SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-434

IN THE MATTER OF :
F. WILLIAM LAVIGNE, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: February 1, 1995

Decided: March 31, 1995

John J. Janasie appeared on behalf of the Office of Attorney Ethics.

S. M. Chris Franzblau 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 Joseph R. McDonough.

The formal ethics complaint charged respondent with knowing misappropriation of client funds, by failing to utilize the proceeds from two separate closings of title for the satisfaction of outstanding liens on the properties (RPC 1.15); conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)); and conflict of interest, by representing multiple parties, including himself, in real estate transactions, without the safeguards of RPC 1.7, as well as by entering into business transactions with clients without complying with the requirements of RPC 1.8.

LAVIGNE

Respondent was admitted to the New Jersey bar in 1970. He is a sole practitioner in Andover, Sussex County, New Jersey.

In the 1980s, in addition to maintaining a law practice, respondent was involved in several real estate deals and other business ventures, such as a sand and gravel company in Andover known as Good Earth, Inc.

On June 17, 1985, respondent obtained a blanket $300,000 mortgage loan from the Sussex County State Bank ("Sussex"), secured by approximately eight lots he owned in Andover. Subsequently, one of those lots, lot 6, was subdivided into two lots: lot 6.01 and lot 6.02. It is respondent's conduct in connection with those two lots that is the subject matter of these ethics proceedings.

Contiguous to the property on which respondent operated his sand and gravel quarry business was a twelve-acre farm, known as Kayhart Farm, owned by Paul Robert Dupont, Sr. and his wife, Julia Dupont. The Duponts, who lived elsewhere in Andover, allowed their two married sons and their respective families to live in a two-family house on the farm. James Dupont was then twenty-fours old and Robert Jr. was twenty-two. Eventually, Dupont Sr. intended to subdivide the farm into two lots on which his sons would build their own houses.

According to Dupont Sr., in 1988, respondent and James Dupont had a conversation about a possible "swap" of properties: respondent would acquire title to the Kayhart farm and each Dupont son would get title to a new house that was either being built or about to be built on two nearby lots owned by respondent. After

discussing the terms and conditions of the transactions, the parties decided to proceed with the "swap," which, by everyone's account, was mutually attractive.

The complex structure of the transactions was as follows: Dupont Sr. and Julia Dupont would sell the farm to respondent for $405,000. Respondent, however, would tender them only $175,000, crediting the remaining $230,000 toward the Dupont brothers' purchases. From the $175,000 proceeds of sale, approximately $52,000 would be used to pay off a mortgage loan given by Charlotte Kayhart to the Duponts when they bought the farm. After the deduction of certain minor closing costs, the approximate balance of $122,000 would be held in trust by respondent to be applied equally toward the brothers' purchases, as a gift from the elder Duponts. Throughout these transactions, respondent represented himself, the elder Duponts, as well as their sons and respective spouses. Respondent did not explain to the Duponts the circumstances of the representation, did not obtain their written consent to the representation and did not advise them to consult with independent counsel.

The closing on the Kayhart farm took place on September 30, 1988. Consistent with the parties' agreement, respondent used $52,000 to pay off the mortgage on the farm and deposited the balance of $122,000 in his trust account.

Although respondent owned the lots, the houses were to be built not by him, but by Doug Ferry, a principal in a corporation known as Cranberry Builders, Inc. ("Cranberry"). Respondent had a

longstanding friendship and professional relationship with Ferry. To compensate Ferry for the $230,000 credit that was to be given to the Dupont brothers, respondent would convey the lots to Cranberry for either reduced or no consideration, in return for which Ferry would deduct $115,000 from each purchase price.

Ferry had maintained a longtime business relationship with Roxbury Lumber, which supplied him with building materials, and with Kenvil Mortgage Company ("Kenvil"), a corporation that owned Roxbury Lumber and provided Ferry with construction financing.

