q. When did you first start seeing a change?

A. Maybe as far back as 19 -- mid 1987.

Q. What did you find out in 1987 that was changing?

A. He just didn't have his heart in his work.

Q. How did that manifest itself?

A. Well, he didn't want to go on motions, like we would have to call our adversary and make an excuse or call the judge to get postponements of motions, he could barely see clients, he saw them but he kept putting a lot of things onto his associate.

Q. Who were his associates over this period of time?

A. I believe at that time Theresa Munson was his associate.

* * *

Q. Now, Mr. Roth's problems, did they get better or worse after you started seeing them in 1987?

A. They got much worse.

Q. And how were they manifesting themselves as they got worse, what would I see if I were watching him from afar?

A. As another attorney?

Q. I'm a casual observer, guardian angel watching him, what am I seeing Jay doing?

A. As a client you probably wouldn't have noticed anything.

Q. How about you as the secretary, what are you noticing?

A. That he didn't seem to be able to do anything, he would just come in and didn't want to be bothered by anyone, you couldn't engage him in conversation, although he was fine, he appeared to be able to put on a front with clients that he was okay.

Q. When the clients left what would happen, client comes in, he speaks to them, client leaves?

A. He would put whatever he got from the client aside and didn't give directions as to what to do with it.

Q. Did this continue to get worse as time went on?

A. Yes.

Q. In or about January of 1990 you went out and found other employ?

A. Yes.

Q. Why?

A. Because I had two choices and I tried the first one and that failed, I tried to convince him to stop, to take a break, a six month break from practicing law or I felt like I was going to lose my mind.

Q. And why did you think you were going to lose your mind?

A. Because the responsibility had been thrown on me, his associate had left, the other secretary who had experience had left.

* * *

Q. January of 1990, just before you left, what was the state of the business records?

A. They were a mess.

Q. Why were they a mess at that time?

A. They hadn't been kept current for one thing, we were so far behind.

Q. What was going on in Jay's personal life in 1989 and just before you left in January of 1990, if you know?

A. I know that he had been having marital problems for a long time.

* * *

Q. Can you describe exactly what Jay would do after a client left the office, what would he do on a normal day if he didn't have clients?

A. He would go in his office and shut the door and read.

Q. What was he reading?

A. Usually science fiction books.

[T1/24/1994 118-22]

Theresa M. Munson, respondent's associate from 1986 to 1989, also testified about respondent's odd behavior:

Q. Did you have occasion to work close enough with Jay to get a feel for him personally?

A. Yes.

Q. Did you find that his attitudes and his demeanor changed in any way from October of '86 up to September of '89?

A. Yes, very much.

Q. What did you see as a change in Mr. Roth?

A. I think that the practice just got to Jay, he sort of withdrew from making decisions, closeted himself for a while, was sometimes prone to having temper tantrums and just seemed to distance himself from what he needed to do.

Q. Who was actually doing the work during the period of time?

A. I would say that the secretary Donna McClintock and I were really running the firm.

Q. Can you -- you've indicated he distanced himself from the work, can you give a for instance as to what I would physically see Mr. Roth doing?

A. Well, a lot of times Jay would sit in his office with just a banker's lamp on, not the overhead lights, just sit and stare off into space or other times he would read the newspapers or read a novel, he just didn't seem to concentrate on what needed to get done. If you asked him quick questions, you know, he would help you but he just seemed incapable of making -- of sitting down and like really going through something and like planning a strategy, you know, it was like he couldn't make that decision.

Q. When did you see that period of time when you felt he couldn't make a decision?

A. I would say that beginning in 1989 things really got bad, that it just became a very tense place to work and I think Jay started to withdraw even more.

[T1/24/1994 142-43]

In June 1989, respondent began treatment with a psychiatrist, Thomas R. Houseknecht, M.D. At their initial session, respondent complained of trouble in concentrating on his work and performing adequately. Dr. Houseknecht concluded that respondent was suffering from a major depression. Dr. Houseknecht, who testified at the DEC hearing, defined major depression as follows:

> * * * major depression is mainly a disturbance of feelings or affect. [Mr. Roth] had low mood, he failed to enjoy things that normally brought him satisfaction or pleasure and he had volitional problems, that is problems of carrying out his duties as he understood them. He lacked motivation, he also lacked confidence in his judgment because of his low mood and, therefore, he was essentially not performing to his customary level of being able to do things.
>
> [T1/25/1994 8]

According to Dr. Houseknecht, respondent's condition worsened in May or June 1990. At that time, respondent experienced a delayed reaction to the tragic death of his mother, in April 1990, caused by an automobile accident. Dr. Houseknecht testified that, thereafter, respondent's sleep became more disturbed and that respondent had greater difficulty in concentrating. Dr. Houseknecht prescribed tranquilizers and anti-depressants to treat respondent's condition. Dr. Houseknecht added that respondent's depression episodes would sometimes last for periods of six to eight weeks, thereby greatly reducing his performance as an attorney. In Dr. Houseknecht's opinion, respondent's conduct in sitting in his office for extended periods of time just staring at the walls would indicate the presence of a "volitional problem, a problem implementing action." T1/25/1994 14-15.

