XIV-90-46E

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-002

IN THE MATTER OF :
DENISE D. ASHLEY, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: March 15, 1995

Decided: May 11, 1995

Nitza I. Blazini appeared on behalf of the Office of Attorney Ethics.

Raymond L. Hamlin 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 Estella S. Gold. The formal complaint charged respondent with knowing misappropriation of client funds, in violation of RPC 1.15 and RPC 8.4(c).

Respondent was admitted to the New Jersey bar in 1984. By Consent Order dated January 12, 1989, respondent was transferred to disability inactive status. No medical records were submitted in support of that transfer. Thereafter, by Order dated January 8, 1991, respondent was suspended for a period of two years for a variety of unethical conduct, including neglect of client matters, misrepresentation, refusal to return client files and retainers,

forgery of clients' signatures to bankruptcy petitions and failure to cooperate with an ethics investigation. Respondent was returned to disability inactive status at the conclusion of the suspension, where she remains to date.

In or about July 1986, respondent was retained by William and Bertha Eleby ("grievants") to represent them in a bankruptcy action. On July 16, 1986, respondent filed an initial Chapter 13 Petition in behalf of grievants. Thereafter, between October 1, 1986 and March 15, 1988, grievants forwarded periodic payments to respondent to satisfy the outstanding mortgage arrearages on their home as well as trustee fees. While Mrs. Eleby testified that she and her husband gave respondent over $13,000 for those purposes, she was able to substantiate only $8,883.50 by way of receipts. Exhibit C-2. Respondent did not use any of those funds to reduce the mortgage arrearages or to pay trustee fees, in spite of the mortgage company's frequent requests for payment.

On February 24, 1987, the bankruptcy petition was dismissed for failure to make the required payments. Thereafter, on June 4, 1987, respondent refiled the first page of the petition, but still did not make the necessary payments. Grievants, therefore, retained other counsel to complete the action. Grievants' debts were, eventually, discharged in bankruptcy. On March 22, 1991, grievants' new attorney also filed a claim with the then Client Security Fund ("CSF"). The CSF awarded grievants the amount of $8,883.50 upon a finding of dishonest conduct on respondent's part. The CSF referred the matter to the OAE for investigation.

Nicholas Hall, the OAE investigative auditor assigned to the matter, testified that, by reviewing subpoenaed bank records, he was able to trace approximately $6,100 of Eleby funds into respondent's trust account between October 1986 and February 1988. A portion of those funds ($3,609.25) represents Eleby money for which receipts were obtained. Hall was unable to trace into respondent's trust account the remaining $5,274.25 for which grievants had receipts. Apparently, some of those funds represented cash payments. Exhibit C-2. The record does not disclose the disposition of those remaining funds. There is no evidence to suggest, however, that respondent maintained another trust account in which these funds might have been deposited. In addition, respondent's business account was not opened until February 24, 1989 — over one year after the last verified payment to respondent. Those business account records were not produced at the DEC hearing. 1T51-54.

The other portion of those Eleby funds that Hall was able to trace to respondent's trust account ($2,572.50) consisted of checks for which there were no receipts, payable to Bertha Eleby and endorsed over to respondent. It is not clear whether those checks were intended to satisfy the mortgage arrearages and trustee fees or whether they were intended as payment to respondent for her fee. See 1T84,85.[1] It is clear, however, that, as of March 1988, respondent should have been holding at least $8,883.50 for grievants' benefit. Nevertheless, Hall testified, respondent was

[1] "1T" refers to the DEC hearing transcript of February 3, 1994.

consistently out-of-trust for the Eleby funds in varying amounts, between May 1987 and April 1989, when the account balance fell to zero. Exhibit C-5 and 1T32. In addition, during the month of May 1987, respondent disbursed four trust account checks to herself, totalling $8,700, causing an alleged shortage in the account with respect to the Elebys. See 1T43 and Exhibits C-5 and C-7. It should be noted, however, that Hall could not identify the purpose of those checks because there was no notation on any of them identifying any client matter or any source (e.g. fees, transfers to other accounts, etc.). 1T55.

