

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 96-198

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IN THE MATTER OF  
WAYLAND H. GOLDSTON,  
AN ATTORNEY AT LAW

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Decision

Argued: September 18, 1996

Decided: December 9, 1996

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear, despite notice by publication in the New Jersey Law Journal and The North Jersey Herald and News.

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 the District XI Ethics Committee (DEC). The complaint charged respondent with knowing misappropriation of client funds, in violation of RPC 1.15 and RPC 8.4(c), and failure to cooperate with the DEC, in violation of RPC 8.1(b) and R.1:20-3(f) [now R.1:20-3(g)(3)].

Respondent neither filed an answer to the complaint nor appeared at the hearings below.<sup>1</sup>

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<sup>1</sup> The panel chair sent notice of the first hearing to respondent's house and office addresses by regular mail. Both letters were returned as undeliverable. Accordingly, notice of both days of hearing was made by publication in the New Jersey Law Journal and the Star Ledger.

Respondent was admitted to the New Jersey bar in 1982. He maintained an office for the practice of law in East Orange, Essex County.

Respondent was temporarily suspended by Order dated March 13, 1995, after he failed to reply to the allegations of the within matter and failed to appear for a demand audit of his attorney books and records. He was ordered to show cause on March 28, 1995 why his suspension should not be continued. When respondent failed to appear on the return date, the Court issued an Order on March 28, 1995 continuing his temporary suspension. Respondent remains under suspension.

Respondent was publicly reprimanded by Order dated May 23, 1995 for lack of diligence, failure to safeguard client funds and recordkeeping deficiencies. In re Goldston, 140 N.J. 272 (1995).

The facts in this matter are as follows:<sup>2</sup>

In 1991 or 1992, Loline Lapaix retained respondent in connection with a personal injury matter arising from a November 1991 automobile accident. That matter was ultimately settled for \$7,500. A release dated June 1, 1992 shows Lapaix' signature. The settlement check for \$7,500 from the insurance company, bearing Lapaix' and respondent's endorsements, was deposited in respondent's trust account on June 10, 1992. A \$5,000 check dated and cashed on June 12, 1992, drawn on respondent's trust account

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<sup>2</sup> The client's version of the facts in her testimony differs from the version in the grievance and in the formal complaint. The discrepancy apparently resulted from an error on the part of her substituted counsel. The recitation of facts set forth herein is based on the client's testimony.

and payable to Lapaix, bears her endorsement and respondent's. (\$5,000 represents the amount of the settlement minus respondent's fee). Although Lapaix did not receive the \$5,000, that check was cashed, allegedly by someone else.

Lapaix testified that she never authorized respondent to settle the case and never signed the release, the settlement draft or respondent's trust account check. She contended that her signature on each document was a forgery.

According to Lapaix, she went to respondent's office to ascertain the status of her case after she had not heard from respondent for approximately one year. At that time, Lapaix spoke with respondent's secretary, Shirley Swinger, who told Lapaix that, based on "citizenship issues" (Lapaix is a native of Haiti), her claim had been denied. Lapaix then contacted another attorney, who told her that her case had been settled and advised her to discuss the matter with respondent.

In or about October 1993, Lapaix met with respondent, who expressed surprise when he heard that she had not received her settlement money. Respondent gave her a copy of the \$5,000 check. Respondent told Lapaix that his secretary had informed him that Lapaix wanted him to cash the check for Lapaix, who, for some unexplained reason, was unable to do it. Respondent recognized his signature on the check. According to Lapaix, respondent asked her at their October 1993 meeting if the signature on the check was hers. When she replied that it was not, respondent expressed his fear that his secretary might have "messed [him] up." Lapaix did

not ask respondent what he had done with the money and respondent did not volunteer that information. Respondent advised Lapaix to contact Swinger because, in his view, she had Lapaix' money. However, Lapaix was unable to locate Swinger.