In his report, Dr. Houseknecht noted that

> [d]epressed mood, loss of patience or over-reacting, diminished interest and capacity for pleasure, weight loss without effort, other times excessive weight gain, insomnia, fatigue daily, diminished ability to think and concentrate, indecisiveness over extended periods of time were prominent features and sufficiently severe to interfere with professional performance and to warrant his request for relief from trial responsibilities by reason of his clinical picture.

[Exhibit R-1]

In or about February 1991, Dr. Houseknecht prepared a note, presumably addressed to the courts, recommending "respondent's medical leave from responsibility for trial cases through June 1991, to allow sufficient recovery from his depressive illness." Dr. Houseknecht opined that, between the date of respondent's mother's death and the several months that followed, respondent's capacity to carry out his professional duties were impaired, to a moderately severe degree, "by this volitional issue, he knew what he should do and he knew he wasn't doing it but his ability to control that was impacted or impaired by his depression." T1/25/1994 85. Dr. Houseknecht did not believe, however, that respondent was insane within the meaning of the McNaughten test of insanity. T1/25/1994 61.

Dr. Houseknecht's treatment, which continued as of the date of the DEC hearing, in January 1994, included prescribed use of tranquilizers and anti-depressants. In addition, Dr. Houseknecht encouraged respondent to engage in physical activities in order to burn off adrenaline and reduce anxiety and, in the process, hopefully get him out of this "rut of depression." Dr. Houseknecht

reported that respondent's condition is now better, although there have been some relapses, the most recent of which occurred in September 1993.

II. THE FOUR SEASONS MATTER (count two - knowing misappropriation)

On November 9, 1990, respondent received an $8,000 check from his client, Four Seasons. On that same day, respondent deposited the check into his trust account. Also on that day, without first waiting for the $8,000 check to clear, respondent issued a $4,000 check to himself, representing his fee in the Four Seasons matter. After this $4,000 withdrawal, the Four Seasons balance was reduced to $4,000, assuming of course that the $8,000 check would eventually clear. On November 13, 1990, respondent deposited $8,159.56 of his own monies in his trust account in behalf of Four Seasons. That deposit was a personal loan from respondent to Four Seasons. According to respondent, Chris Williams, a principal of Four Seasons, had asked respondent for a loan, to which he had agreed. The proceeds of that loan had come from an IRA that respondent had previously cashed and deposited into his trust account, instead of in his business account, in order to avoid an IRS lien. (The IRS had, on prior occasions, asserted a lien on respondent's business account as ã result of outstanding payroll taxes.) Assuming again that the initial $8,000 check from Four Seasons would clear, after that $8,159.56 deposit the Four Seasons balance was increased to $12,159.56. On November 15, 1990,

respondent wrote a check for $6,159.56 to Chris Williams, thereby reducing the Four Seasons balance to $6,000. However, on the next day, November 16, 1990, the $8,000 check given to respondent by Four Seasons bounced. Accordingly, instead of having a $6,000 positive balance, the Four Seasons account was actually overdrawn by $2,000.

The record is not entirely clear as to the precise date on which respondent learned of the return of the $8,000 check for insufficient funds. Respondent was not sure whether he had opened the envelope containing the bank's notice of the overdraft on the same day he received it or "weeks later." T1/25/1994 136. He assumed, however, that he had opened the mail on the same day he had received it, which would have been "several days" after November 16, 1990, the day the check was returned. T1/25/1994 137.

Respondent did not redeposit the $4,000 fee in the trust account, upon being notified of the overdraft. According to the OAE investigator, Jeanine Verdel, respondent told her that he was unable to return the $4,000 fee paid to himself on November 9, 1990, because he had used it to pay personal expenses. T1/24/1994 46. Respondent, in turn, explained that he had not returned the fee because

> [w]ell, first off, I wasn't sure exactly how much it was because I had put my money in there and I still had a couple [of] thousand of my money left so I wasn't quite sure how much I was out because I wasn't -- I didn't have the records.
>
> Q. What was the status of the trust records at that point in time?