II. THE JAMES/YOLANDA DUPONT TRANSACTION — LOT 6.02

Respondent, through his corporation, Good Earth, Inc., owned lot 6.02. As part of the agreement between respondent and Ferry, lot 6.02 was conveyed to Cranberry for $100,000, payable by way of a $100,000 mortgage loan given to Cranberry by Good Earth. In order to convey clear title to Cranberry, Good Earth first had to obtain a release of lot 6.02 from the lien of the aforementioned $300,000 blanket mortgage held by Sussex. To that end, Good Earth agreed to assign to Sussex the $100,000 mortgage given by Cranberry for the conveyance of lot 6.02, whereupon Sussex would release lot 6.02 as collateral for the $300,000 blanket mortgage on other Good Earth properties. Respondent did not profit monetarily from the assignment of the $100,000 mortgage to Sussex. Although it is true that by assigning the mortgage he satisfied a portion of his overall indebtedness to Sussex, he also, at the same time, forewent receiving the $100,000 owned by Cranberry on the mortgage. His

true benefit from the assignment was his ability to convey clear title to lot 6.02 and, in the long run, see to completion the overall transaction among himself and the Duponts.

After Cranberry obtained title to the lot, it arranged for a $200,000 construction loan given by Kenvil, the mortgage company that regularly gave Cranberry construction financing.

The total price to be paid by James and Yolanda Dupont was $318,900. After a $115,000 credit was applied toward that price (one-half of the total $230,000 credit given by Dupont Sr. to respondent on the Kayhart Farm transaction), the actual price to be paid by James and Yolanda was $203,900.

The net effect of the transaction, as structured, was that, at closing, Cranberry would receive from James and Yolanda Dupont only approximately $214,000 ($203,900 plus $10,000 in extras), out of which $300,000 in mortgages had to be paid off: the $100,000 mortgage on lot 6.02 that Good Earth had assigned to Sussex and the $200,000 mortgage to Kenvil. Again, the reason why there were insufficient closing funds to pay off the two mortgages was that the purchase price had been reduced to $203,900 by way of a $115,000 credit, an obligation that Cranberry inherited from respondent after it acquired lot 6.02 for a reduced price of $100,000 (presumably, lot 6.02 was worth more). As part of the compensation to Cranberry for the $115,000 credit, respondent also conveyed another lot (lot 5) to Cranberry, thus "trading value for cash," so to speak. Having received presumably at least $230,000 worth of property ($115,000 for each son), Cranberry then had the

obligation to satisfy all liens and encumbrances on lot 6.02, an obligation that obviously remained unaffected by the fact that Cranberry was to receive only $203,900 in cash at the James/Yolanda closing.

On September 30, 1988, James and Yolanda closed title on the property. As noted earlier, at settlement, respondent represented the Duponts, as buyers, and Cranberry, as seller. To make up the $203,900 purchase price, the Duponts obtained a $156,000 mortgage loan by National Community Bank of New Jersey ("National Community Bank") and also received the benefit of $62,500, or approximately one-half of the $122,000 proceeds from the Kayhart Farm closing, which respondent was holding in his trust account. As explained above, Dupont Sr. had instructed respondent to retain the $122,000 until his sons closed on their new houses, at which time the funds were to be applied equally toward each purchase.

The RESPA statement that respondent prepared reflected that the gross amount due to Cranberry by James and Yolanda was $214,000. The RESPA also showed two outstanding mortgage loans on the property: a $100,000 mortgage loan by Sussex and a $100,000 mortgage loan by Kenvil. The latter amount was falsely listed, however. As mentioned earlier, the amount of the Kenvil mortgage loan was $200,000, not $100,000. By listing only $100,000, the RESPA was meant to lead to the conclusion that the gross closing proceeds of $214,000 were sufficient to satisfy all closing obligations, including the two outstanding mortgages on the property. In reality, Cranberry was short by $100,000.

Respondent did not disclose to James and Yolanda that the amount of the Kenvil outstanding mortgage loan was actually $200,000, not $100,000. The Duponts, therefore, walked away from the closing believing that they had acquired free and clear title. In fact, that was not the case.

After the closing, respondent paid off the Sussex mortgage and then issued a check to Cranberry for $99,784.50 (Exhibit 22), ostensibly to be applied toward the $200,000 Kenvil mortgage. Cranberry then issued its own check to Kenvil for $100,000 (Exhibit 17). Parenthetically, respondent did not give formal notice of the closing to Kenvil.