In or about April 1994, Lapaix consulted with Scott Arons, Esq., who spoke with respondent on several occasions. By letter dated July 15, 1994, Arons confirmed an April 28, 1994 conversation with respondent. Arons' letter to respondent stated that, during their conversation, respondent had advised him that he had "entrusted Sheila Wagner [a possible alias for Shirley Swinger] to handle claims and that she was executing releases, obtaining settlement checks which [respondent] rendered and then converting the money to her own use." Exhibit C-21. According to Arons' testimony, respondent admitted to him that he had endorsed the Lapaix settlement check and deposited it in his trust account. Respondent also admitted to Arons that he had not seen Lapaix sign the release, although he had notarized her signature. Respondent did not admit to Arons that he had obtained any of Lapaix' money. Respondent also stated to Arons that he had contacted the Essex County Prosecutor's office and had filed several complaints against Swinger, who no longer worked for him.<sup>3</sup> Arons also testified that, on more than one occasion, respondent assured him that he would turn over \$5,000 to Lapaix.

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<sup>3</sup> Although Arons' letter refers to respondent's secretary as Wagner, when testifying in this regard, Arons referred to Shirley (Swinger).

Arons' July 15, 1994 letter to respondent was sent via certified and regular mail. Only the certified mail was returned as unclaimed. Three subsequent letters from Arons to respondent, sent via regular mail, were not returned as undeliverable.

When respondent did not forward the \$5,000 to Lapaix, Arons filed a claim with the New Jersey Lawyers' Fund for Client Protection. That claim was paid on April 25, 1996.

On September 6, 1995, while this matter was pending, the DEC presenter spoke with respondent's former secretary, Shirley Swinger, and told her about the accusations raised by respondent. She denied any wrongdoing.

Swinger was subpoenaed to appear before the DEC, but was unavailable on the scheduled hearing date. OAE Investigative Auditor G. Nicholas Hall, however, interviewed her on November 14, 1995, before the hearing. Swinger, who had worked for respondent for approximately six months, told Hall that respondent allowed no one to take physical control of his checkbooks and checks. Swinger also discussed bank procedures for cashing a check drawn on respondent's trust account. She explained that, every time a trust account check was presented, the bank would telephone respondent directly to verify that the check was authorized to be negotiated.

At the DEC hearing, Hall explained his understanding of the bank's procedures:

Q. Mr. Hall, is it your understanding, based on what you were told regarding procedures, set up by [respondent] with the bank that Shirley, Sheila, could not have taken the check and issued, the LaPaix [sic] check down to the bank and cashed it, even with

[respondent's] signature on it, because she wouldn't have had adequate ID?

A. If it was endorsed by [respondent], also the only one who could probably cash it would have been [respondent] or the client. She didn't have either identification. The bank would have called to the office.

Q. In other words, based upon your understanding of the procedures that were set up, Shirley could not have cashed it because they still, even with [respondent's] signature, would have asked for the ID.

A. That's correct, and called his office. That's the main thing. Either way he would have been aware that this check was being cashed.

[T11/21/95 61-62]

Hall spoke with a bank employee, Tania Matthews, who confirmed that the bank would call for respondent's authorization to cash a trust account check.

According to Hall, the presenter informed him that the prosecutor's office was conducting an investigation of respondent's possible involvement with the theft of client funds.

After the first day of hearings, the presenter wanted to call Swinger as a witness to clear up the confusion about the identities of Swinger and Sheila Wagner. At the second DEC hearing, Hall testified that he had been informed by the Essex County Prosecutor's office that it had interviewed Swinger, who was now a possible suspect. Swinger had retained an attorney. The current status of the investigation is unknown. (The prosecutor was unable to locate a person named Sheila Wagner). Apparently, the OAE did not subpoena Swinger to appear at the second DEC hearing.

Marcelle Nicolas, an employee of the bank where the transaction in question took place, also testified at the DEC

hearing.<sup>4</sup> Nicolas thought that respondent and Swinger were partners, although she did not know if Swinger was an attorney. Nicolas testified as follows about bank procedures on cashing checks drawn on attorney accounts:

Q. The fact that there are two endorsements on that check does that tell you anything about how that check was presented?

A. Loline La Paix [sic] came in with [respondent]. They came together to cash the check.

Q. You know Loline La Paix personally?

A. I don't know her. Like I said, if he don't [sic] have identification they just come with the lawyers.

Q. But you are certain, based on your procedures, that [respondent] would have had to have been in the branch that day when the check was cashed?