A. Most -- not most, a good portion of bank statements were unopened, hadn't been reconciled in a couple [of] years, there basically had been no records kept since Donna had left.

Q. Did you know at some point in time at that point that the trust account was then running short of funds, that you had overdrafted the trust account?

A. Yeah.

Q. What steps did you take at that point?

A. I didn't really take any steps.

Q. Why?

A. I couldn't do it.

Q. Excuse me?

A. Couldn't do it.

Q. Why couldn't --

A. All I had to do -- I could have had it fixed in ten seconds, all I had to do was pickup [sic] the phone and call my father.

Q. Why didn't you do that?

A. I don't know.

Q. Excuse me?

A. I don't know.

Q. Were you on medication at that point in time?

A. Yes.

Q. What impact was the medication having on you, if any.

A. I don't remember too much of that time period. The medication -- I was feeling pretty beat up, the medication wasn't great.

[T1/25/1994 116-17]

Q. At any time during the periods that have been set forth in the complaint were you aware that you were invading trust funds of clients?

A. The only time I could truly say that I would have been aware of it would have been on the Williams matter.

Q. What was the Williams matter?

A. Well, the Four Seasons, when his check bounced.

* * *

Q. In between the time you took in and the time that you figured out what was wrong, did you realize that your trust account was overdrawn, that you, in fact, had invaded clients' funds from the standpoint that there was an overdraft in the amounts that should have been there and the amounts that were there?

A. Like I said, I realized that there was a -- I realized that there was a problem with regard to the Williams matter.

[T1/25/1994 120-21]

On August 30, 1991, presumably after his accountant completed the reconciliation of his trust records, respondent finally replaced the missing funds by depositing $1,967.28 in his trust account. Exhibit C-26.

III. THE HILLCREST MATTER (count three - knowing misappropriation)

Respondent's father, Walter L. Roth, Sr., owned Prudential - Hillcrest Homes Realty ("Hillcrest"). In fact, he had purchased that business at respondent's suggestion. Respondent's father, however, had never really run the realty himself. Instead,

respondent's mother had obtained her broker's license, whereupon, according to respondent, the business "really became hers."

Whether respondent was the attorney for Hillcrest is not entirely clear. It is clear, however, that, on May 25, 1990, respondent issued trust account check No. 4318 to Hillcrest, in the amount of $7,500. At that time, which was approximately four weeks after the death of respondent's mother, there were no corresponding funds on deposit standing to the credit of Hillcrest. Stipulation, paragraph 35. As of May 25, 1990, respondent's trust account balance was $9,278.83, an amount that was $124.47 short of the funds respondent should have had on deposit for the benefit of nineteen other clients. Stipulation, paragraph 36. On May 29, 1990, when the $7,500 check was cashed, those client funds were substantially invaded.

Asked by the Special Master what he believed his trust account held in behalf of Hillcrest, respondent replied as follows:

> A. I probably believed that there was nothing there.
>
> Q. So you wrote the check knowing that there were no funds for that client to support that disbursement?
>
> A. But the writing the check isn't the disbursement. Yes, I wrote the check.
>
> Q. And you gave it to somebody at Prudential - Hillcrest Homes?
>
> A. Yes.
>
> Q. And there was [sic] still no funds there in your trust account when you delivered the check?

A. I don't know if I delivered it or I put it in an envelope for somebody to pickup [sic].

Q. When you transmitted it?

A. Okay.

Q. Right, there was [sic] still no funds there?

A. Yes.

Q. And you knew that as well?

A. Yes.

Q. Okay. And at some point in time you intended on replacing those funds?

A. Well, again, I'm trying to recall as best as I can. All I would have had to have done is gone home and said dad, I have to put so much in, I need this much and he would have given it to me. I probably went home and he was probably sitting there, whatever mood he was in, you will get the opportunity to see him this afternoon, and said I'll ask him in the morning and then I didn't do it, I was in as bad -- I was in probably worse shape than he was and I didn't do it. As a practical matter, the man has loaned me a couple [of] hundred thousand and had put over $100,000 into Hillcrest and it didn't even make a dent. It was just my failure to carry through with what I intended to do. If I had carried through and done what was available and what should have been done when the check was presented to my bank, the funds would have been there, collected.

Q. All right. But as matters turned out, the funds weren't there?

A. As matters turned out, I screwed up big time.

[T1/25/1994 139-41]

Q. What was your father's financial status at that point?

A. Couple [of] hundred thousand in the bank.

Q. What was the Hillcrest -- Prudential Hillcrest Homes Realty's financial status at that time?

A. It didn't have any bills but it was a bad period for real estate so it needed money put in. What I probably did was wrote the check, gave it to the broker and went to go home, you know, just to get the money from my dad to put in right away and didn't do it.