As noted, the closing of title occurred on September 30, 1988. As of the date of the DEC hearing, February 15, 1994, the Kenvil mortgage on lot 6.02 remained outstanding. Respondent never informed James and Yolanda that they did not have free and clear title to their property. Similarly, respondent falsely certified — or caused James and Yolanda to certify — to the title company and to National Community Bank that there were no other liens or encumbrances on the property, except for the National Community Bank's purchase money mortgage.

The following was respondent's explanation about the RESPA:

A. The RESPA statement * * * was originally a draft that ended up being the only one ever done. What I did is I sat down with Doug Ferry and we talked about it, you know. And obviously there wasn't enough money. I mean, he was selling the house for basically $100,000 less than the mortgages we knew had to be paid off. So I asked, 'How, where are you going to come up with the money? Do you have the money?' He said, 'well, I don't have the money.' He said, 'I talked to Kenvil and they're going to allow me to move the balance of my indebtedness to

another property.' I had handled Doug Ferry's stuff. I helped him prepare his financial statement. He had problems. He needed in excess of $1,000,000 at that point in time and I think he probably only had 400 or $500,000 in mortgages on them.

* * *

Q. [Ferry] told me that he'd spoken to Kenvil. They didn't know which property was going to be transferred to, but they would release the mortgage.

Q. Did you have to pay any money to Kenvil at that time to get a release of the mortgage?

A. I had to give the $100,000 that is shown on the RESPA statement, that's why we put the $100,000 down.

Q. Was that the $100,000 that was paid to Kenvil on October 7, 1988?

A. Yes * * * *

[T2/15/1994 181-82]

According to respondent, contrary to its promise, Kenvil refused to remove the lien from lot 6.02 and to transfer it to another Cranberry property. Respondent added that, when he realized that he had not received the discharge of the mortgage from Kenvil, he asked Ferry when "this thing would be straightened out." Ferry replied, "they're working on it." The latter reference, according to respondent, was to a refinancing work-out between Kenvil and its lending institution; Kenvil was presumably awaiting the resolution of that deal. Respondent contended that he had relied on Ferry's statement, believing that Kenvil would ultimately fulfill its promise. There were no writings memorializing this alleged understanding.

On May 25, 1989, eight months after the James/Yolanda closing, Paul Robert Dupont, Jr. and Cecelia Dupont closed title on 6.01.

The Kenvil mortgage on lot 6.02 was still outstanding, of which James and Yolanda remained unaware.

III. THE ROBERT/CECELIA TRANSACTION — LOT 6.01

On April 29, 1988, Robert and Cecelia Dupont signed a contract with Cranberry to purchase a house for $224,000. The price had been reduced to $224,000 after the allocation of a $115,000 credit, as agreed. The original price of the property was, thus, $339,000.

The lot on which the house was to be built, lot 6.01, had been conveyed by respondent to Cranberry for no consideration. Respondent and Cranberry's intent was to give Cranberry value of $100,000 (together with another lot, lot 5) so that, in turn, Cranberry could give Robert and Cecelia the agreed $115,000 credit against their purchase price.

On July 26, 1988, Kenvil extended a $200,000 construction loan to Cranberry, secured by lot 6.01, which was then unencumbered (respondent had previously satisfied the Sussex mortgage on that lot).

Closing of title took place on May 25, 1989. The RESPA statement (Exhibit 30) listed a pay-off figure of $208,194.16 for the Kenvil mortgage. The gross amount due to Cranberry was $238,000; the total closing obligations amounted to $272,000, leaving a shortfall of $34,000, which Cranberry had to fund in cash at the closing.

Robert and Cecelia had obtained a mortgage loan from National Community Bank in the amount of $165,000. There is nothing in the

record indicating that they did not receive an allocation of the balance of the $122,000 held by respondent in his trust account, according to Dupont Sr.'s instructions.