A. Yes.

Q. What about that check tells you that besides two endorsements?

A. It have [sic] to have approval. It was approved by Linda Persichino. She's no longer [sic] and me.

\* \* \*

Q. Did you do anything yourself in the approval process for that particular check?

A. Yes.

Q. What was that? What did you do?

A. I identified [respondent].

\* \* \*

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<sup>4</sup> The \$5,000 check in question bears a notation "CSHCHK" with the date, amount and time, followed by "OK MARCELLE."

Q. Is it fair to say then, looking at that check with Linda's approval, the only way is [respondent] himself had come to the branch?

A. Yes.

\* \* \*

Q. Do you have any recollection at all of when check C-1 was presented to the bank to be cashed?

A. No. I'm not a member of that [sic] because they have many clients, and we have many lawyers that we are dealing with, and they go through the same process.

\* \* \*

Q. When the attorney comes in with the person that they indicate is the client to get a check cashed, is it correct that you don't then seek any identification from the clients[?]

A. No, we don't because the lawyer is here with them, with that person because they don't have any identification that is the reason why they come with the clients.

Q. If [respondent] had come in with regard to check C-1 and had only Ms. Swinger with him, would that check have been approved to be cashed?

A. No, because it is made payable to Loline La Paix. We know Ms. Swinger so therefore she's not La Paix.

Q. So if Ms. Swinger was there only with La Paix then the check wouldn't have been paid?

A. No.

Q. Could [respondent] have brought the check alone?

A. No.

Q. If Ms. Swinger brought this check with Mrs. La Paix indicating something to the effect that [respondent] was unavailable, would that check have been cashed?

A. Yes.



Q. Do you recall that happening in the past where Ms. Swinger came down with checks with [respondent's] endorsement and the client and having the checks cashed?

A. I don't recall that, but if she comes with one of [respondent's] clients to cash a check, she personally will ID that person because they work in the same office together. They know their clients.

Q. So [respondent's] signature would be on the check, Ms. Swinger would be there and that check would be cashed?

A. Yes, as ID.

\* \* \*

Q. If [respondent] sent a client to the bank with a check with his endorsement, would the bank ever call [respondent] on the phone and ask if it was okay to cash the check?

A. Yes, we do. We call the lawyer.

Q. And say I have a client here presenting a check?

A. Yes, check number, blah-blah. She's here and it's okay.

Q. Could Ms. Swinger give that authorization?

A. No.

Q. It would have to be [respondent]?

A. Yes.

\* \* \*

Q. . . . When a person would come in, the client, with the attorney, would that person be asked for any identification? You said the attorney vouches for the person.

A. That's the only time the attorney will come with the clients because they don't have identification.

Q. You wouldn't ask anyway for something.

A. No. No.

\* \* \*

Q. I thought I had asked you, Mrs. Nichols [sic], if Shirley Swinger had appeared at the bank with this check and someone identified as Loline La Paix would this check have been cashed, and you said yes, we will call [respondent] to make sure that the check was signed by him.

There's no question in your mind about that?

A. No, we would call him.

Q. [Respondent] would have had to do what?

A. He would say yes he did [sic] the check to La Paix, and Shirley is there because she didn't have an [sic] identification.

[T3/19/96 16-30]

Nicolas added that she knew respondent and was familiar with his voice.

\* \* \*

By letter dated January 18, 1995, sent via "fax" and certified mail, the OAE asked that respondent reply to Lapaix' grievance.<sup>5</sup> The certified letter was received by respondent's office, although the signature on the green card is illegible. The "fax" was also received. Respondent did not reply. On February 6, 1995, the presenter called respondent to discuss his failure to reply, leaving a message on his answering machine. Respondent did not return his call. By letter dated February 9, 1995, again sent via "fax" and certified mail, the OAE scheduled a demand audit of respondent's attorney books and records for February 27, 1995. At least the "fax" copy was received by respondent's office. (The