Q. Do you have any idea why that $7,500 amount was cashed?

A. Because I didn't tell him not to, I just forgot about it.

[T1/25/1994 118]

Q. Now, Hillcrest, you say in testimony that you admit that you disbursed $7500 from the trust account on May 25, '90 and there were no funds in your trust account at that time for Hillcrest or for your father?

A. That's the way it turned out.

Q. Well, there were none, you were going to go to your father and get him to give you money to put into the account?

A. To the best of my recollection, it was my intention that the check was not to be presented until I had placed my father's check into the account and I, for whatever reason, did not follow through.

Q. I have, I guess -- I'm sort of puzzled. If this was $7500 issued from your trust account to him to be paid by a check from him, why did you do the whole transaction in the first place, sounds like a circle?

A. Well, yeah, it was a circle.

Q. What was the point of the circle?

A. It's in the middle of the day, the broker from Hillcrest comes over and says I'm going to have to pay bills tomorrow; now, I've got a choice, my dad is in bad shape, I can pickup [sic] the phone, this is the way I'm reconstructing it, I can pickup [sic] it again

and say dad, hop in your truck and get a check up here for $7500 or I can hand the check over, go home that night, pick the proper moment to tell him, he will write it, bring it up, put it in the bank and the money is never out of the account, for whatever reason I did not do that.

Q. Describe for me though what your responsibility was for his business if this was basically --

A. I was trying to help out, he never went back into the building again, he closed it, I don't know, a year or two later, he never was back in the building again, he wouldn't go back in and never looked at the books again, he didn't want anything to do with it, it was my mother's, he didn't want anything to do with it, he wouldn't go back in, I was sort of -- I wasn't -- sorry.

[T1/25/1994 157-58]

A. * * * months later, the $7,500, months later, it just hit me and said oh my God, you know, and this isn't even a great recollection, I said I wrote that check and I went to my father, I said I have to put $7,500 in that I gave Hillcrest, he gave me it [sic] immediately, I put it in.

Q. In between the time you took it and the time you figured out that that was wrong, did you realize that your trust account was overdrawn, that you, in fact, had invaded client's funds from the standpoint that there was an overdraft in the amounts that should have been there and the amounts that were there?

A. Like I said, I realized that there was a - - I realized that there was a problem with regard to the [Four Seasons] matter.

Q. What action did you then take to correct that?

A. I didn't take any action.

Q. During this period of time, were you under the treatment of Dr. Houseknecht?

A. Yes.

Q. How would you characterize your day-to-day operation of your business affairs?

A. I didn't operate, I just sat back and let it sort of operate itself, and not very well.

[T1/25/1994 120-21]

On August 24, 1990, approximately three months after respondent issued the $7500 trust account check, he replenished the trust account by way of a business account check.

IV. THE $10,000 LOAN (count four - knowing misappropriation)

On January 7, 1991, respondent deposited $10,000 in his trust account, which he identified as a loan from his father. According to respondent, he did not deposit the $10,000 loan in his business account because he feared that the IRS would assert a lien against it.

On February 15, 1991, respondent issued trust account check No. 4427, in the amount of $8,000, against the $10,000 deposit. Eleven days later, on February 26, 1991, he issued trust account check No. 4428, in the amount of $3,000, also against the $10,000 deposit. Both checks were made payable to cash. The checks were then deposited in respondent's business account to cover overdrafts that occurred on February 14 and February 25, 1991. Because, at the time that respondent issued those two checks, he had no fees or other monies in the trust account to which he was entitled, client funds were invaded to the extent of $1,000. Stipulation, paragraphs 38 through 44.

At the DEC hearing, respondent was asked whether he knew, when he issued the two checks, that he was withdrawing $11,000 from his trust account, instead of $10,000. Respondent replied as follows:

A. When I issued the second check I didn't recall what I had issued the first check for and I just --

[T1/25/1994 141]

Q. Now, on the $10,000 loan, that money was deposited January the 7, '91?

A. Yes.

Q. And that's when you disbursed $8,000 and $3,000 to cash?

A. But not until February.

Q. Okay. When you did, you, of course, overshot the $10,000 by $1,000?

A. Yeah.

Q. At that point you knew that you had no other non-client money in your trust account besides that loan?

A. I didn't really remember what exactly I had there from him, I knew he had given me -- when I drew the two -- he gave me the money and I left it there and it stayed there for what was it five weeks and when I wrote the checks it was one of the -- I can't explain it.