Unlike the RESPA statement in the James/Yolanda transaction, the RESPA in the Robert/Cecelia deal listed the true amount of the outstanding Kenvil mortgage on the property. But despite the fact that, in this case, there should have been sufficient funds to satisfy all closing obligations if Cranberry brought $34,000 in cash, respondent did not pay off the Kenvil mortgage. That was so, respondent testified, because Kenvil had agreed to move the lien of the mortgage on lot 6.01 to another property, provided that the outstanding mortgage on lot 6.02 was paid in full. Respondent contended that, once again relying on Kenvil's representation, he then applied the proceeds from the Robert/Cecelia closing (lot 6.01) to the Kenvil mortgage on the James/Yolanda property (lot 6.02). Respondent allegedly relied on Kenvil's promise, although eight months had passed since the James/Yolanda closing and Kenvil still had not released its mortgage lien on lot 6.02.

On May 30, 1989, respondent wrote a check to Kenvil for $117,609.85 (Exhibit 35). Although the check was drawn against the Robert/Cecelia closing proceeds, it was intended to pay off the Kenvil mortgage on the James/Yolanda property. Still without James and Cecelia's authorization, respondent also issued a check for $22,239.16 to Kenvil for interest on loans given to Cranberry, $11,000 of which was for a mortgage loan on lot 5, which was unrelated to the Robert/Cecelia closing. Respondent also wrote a

check for $420 against the closing proceeds to pay off a Cranberry debt and, more egregiously, gave Cranberry a $10,000 check because

> [Kenvil] had told me they were moving the mortgage over. So, as I said, there would have been liquid cash left over if that mortgage, if the $200,000 indebtedness was transferred to Ferry's house or any Cranberry Village property. Then there would have been liquid cash left for Cranberry Builders.
> [T2/15/1994 236]

Incredibly, respondent made all of the above disbursements in spite of fact that Cranberry had not brought $34,000 in cash to the closing, as required, to satisfy all of the closing obligations. As to that, respondent testified:

> [Cranberry] wouldn't have had [to bring $34,000 to the closing]. There was more than enough. If you've got a gross obligation of $224,000 and [$200,000] that is going to go away because the mortgage is going to be moved, then the first mortgage, 117, could still be paid and still have about 50 or 60,000 left, which would have been Cranberry's, it certainly wasn't mine.
> [T2/15/1994 236]

Respondent did not apprise Robert and Cecelia Dupont that the funds entrusted to him had been utilized for purposes other than as stated on the RESPA statement.

As in the James/Yolanda closing, respondent either certified — or caused his clients to certify — to National Community Bank and to the title company that the property was unencumbered, save for the National Community Bank's purchase money mortgage.

As with James and Yolanda, as of the date of the DEC hearing,

February 2, 1994, the mortgage on the Robert/Cecelia property still had not been discharged. According to respondent, Kenvil kept "stringing me out," making demand after demand for additional collateral and for additional monies, in order to release the mortgage. Respondent went on to say that, even after he had given Cranberry a mortgage on property owned by Good Earth so that Cranberry could "increase its portfolio or financial status * * * by another $90,000", even after that mortgage was assigned to Kenvil, and even after respondent borrowed additional funds to pay off that mortgage, Kenvil still refused to release the mortgage on lot 6.01. According to respondent, he did all of the above because he had no choice; whatever Kenvil demanded, Kenvil got:

> I knew I was in hot water at this point. I had screwed up this deal pretty bad. I was doing whatever I could do to straighten the thing out. If they told me whatever they were going to tell me to do, I knew I didn't have a choice. So this is all I did. And Doug [Ferry] all along had offered to put his house up, do whatever they wanted. He didn't want to see me get into trouble. He told me it was all a done deal and it was okay. So he then offered to refinance his house and he paid the balance of the money.
>
> Q. And that was on June 6, 1990, there was a check of $104,357.30, correct?
>
> A. Yes. And still they didn't release it.
>
> Q. Still they didn't. So they were paid a sum of $430,934.46 to date?
>
> A. Yeah, that sounds about right.
>
> [T2/15/1994 191-92]

* * *

Meanwhile, the Duponts remained oblivious to these disastrous events. On December 27, 1989, seven months after his closing, Robert Dupont Jr. received a letter from Kenvil's attorney (Exhibit 45) demanding full payment of the balance of the mortgage, in the amount of $214,000 plus interest. Robert immediately called Kenvil's attorney and then respondent:

> And his answer was he shook it off, basically made it sound like it was a clerical error and that it was a misunderstanding. That he would contact us and get back to us in the days to come. He avoided us, and it just all went down hill from there.
> [T2/15/1994 98]

According to the Duponts, months went by without a word from respondent. By then, Robert Dupont Sr. was also interceding in his son's behalf. He testified that he attempted to reach respondent thirty to forty times and that he had approximately fifteen conversations with respondent on the subject. All the while, respondent kept assuring the Duponts that there had been an error that would soon be resolved. On one occasion, he explained to Dupont Sr. that he would have to "restructure the financial aspects" by either borrowing monies or by straightening the matter out with Kenvil. Respondent never disclosed to the Duponts that he had used the funds from the Robert/Cecelia closing for Cranberry's obligations unrelated to lot 6.01. In fact, Dupont Sr. testified that, when he asked respondent if there was a problem as well with James and Yolanda's property, respondent answered "no." It was only through their own subsequent investigation, aided by their tax

attorney, that the Duponts discovered that, like Robert and Cecelia, James and Yolanda did not have clear title to their house.

* * *

Respondent claimed that he was a victim of the circumstances. In his brief, respondent's counsel denied that respondent had knowingly misappropriated client funds because "[a]ny and all trust funds which came into the hands of respondent were disbursed by respondent for the purposes for which received. Not one penny was diverted or misappropriated for respondent's personal use." Respondent's brief at 6. Respondent conceded that he had been grossly negligent in failing to require a formal written commitment and agreement from both Kenvil and Cranberry. Respondent also admitted that he had impermissibly engaged in a conflict of interest situation and that he had failed to communicate with his clients.

Respondent's counsel argued that respondent should receive no more than a reprimand.

* * *

At the conclusion of the ethics hearing, the Special Master found that respondent had violated RPC 1.7, when he had represented multiple parties without disclosing or explaining the circumstances of the representation to his clients and without obtaining their express consent to the representation. The Special Master also found that respondent had failed to safeguard client funds and to deliver those funds to third persons entitled to receive them, in

violation of RPC 1.15. In addition, the Special Master found that respondent had engaged in an "extended course of deceit, dishonesty and misrepresentation," in violation of RPC 8.4(c). Lastly, the Special Master concluded that respondent had knowingly misappropriated trust funds, when he "utilized client funds in an unauthorized manner on two separate occasions."

* * *

Following a de novo review of the record, the Board is satisfied that the Special Master's findings were supported by clear and convincing evidence. Respondent participated in an ethics-violations spree, the likes of which are rarely seen. It began when respondent engaged in a serious conflict of interest situation by representing himself, Cranberry and all of the Duponts in the transactions and also when he entered into business dealings with his clients. Specifically, respondent bought Kayhart Farm from Dupont Sr. and his wife, having represented himself and the Duponts in the transaction; he then conveyed the lots to Cranberry, at which time he also represented himself and Cranberry; and he struck an agreement with the Dupont children for the "swap" of the properties, at which time he also represented himself and the Duponts. Throughout this representation of multiple parties with adverse interests, respondent did not disclose to them the circumstances of the representation, did not obtain their written consent to the representation and did not advise them to consult with independent counsel. His actions in this regard violated RPC

1.7 and RPC 1.8.

More seriously, however, respondent knowingly misused trust funds in both transactions involving the Dupont children.

In the James/Yolanda deal, the funds brought to closing were insufficient to pay off the existing mortgages on the property. Respondent knew, in advance of the closing, that that would be the case. He then altered the amount of the Kenvil mortgage on the RESPA statement so as to mislead the Duponts, National Community Bank and the title company that the Kenvil mortgage had been paid off with the proceeds from closing. Then, for a period of more than one year, he misled James and Yolanda that they had free and clear title to their property. In reality, the Kenvil mortgage was still outstanding.

Respondent's explanation is that he mistakenly relied on Kenvil's oral representation to Cranberry that, if Cranberry applied $100,000 from the closing proceeds toward the mortgage, Kenvil would release the lien on that property and would transfer it to other Cranberry properties. He was, he claimed, a helpless prey victimized by the circumstances. He had placed blind faith on Kenvil's reputation for its honorable dealings with Cranberry over the years; later, when Kenvil reneged on its promise, he had to accede to every unreasonable demand made by Kenvil, being reassured at each stage that the mortgage would be transferred to another property.