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<sup>5</sup> Two other grievances filed against respondent were discussed during the DEC hearing. References to those matters are made in the exhibits. In fact, the OAE's January 18, 1995 letter to respondent asking that he reply to the Lapaix grievance also included one of those two other matters. These two matters, however, were not the subject of a formal complaint. Despite their inclusion in the record, the Board has not considered these matters in its determination.

green card from the certified mail is not a part of the record).<sup>6</sup> Respondent did not reply to the OAE's scheduling letter. On February 24 and 27, 1995, OAE investigator Hall left messages on respondent's answering machine, confirming the scheduled audit. Respondent failed to reply to Hall's messages or to appear for the demand audit. Thereafter, on March 6, 1995, the OAE filed a motion with the Court seeking respondent's immediate temporary suspension from the practice of law.

Copies of the formal complaint in this matter, dated September 12, 1995, were sent on or about that date, via both regular and certified mail, to respondent's house and office addresses. The certified mail to respondent's office was returned to the OAE as "moved left no address." The regular mail to respondent's house came back with the notation "forwarding order expired." Exhibits C-13 and C-14. According to the OAE: "the certified mail to respondent's home and the regular mail to respondent's office were never returned by the Post Office, so [the OAE] assume[s] they were received or are in a dead letter file." See OAE's letter of August 16, 1996. As noted above, respondent neither filed an answer to the complaint nor appeared at the DEC hearing.

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<sup>6</sup> In a March 13, 1995 letter to the Clerk of the Supreme Court about service of the motion for temporary suspension, the presenter stated that "[n]one of the other mail I have sent to [respondent] since the inception of this case has been returned." Thus, it is inferred that respondent received the certified copy of the OAE's February 9, 1995 letter.

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The DEC determined that respondent knowingly misappropriated the Lapaix funds. In its report, the DEC pointed to respondent's conversations with Arons and Lapaix, during which respondent acknowledged that the case had been settled for \$7,500, that he signed the release, that he received the \$7,500 check from the insurance company and deposited it into his trust account and that he issued the \$5,000 settlement check to Lapaix. The DEC also noted that while the settlement draft was deposited with the bank on June 10, 1992, the check to Lapaix was issued two days later, before the draft had cleared. In addition, the DEC noted Nicolas' testimony that she knew respondent personally and that she was one of two bank employees that had authorized payment of the \$5,000 Lapaix check. The DEC concluded that the \$5,000 check could have been cashed only if respondent was either physically present in the bank with someone identified as Lapaix, or respondent's secretary/associate, Swinger, appeared with Lapaix and respondent instructed the bank over the telephone that the check could be cashed.

The DEC also determined that respondent failed to cooperate with the disciplinary authorities. The DEC recommended that respondent be disbarred.

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

Respondent did not file an answer to the complaint. Thus, the allegations therein are deemed admitted. R.1:20-4(f)(1). The facts alleged in the complaint and those adduced at the hearing establish that respondent is guilty of knowing misappropriation. Respondent has not contested those facts. While the fact that Swinger is a possible suspect in the eyes of the Essex County Prosecutor's office could lend some credence to respondent's contentions to Lapaix and Arons that she could have appropriated the funds for herself, respondent's failure to appear for the OAE's demand audit, failure to appear before the Court in connection with the motion for his temporary suspension and abandonment of his office lend no support to his claims of innocence.

The Board is mindful of the fact that respondent has not communicated with the DEC, the OAE or the Board and, given that the ultimate sanction is at stake in this matter, has looked long and hard at the efforts made to contact him. The Board is persuaded that the notice requirements of R.1:20-7(h) have been met.

In addition, even if there is a remote possibility that respondent was unaware of the formal complaint filed against him, respondent knew, at a minimum, of the pending grievance. Thus, the burden was on him to ascertain from either the OAE or the DEC the


status of the grievance as well as to participate in and cooperate with the proceedings.

By an eight-member majority, the Board recommends that respondent be disbarred. See In re Wilson, 81 N.J. 451 (1979).

One member would continue respondent's temporary suspension and would remand this matter for a proof hearing that would include testimony by a handwriting expert to determine who signed Lapaix' name on the check.

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

Dated: 12/9/96

By:   
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Lee M. Hymerling  
Chair  
Disciplinary Review Board