Q. I'm listening.

A. I know but it doesn't make any sense.

Q. Well, this is your chance to try to make some sense of it, go ahead.

A. I wrote the checks against it of the money that was advance [sic] -- that was loaned to me and for whatever reason I didn't have any records of it, I didn't have any sheet for it,

that sheet was made up later and I understand I miscalculated. I don't know if I didn't remember what the first one I wrote was or how much was put in, I don't remember but --

Q. Do you recall what you did with the $8,000 that you took out as cash on February 15, '91?

A. I put quite a bit of it into my business account to pay the checks that are listed in the exhibit, I don't even know what exhibit it is, there was a schedule --

Q. Exhibit 43?

A. The schedule of checks.

Q. Right.

A. And I kept some of it as cash to pay some personal obligations and I think I gave some of it to -- I think I gave some it -- I might have given some of it to either my wife for support money or to probation for support money, I'm not sure which, I didn't keep -- I don't know exactly how much I kept.

* * *

Q. And then on February 26, $3,000 do you recall what you did with that?

A. I think that also went to cover some business checks that are listed on the document.

Q. That $1,000 shortage, was that caught up again as a result of the OAE involvement?

A. Yes.

Q. So that's been paid?

A. Everything has been paid.

Q. And again, perhaps August 30, '91 or some time like that?

A. It went in -- I corrected -- when the information came back from my accountant and I think it was -- I don't know if it was

approved by the OAE or if we agreed with the figures, but whatever it was, I was told this much has to go in to bring your account into balance and that's how much I put in.

Q. So all the shortages have been repaid?

A. Every penny.

[T1/25/1994 159-61]

V. COMMINGLING OF FUNDS (count five)

Respondent stipulated that he used his attorney trust account to clear checks for his father, drawn against his father's cash management account. He also stipulated that he deposited the $10,000 loan from his father into his trust account to avoid a possible IRS lien on his business account. Stipulation, paragraphs 46 and 47.

VI. THE AHRENS MATTER (count six)

In April 1986, respondent was retained by Robert Ahrens to represent him in connection with the administration of the estate of Henry J. Ahrens. Despite his obligation to represent his client's interests responsibly, respondent failed to pursue the matter diligently and did not complete his work in a timely fashion. In addition, he failed to keep his client informed about the status of the matter and to reply to his client's telephone

calls, letters and other reasonable requests for information. Stipulation, paragraphs 49-51.

VII. MISREPRESENTATION TO THE OAE (count seven)

On August 14, 1990, respondent's bank notified the OAE that his trust account had been overdrawn by $121.46. When the OAE requested an explanation for the overdraft, respondent informed the OAE, by letter dated January 15, 1991, that he had inadvertently deposited $2,500 in his business account, instead of in his trust account. In support of this explanation, respondent submitted two deposit slips showing a $2,525 deposit to the business account on July 28, 1990 and a $2,500 deposit to the trust account on August 14, 1990, as evidence that he had discovered and corrected his error. The OAE audit, however, later disclosed that the $2,525 sum received from a client, Schober, had first been deposited into respondent's trust account, on July 27, 1990, and then transferred to his business account on the next day, July 28, 1990. This deposit to the business account was the mistaken deposit mentioned in respondent's explanation to the OAE. As it turned out, the $2,500 in personal funds that respondent deposited in his trust account on August 14, 1990, after he received the trust overdraft notification, was unrelated to the Schober matter. In light of the foregoing, respondent was charged with misrepresenting the nature of that transaction to the OAE.

Respondent denied that he knowingly made a false statement of fact to the OAE. He testified that, at the time, he believed that the explanation to the OAE was accurate, based on the records then available to him.

* * *

The Special Master found that, on four occasions, respondent took client funds from his trust account for his own purposes: $7,500 in May 1990 (the Hillcrest matter), $1,300 in August 1990 (the McCracken matter), $2,000 in November 1990 (the Four Seasons matter) and $1,000 in February 1991 (the $10,000 loan matter), for a total of $12,000. The Special Master, however, was unable to find clear and convincing evidence that respondent had "intentionally and purposely avoided knowing the situation in his trust account. The proofs demonstrate that his poor record-keeping was the product of his overall depression and lack of commitment of his professional duties." Special Master's Report at 11. The Special Master concluded that respondent negligently misappropriated client funds in the McCracken, Four Seasons, Hillcrest and the $10,000 loan matters. The Special Master also found that respondent commingled personal funds in his trust account in 1990 and 1991, in violation of RPC 1.15, and that he grossly neglected the handling of the Ahrens estate and failed to communicate with his client, in violation of RPC 1.1, RPC 1.3 and RPC 1.4. Lastly, the Special Master concluded that the evidence

did not clearly and convincingly establish that respondent knowingly misrepresented facts to the OAE in connection with the $121.46 trust account overdraft.