The Board rejects this reliance argument. Respondent had no longstanding relationship with Kenvil or, for that matter, no

relationship with it at all. This is not a case of misplaced trust, although that too would not have saved respondent. The inevitable conclusion is that respondent was not a trusting soul, but a willing participant, from the outset, in a deliberate enterprise to advance his own interests and those of Cranberry, with no regard whatsoever for the interests of the Duponts, who had reposed trust and confidence in his legal representation and in their relationship as neighbors. Throughout these transactions, respondent displayed outrageous indifference for the Duponts' welfare, having caused them great distress and enormous economic injury. No amount of reparation may ever be sufficient to redress the harm visited on them.

As to the nature of respondent's acts of misconduct, it was respondent's argument that he did not knowingly misappropriate client funds because not a single penny of the closing funds ended in his pocket. Knowing misappropriation, however, is not limited to theft of clients funds for the attorney's own benefit. The misuse of trust funds for the benefit of others also constitutes knowing misappropriation. In re Noonan, 102 N.J. 157, 160 (1986). Here, respondent did not steal the Duponts' funds for himself, or for Kenvil or for Cranberry. However, a knowing misappropriation occurred because James and Yolanda entrusted respondent with sufficient funds, either in cash or value, to satisfy all closing obligations and respondent failed to insure that the proceeds generated from the closing were enough to pay those obligations. Indeed, Dupont Sr. gave respondent a $230,000 credit which, in

turn, respondent had to pass on to the Dupont children. Respondent then transferred this obligation to Cranberry by giving Cranberry value (the lots) so that Cranberry, in exchange, could give a $230,000 purchase credit to the Dupont brothers. But, as to the Dupont children, it was respondent's responsibility, not Cranberry's, to carry out his agreement with the Duponts for the $230,000 credit and to ensure that all closing obligations were satisfied. Respondent breached his duty to James and Yolanda when he allowed Cranberry to keep the value (the lots) given in exchange for the $230,000 credit without converting that value to equivalent cash to satisfy the closing obligations. Aware that Cranberry was in financial straits, respondent then placed Cranberry's and his own interests ahead of the Duponts' and inserted a lower figure for the Kenvil mortgage on the RESPA statement to give the impression that the funds brought to closing matched or exceeded the closing obligations. In short, the knowing misappropriation occurred when, having been entrusted by James and Yolanda with sufficient cash or value for the closing, respondent allowed Cranberry to keep the value and not advance corresponding cash to make up the shortfall at closing.

The Board does not hesitate to add that, even if this conduct were found not to be, strictly speaking, knowing misappropriation, respondent's deceitful conduct was so egregious that he should suffer the same consequences attached to conduct involving knowing misappropriation.

In the Robert/Cecelia transaction, too, respondent was guilty

of knowing misappropriation. There, respondent made unauthorized use of the funds entrusted to him by applying them toward the Kenvil mortgage on the James/Yolanda property (lot 6.02) and, even more egregiously, to other Cranberry obligations that were unrelated to the transaction. A clearer case of knowing misuse of trust funds may not be envisioned.

All in all, respondent displayed abominable conduct. His actions were tainted by dishonesty and deceit and motivated by self-interest. He knowingly misused trust funds, he impermissibly represented clients and himself despite conflicting interests, he lied at the closings and after the closings, leaving behind him a trail of immeasurable emotional and financial harm to the Duponts. Indeed, as of the date of the DEC hearing, February 15, 1994, almost five years after the first closing of title (James/Yolanda), the Kenvil mortgages on the Duponts' houses still had not been discharged.

For his knowing misuse of trust funds alone respondent must be disbarred, pursuant to the rules enunciated in In re Hollendoner, 102 N.J. 21 (1985), and In re Wilson, 81 N.J. 451 (1979). The Board unanimously so recommends.

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

Dated: 3/31/95 By:
Raymond R. Trombadore
Chair
Disciplinary Review Board