Hall also testified that, on February 19, 1988, at a time when respondent was already substantially out-of-trust for the Eleby funds, respondent disbursed a trust account check to herself in the amount of $2,000. A mere seven days earlier, on February 12, 1988, respondent's trust account had a balance of only $419.21. Therefore, Hall testified, respondent deposited approximately $2,500 of Eleby funds into her trust account on February 12, 1988. Hall contended that respondent's disbursement of the check to herself increased the shortage of Eleby funds by $2,000. 1T43-45 and Exhibit C-13. That contention, of course, assumes that those deposited Eleby funds were intended to be applied to mortgage arrearages, rather than to respondent's fees.

Respondent testified before the Special Master. She contended that she was able to recall very little, if anything, regarding this matter. While respondent did not admit the allegations of the complaint, she stated that she could not dispute them because she

had great difficulty recalling many things, particularly around the time of the Eleby transactions. Respondent testified that she was unable to produce any records relating to the Eleby matter because a fire in her home had destroyed all of her records.

Respondent maintained that, during the period in question, she suffered from depression, which prevented her from distinguishing right from wrong. To support her position, respondent offered the testimony of Dr. Robert Latimer, M.D., an expert in the field of psychiatry and neurology. Respondent was examined by Dr. Latimer at the request of her attorney. She met with him on one occasion, March 1, 1994, for approximately two hours. Dr. Latimer opined that, during the years that respondent practiced law, "1984 through 1987 or thereabouts she was suffering from a disease of the mind as a result of which she could not understand the quality of her actions and she did not understand the differences between right and wrong in regards to those actions." 2T12.[2] Specifically, Dr. Latimer testified that respondent suffered from a major depression, single episode, with psychotic features, which was manifested by a depressed mood, diminished interest in pleasurable activity, sleep disorders, lack of energy, diminished ability to concentrate, and inability to function socially, interpersonally or professionally. Exhibit R-1 at 3. In Dr. Latimer's opinion, during the period of time in question, respondent did not have "the mental capacity to carry out the requirements of the legal practice." 2T42. According to Dr. Latimer, this inability to function properly as an

[2] "2T" refers to the DEC hearing transcript of November 3, 1994.

attorney could have resulted in respondent's use of client monies because respondent did not have the capacity to think and lacked insight. So severe was respondent's illness, Dr. Latimer testified, that, had he seen respondent during her illness, he would have committed her and treated her with psychotic medication and powerful antidepressants. 2T40.

Dr. Latimer based his opinion, in part, on interviews he conducted of respondent's mother and brother. They apparently related to him that, on one occasion, on an unspecified date, they became worried about respondent, who had not been answering her telephone. When they went to respondent's home, she did not open the door. Becoming increasingly worried, her brother climbed the balcony to respondent's apartment. He found that "the house was a mess, she [respondent] was in bed, wearing a sweatsuit, crying and evasive . . . she was staring into space . . . and appeared very despondent." Exhibit R-1 at 1. According to respondent's family, respondent had been suffering a great deal before that particular incident. Apparently, respondent had been taking care of her ill father until 1987, when he died. She had been very close to him and her family agreed that his long illness and death created a great deal of "strain" for her. Id. at 2. In addition, during the time that her father was ill, respondent took on the responsibility of caring for his seven year-old son, her brother. Respondent also reported to Dr. Latimer that she suffered from spousal abuse during this same time and that her life seemed to "unravel quickly" in late 1987, after her father died. 2T23.

Dr. Latimer was unable to identify the date or even the year of the onset of respondent's illness. He nevertheless maintained that she suffered from it at the time of the alleged misappropriations. Respondent's illness, in his opinion, was "slow, progressive and surreptitious", snowballing and culminating in her illegal acts and her inability to function properly as an attorney. 2T47-50. Dr. Latimer described respondent's various failings as typical of a person who suffers from a major depressive psychosis. 2T49.