The Special Master recommended that respondent be suspended for a period of six months, given the degree of carelessness exhibited in these matters. The Special Master also recommended "some form of monitoring to help insure proper trust accounting in the future." Special Master's Decision at 15.

CONCLUSION AND RECOMMENDATION

Following an independent de novo review of the record, the Board agrees with the Special Master's conclusion that respondent acted unethically. The Board is unable to agree, however, with the Special Master's findings that respondent's misappropriations in the McCracken (count one), Four Seasons (count two) and Hillcrest (count three) matters were negligent. In the Board's view, the record clearly and convincingly establishes that respondent's misappropriation of client funds in those matters was knowing. The Board agrees with the remainder of the Special Master's findings with regard to the other counts of the complaint, that is, that respondent negligently misappropriated client funds in the $10,000 loan matter (count four); commingled personal and trust funds in his trust account (count five); and failed to communicate with his client and to act diligently in the Ahrens matter (count six). The Board also agrees with the Special Master's conclusion that there

was no clear and convincing evidence that respondent made a misrepresentation to the OAE (count seven).

I. THE McCRACKEN MATTER

There is no question that the McCracken funds were invaded on August 13, 1990, when, after the $120 and the $2,500 checks were cashed, respondent's trust account became overdrawn. Respondent disputed, however, that this invasion of client funds was intentional. He claimed that he was unaware of the balance in his trust account at the time that he wrote those two checks on August 13, 1990, because his attorney records had not been reconciled since January 1990, when his secretary left the office. He also contended that he was suffering from a major depression at the time — a contention corroborated by his psychiatrist — which caused him to overlook his recordkeeping obligations. Respondent testified that some of the envelopes containing his trust account bank statements were left unopened, a fact that was acknowledged by the OAE investigator.

It is undisputed that respondent received notice that the account became overdrawn when the $120.00 and the $2,500 checks were cashed. A copy of the bank's notification of the overdraft, dated August 14, 1990, was sent to respondent. Yet, three days later, on August 17, 1990, he issued three other checks totalling $4,500, thereby invading the McCracken funds for a second time. And although the record is not entirely clear as to when respondent

received the bank's notification, respondent testified that, when he found out about the overdraft, he deposited $2,500 in his trust account. A review of the bank statement shows that the deposit was made on August 14, 1990. The logical inference is that respondent received notice of the overdraft on August 14, 1990, one day after it occurred. Accordingly, when respondent issued three checks in the amount of $4,500 on August 17, 1990, he knowingly invaded the McCracken funds. This was so because, as the bank statement (Exhibit C-9) indicates, on August 13, 1990, the trust account became overdrawn when the $120 check was cashed. On August 14, 1990, respondent deposited $2,500, thereby bringing the trust account balance to $2,378.54 ($2,500 - $121.46 = $2,378.54). No checks were presented for payment on August 14, 15, or 16, 1990. On August 17, 1990, respondent deposited $3,047 in the account. The balance, thus, rose to $5,425.54 ($2,378.54 + $3,047. = $5,425.54). On August 17, 1990, however, respondent issued three checks totalling $4,500. Although there were sufficient funds in the account ($5,425.54) to cover those checks, respondent was still obligated to hold $1,300 for the McCrackens. With the cashing of the $4,500 checks, the balance in the trust account dropped to $925.54, below the required $1,300 balance.

Accordingly, even if one believes respondent's contention that the first invasion of the McCracken funds, on August 13, 1990, was not knowing because he had "no idea" what his trust account balance was on that date, respondent had to know, on August 17, 1990, when he issued three checks for $4,500, that his trust account balance

was insufficient to cover those checks and, at the same time, keep the $1,300 McCracken funds inviolate. Respondent had to know that because, on August 14, 1990, he received the bank's notice of the $121.46 overdraft of August 13, 1990, deposited $2,500 and $3,047 in the account on August 14 and August 17, 1990, respectively, and then wrote three checks for $4,500 against a $5,425.54 balance that should have included the $1,300 McCracken funds. As noted above, after the $4,500 checks were cashed, the trust account balance dropped below $1,300 (to $925.54). The conclusion is, thus, inescapable that respondent knew that he was invading the $1,300 McCracken funds when he issued the $4,500 checks on August 17, 1990.

II. THE FOUR SEASONS MATTER

On November 9, 1990, respondent received an $8,000 check from Four Seasons. On that same day, he deposited it in his trust account and also issued a $4,000 check to himself for his fee. He then deposited $8,159.56 in the Four Seasons account, as a personal loan to his client. Next, he issued a check for $6,159.56 to his client, which would have reduced the Four Seasons balance to $6,000. On the next day, however, November 16, 1990, the initial $8,000 check given to respondent by Four Seasons was returned for insufficient funds. As a result, the Four Seasons account became overdrawn by $2,000. It was not until August 30, 1991, nine months later, that respondent replenished the trust account.

Respondent admitted that he had been notified of the account overdraft. He testified that he had received the bank's notice "several days" after November 16, 1990, the date on which the check was returned. He was unable to say exactly when he had opened the envelope containing the notice. He added that it could have been either the same day on which he received it or "weeks later." Because respondent did not write any further checks against the Four Seasons account after November 16, 1990, there is no contention that he continued to draw against the account despite his knowledge of the return of the $8,000 check. It is respondent's failure to replenish the account for nine months that allegedly constituted knowing misappropriation.

The OAE took particular issue with respondent's failure to return the $4,000 fee to the account within a reasonable period time, following his discovery that the $8,000 check had been returned. The OAE also found significant respondent's statement to the OAE investigator that he had used the $4,000 to pay personal bills. As to this latter point, however, it should be recalled that respondent issued the $4,000 check to himself on November 9, 1990. The bank statement shows that the check was cashed on that same day. Even if it is found that respondent became aware of the return of the check, at the earliest, several days after November 16, 1990, the fact that he spent the money drawn on November 9 on personal expenses is not crucial to or dispositive of a charge of knowing misappropriation. On November 9, respondent was still unaware that the $8,000 check was not backed by sufficient funds.

It is respondent's failure to replenish the account within a reasonable period of time that is relevant.

According to respondent, he did not do so because (1) he did not know the amount of the overdraft, (2) he had just deposited $8,159.50 into the account and (3) his records were in such a state of disarray that it was impossible for him to figure out the amount of the shortage. Respondent also suggested that his mental condition at the time played a significant role in his inaction. Nine months later, on August 30, 1991, presumably after his accountant performed the reconciliation of his attorney records, as directed by the OAE, respondent finally replenished the trust account. But respondent cannot rely on the deposit of the $8,159.56 to explain his failure to quickly remedy the trust account deficiency. Those were the same funds that respondent had personally lent to Williams on November 15, 1990. Furthermore, his attempted explanation that he did not promptly replace the missing funds because he was unaware of the amount of the negative balance must be rejected. There is no justification for his failure to deposit a sum sufficient to cover the trust account shortage. In fact, a deposit of $8,000, the amount of the dishonored check given by his client, would have shown a good faith effort on his part. In this regard, respondent's conduct is distinguishable from that of the attorney in In re Moras, 131 N.J. 164 and 483 (1993). Unlike respondent, Moras acted expeditiously after he found out that the check had been returned. He quickly contacted the friend, who assured him that the monies would be given to him immediately.

Indeed, the client made periodic reimbursement payments to respondent to the extent of $12,500, beginning within two months of the issuance of the trust account check. Ultimately, however, the friend stopped making the installment payments. Moras then deposited personal monies in the trust account, when it became apparent to him that no more payments would be forthcoming.

The Board concludes that respondent's failure to return trust funds to his trust account for a period of nine months constituted knowing misappropriation.

III. THE HILLCREST MATTER

In this matter, on May 25, 1990, respondent issued a $7,500 check to Hillcrest, his father's realty company, without having equivalent funds on deposit in his trust account. At that time, respondent had $9,000 in his trust account, belonging to nineteen clients. When the $7,500 check was cashed, on May 29, 1990, those client funds were invaded.

Respondent testified that he "probably believed" there were no corresponding funds in his trust account to cover the $7,500 check. He also testified that he had given that check to the broker that worked for his father because the broker had apprised him of the need to pay certain expenses in connection with the business. Because his father was despondent over the recent death of his mother, respondent gave the check to the broker, allegedly intending that it not be presented to the bank until he talked to his father and asked for a check to be deposited into his trust

account to cover the $7,500 check to Hillcrest. Respondent added that, "for whatever reason," he did not follow up on his intent. At an unspecified later time, respondent suddenly realized that he had not asked his father for the check and, on August 24, 1990, three months after he had issued the $7,500 check, he replaced the missing funds.