When asked why such an ill person would not promptly seek psychiatric help, Dr. Latimer testified:

> Well, sometimes you can't see the flies in your eyes because you have flies in your eyes. The insight of a person into their condition in psychiatry is particularly grievous. It is bad enough that sometimes we have a cough and we don't want to be x-rayed, we don't want the doctor to tell us we have a malignancy. With psychiatry you don't realize you're covering, in psychiatry you don't even realize that you are going in a nose dive because insight is part of judgment and if the judgment is impaired you automatically go into denial because you don't want to think of yourself as crazy, we abhor the thought of being mentally ill and we try to hide it from ourselves.
>
> The basis of the human being is the mind, the mind is the human being, in essence, and the dissolution of the mind is just about the worst thing short of dying that can happen to a person. We try by every possible means to deny that we have something wrong, that we have something crazy going on in our mind and as a result a psychotic person who is depressed who is doing crazy things and who is not taking care of her life goes into denial as defense and this denial insulates her from suffering and seeing the tragedy in her life.
> [2T44-45]

Finally, Dr. Latimer testified that respondent currently suffers from only a mild depression. He did not believe she would again experience her more serious illness for various medical reasons. In addition, he believed that, in the future, respondent would be more "careful" and "aware," should she see herself becoming depressed. 2T112.

The OAE offered no psychiatric expert to rebut Dr. Latimer's testimony, but, rather, relied on cross-examination. On cross-examination, Dr. Latimer admitted that he did not know whether environmental factors alone, such as the death of one's parent and/or spousal abuse, could cause a person to become so "insane" that he or she would not know the difference between right and wrong. Yet, he did not subject respondent to any tests to rule out genetic or chemical reasons for her illness. He testified that any such tests would have been "unnecessary" and "probably" would not have changed his opinion. This was so in spite of the fact that his somewhat brief examination of respondent occurred some seven years after the alleged misconduct. 2T99-104.

In addition, the OAE produced two lay witnesses, both of whom shared office space and worked closely with respondent during the time in question. Philip Wolf, Esq., testified that, while respondent told him in June 1988 that she was having some problems and would be taking a leave from the practice, he never observed any bizarre or unusual behavior on her part at any time during their association. Wolf's secretary, Catherine Worthington, testified similarly.

During summations, the OAE argued that respondent's actions during the period in question were inconsistent with those of a person suffering from an illness such as that described by Dr. Latimer. The OAE contended, for example, that, when respondent deposited approximately $2,500 of Eleby funds into her trust account in February 1988, she did so in order to write a $2,000 check to herself. In other words, had respondent truly been suffering from the illness described by Dr. Latimer, she could not have engaged in the thought process of first depositing the Eleby funds to support the later withdrawal and then waiting seven days for the funds to clear. Instead, she would have simply written the check against insufficient funds. In addition, when respondent answered the mortgage company's inquiries on December 8, 1986, she acknowledged that she was holding mortgage funds that were owing and knew that she was holding client funds, as opposed to her own. Exhibit C-19. Finally, the OAE contended that even Dr. Latimer had failed to establish that respondent's illness coincided with the period of time during which the misappropriations occurred.

* * *

The Special Master found that, on four occasions during 1986 through 1987, respondent withdrew funds from her trust account against the Eleby funds. The Special Master found that these funds were intended by the Elebys to be used for the payment of mortgage arrearages and trustee fees. Because the Special Master considered

no dispute to exist on the issue of respondent's misappropriation of client funds, she confined the bulk of her decision to the issue of respondent's state of mind during the relevant period of time. The Special Master found respondent's evidence to fall "far short of showing that at the time of the misappropriations . . . she was unable to comprehend the nature of her acts or lacked the capacity to form the requisite intent." Report of the Special Master at 5. Although the Special Master accepted Dr. Latimer's testimony to explain respondent's "inability to act in a responsive manner to the requirements of Court and Client (such as her failure to appear before a tribunal in a timely fashion or take action)," she found that the doctor's testimony failed to explain the "multiple affirmative acts of misappropriation which required the writing of checks, the making of deposits to clients account [sic] and the personal use of those funds." Id. In addition, because Dr. Latimer admitted that respondent's illness was progressive and because he was unable to "pinpoint" the time period of the most serious manifestation of the illness (when respondent's family members found her incapacited), the Special Master found that respondent failed to meet her burden of proof under the McNaughten test of insanity. The Special Master, therefore, found respondent guilty of knowing misappropriation and recommended her disbarment. Finally, the Special Master granted respondent's motion to seal that portion of the record dealing with the psychiatric testimony only as to third parties. The exact nature and scope of that motion is not clear from the record. Respondent should, therefore,

renew her motion before the Court, should she be so inclined.