Respondent's most glaring act of knowing misappropriation occurred in this matter. Knowing that there were no corresponding funds standing to the credit of Hillcrest, respondent drew a $7,500 check from his trust account to pay for Hillcrest's business expenses. In so doing, respondent invaded other client funds, which invasion continued for a period of three months, or until he replenished the trust account. Here, too, respondent's conduct is distinguishable from that of the attorney in In re Moras, supra, 131 N.J. 164 and 483(1993). Moras did not know, at the time that he drew a trust account check to the order of a friend, that the friend's check would bounce. Here, as even the Special Master found, respondent knew, at the time that he issued the $7,500 check to Hillcrest, that he was not holding equivalent trust funds in behalf of Hillcrest. The evidence is, thus, clear and convincing that respondent knew that he was invading other client funds when he drew the $7,500 check.

IV. THE $10,000 LOAN MATTER

On January 7, 1991, respondent deposited to his trust account a $10,000 loan obtained from his father. On February 15, 1991, he

issued a check to himself for $8,000. Eleven days later, on February 26, 1991, he issued another check to himself, this time for $3,000. By withdrawing a total of $11,000 against a $10,000 loan, respondent invaded client funds to the extent of $1,000.

Respondent testified that, when he issued the second check for $3,000, he did not recall the amount of the first check ($8,000). Respondent further testified that he did not remember exactly how much his father had given him some five weeks before. On August 30, 1991, when his accountant finished the reconciliation of the trust account, respondent replenished his trust account.

Here, the Board is compelled to agree with the Special Master's conclusion that respondent's actions did not amount to knowing misappropriation. Like the Special Master, the Board found plausible respondent's testimony that he did not recall the amount of the loan from his father or the amount of the first check, when he issued the second check. In the Board's opinion, respondent's conduct in this count caused a negligent, but not knowing invasion of $1,000 in client funds.

* * *

The Board considered carefully Dr. Houseknecht's report and testimony, to which the Board accorded great weight. The Board believed Dr. Houseknecht's assessment of respondent's condition, at the time of these events, as suffering from a major psychiatric illness. But even Dr. Houseknecht, who testified that respondent's

lack of volition was a major component of his illness, was unable to say that respondent's severe depression was of such magnitude as to prevent him from either knowing the nature and quality of his actions or, if he knew it, that what he was doing was wrong. See State v. Humanick, 199 N.J. Super. 283, 299 n.6 (App. Div. 1985). Under these circumstances, respondent's psychiatric illness — albeit major — cannot be a defense to knowing misappropriation. See In re Hein, 104 N.J. 297 (1986).

* * *

As to the remaining counts, the Board agrees with the Special Master's conclusion that there was no clear and convincing evidence of a misrepresentation to the OAE. Respondent's explanation that his statement to the OAE was based on whatever records he had at the time appears plausible. As to the Ahrens matter, respondent stipulated that his conduct violated RPC 1.3 and RPC 1.4. (The Special Master's finding that respondent also violated RPC 1.1 in this matter does not appear appropriate. Neither the complaint nor the stipulation refers to this RPC.) Lastly, respondent conceded that he commingled funds in his trust account when he deposited personal monies therein in order to avoid a possible IRS lien.

* * *

In conclusion, the Board, not without a sense of compassion, is constrained to find that respondent's conduct in the McCracken, Four Seasons and Hillcrest matters constituted not a series of extremely negligent acts, as urged by his counsel and as found by the Special Master, but conduct that was knowing and purposeful. Disbarment is, hence, the only appropriate sanction. In re Wilson, 81 N.J. 451 (1979). A five-member majority of the Board so recommends.

Three members would have imposed a six-month suspension, believing that (1) the evidence did not clearly and convincingly establish that respondent knew that he was invading client funds in the McCracken matter because of his sloppy recordkeeping practices; (2) that a nine-month delay in replenishing the funds in the Four Seasons matter was not unreasonable in light of some evidence that respondent was awaiting the completion of his accountant's reconciliation to determine the amount of the missing trust funds and (3) that respondent's conduct in Hillcrest did not reflect the state of mind associated with a knowing misappropriation as, at the time that he issued the $7,500 check, he intended to obtain an equivalent check from his father before his trust account check was presented for payment, but forgot to follow through on his intention. These members also accorded great deference to and placed considerable weight on the Special Master's conclusion that

the proofs of knowing misappropriation were not clear and convincing.

One member did not participate.

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

Dated: 9/27/1994

RAYMOND R. TROMBADORE, ESQ.
Chair
Disciplinary Review Board