* * *

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. At minimum, respondent knowingly misappropriated $3,609.25 in identified Eleby funds — specifically, those that found their way into respondent's trust account. Moreover, respondent has failed to account for the remainder of those identified Eleby funds that were not deposited into the trust account ($5,274.25). It is clear that they were not deposited and kept inviolate in respondent's business account as that account did not come into existence until February 24, 1989 — almost one year after respondent's receipt of the last verified payment. Furthermore, neither respondent nor anyone in her behalf came forward to claim either that these funds were not intended for arreages or that they were kept inviolate in some other undisclosed, albeit impermissible, location. This is compounded by respondent's inability to deny any of the allegations of the formal complaint. The Board, thus, must conclude that respondent misappropriated those funds as well.

The more pressing question, however, is whether respondent possessed the requisite knowledge at the time of her misappropriations to characterize her misconduct as purposeful or knowing. The Court has defined knowing misappropriation as "any

unauthorized use by the lawyer of client's funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." In re Wilson, 81 N.J. 451, 455 (1979). The attorney's state of mind is irrelevant. "It is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment." In re Noonan, 102 N.J. 157. However, in In re Jacob, 95 N.J. 132, 137 (1984), the Court recognized that there may be circumstances in which an attorney's loss of competency, comprehension or will may be of such magnitude that it will excuse or mitigate conduct that was otherwise knowing and purposeful. After a prima facie showing of knowing misappropriation, however, the burden shifts to the attorney to show that he or she is entitled to consideration for a sanction less than disbarment. See, e.g., In re Romano, 104 N.J. 306, 311 (1986) and In re Hein, 104 N.J. 297, 303 (1986).

Like the Special Master, the Board has determined that respondent has failed to establish, even by a preponderance of the evidence, that, at the time of her misappropriations, she either did not comprehend that she was misappropriating client funds or that she did not appreciate the wrongfulness of her conduct. It is true that Dr. Latimer labelled respondent as "psychotic" during the period in question. Yet, never once did he find that she suffered from delusions or hallucinations, which he admitted to be present in over 50% of all psychoses. When Dr. Latimer referred to "psychotic features" of respondent's depression, he must have been

alluding to the one occasion when respondent's family found her in a despondent state. Even if we were to accept the proposition that respondent was out-of-touch with reality on that occasion, Dr. Latimer was unable to establish the date of that occurrence, even by year. This would be especially relevant in light of his testimony that respondent's illness was a slow and progressive one. Presumably, the incident in question would fall on the most severe end of a continuum. It would seem critical to correlate the timing of that incident with the timing of the misappropriations. Dr. Latimer was unable to do so.

Furthermore, respondent herself reported to Dr. Latimer that, by late 1987, after her father had died, her life "unraveled very quickly." Respondent herself, therefore, believed her illness to be at its worst following her father's death. Yet, according to the OAE records, respondent's misappropriations began in May 1987 — many months prior to her fathers death. It cannot be said, therefore, that her depression, if it truly existed at the time of her misappropriations, clouded her judgment to such a degree that it overcame her will or otherwise caused her to misappropriate her client's funds without realizing that it was wrong.

Finally, respondent's own actions during the periods of the misappropriations are inconsistent with a claim of loss of competency, comprehension or will. It is clear that, at least as of December 8, 1986, when respondent wrote to the mortgage company representative acknowledging that she was holding the mortgage arrearage payments in her trust account, she was well aware that

she was holding client funds and not her own. In addition, there is merit in the OAE's argument that a certain thought process was required of respondent when, in February 1988, she deposited $2500 of Eleby funds into her trust account in order to draw a check to herself seven days later, after the deposit cleared.

A five-member majority of the Board concludes that respondent's actions amounted to knowing misappropriation of client funds, for which she must be disbarred. One member dissented. That member believed that respondent had proved a valid psychiatric defense by a preponderance of the evidence, particularly in the absence of any psychiatric proofs to the contrary.

The Board further directs that respondent reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 5/11/95

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