SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-300

IN THE MATTER OF :

JOHN R. NEENAN, :

AN ATTORNEY-AT-LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: October 21, 1992

Decided: December 3, 1992

Thomas J. McCormick appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear.[1]

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before the Board on a recommendation for public discipline filed by a Special Master on behalf of the District XIV District Ethics Committee (DEC).

This disciplinary proceeding arose from a complaint charging respondent with ethics improprieties in three different matters as well as failure to cooperate with the ethics investigation.

[1] Respondent did not appear or waive appearance before the Board, despite proper notice of the hearing.

Respondent neither filed an answer to the formal complaint nor appeared at the DEC hearing.[2]

Respondent was admitted to the New Jersey bar in 1983. He maintained an office for the practice of law in Palisades Park, New Jersey. By Order dated October 16, 1990, the Supreme Court temporarily suspended respondent. The suspension remains in effect as of this date.

The Wilt to Burden Matter

Respondent represented Karen Burden in the purchase of a residence (condominium) in Hoboken from Vincent Wilt. Settlement occurred on August 31, 1990. At the time of closing, as evidenced by the Title Closing Statement, C-1, (Sub-Exhibit A-1), there existed a mortgage on the property in the amount of $58,989.89 in favor of Prospect Park Savings Bank. Respondent retained that amount for subsequent payment to Prospect Bank to discharge the mortgage lien on the property. T5, Exhibit C-1 (Sub-Exhibit A-4).[3] At the time of the sale, the Prospect Bank mortgage was in foreclosure, an indication of the need for absolute expediency to satisfy it. T5, C-1(Sub-Exhibit A-4).

Within two weeks of the closing, Wilt's attorney received notice from Prospect Bank that the mortgage had still not been paid off. C-1 (Sub-Exhibit A-4). Thereafter, the attorney made several

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[2] Respondent also did not appear at the pre-trial conference held in the matter or respond to the Special Master's subsequent letters soliciting his position on documents marked in evidence at the pre-trial conference.

[3] T denotes the DEC hearing transcript of June 19, 1992.

unsuccessful attempts to reach respondent by telephone. He was finally able to speak with respondent on October 5, 1990. During that conversation, respondent admitted to Wilt's attorney that he had misappropriated the Wilt funds and that the ethics committee was already investigating the matter. C-1 (Sub-Exhibit A-4). The mortgage, plus interest, was paid by Continental Title Insurance Company (hereinafter "Continental") in February 1991. T5-6, C-1 (Sub-Exhibit A-2).

At some point after the closing, respondent admitted to a Continental representative and to an attorney representing Continental that his trust account was short by $35,000-$45,000 and that the shortage, on which he was attempting to cure, was the result of a bad client check. T13-14, C-1 (Sub-Exhibit A-2). However, the OAE investigator testified that, while there was a record of a returned client check in January 1990 in the amount of $10,224.13, that check was subsequently redeposited that very same month and recredited to respondent's account in full, less a $2.00 service fee. T13-14, C-1(Sub-Exhibit A-3).

Aside from respondent's admission, a review of his trust account records for the month of September 1990 disclosed that the trust account balance fell below that amount needed to satisfy the mortgage from at least September 17, 1990 to September 26, 1990, when a deposit was made.[4] Given respondent's lack of cooperation

[4] It should be noted that the record is devoid of any evidence indicating that the Wilt proceeds were ever deposited into the trust account. Given respondent's admissions, it is clear that, regardless of where he may have deposited those funds, he subsequently converted them to his own use or other unauthorized uses.

and failure to produce documentation, the OAE investigator found it difficult to conclusively establish the use to which respondent put the Wilt money. However, the investigator testified that sixteen checks, dated prior to the closing date and totalling $11,688.00, were written from the trust account and cleared that account on September 24, 1990. T6-7. These checks were written to a title agency for various other client matters. T6. In addition, a check in the amount of $25,000.00 cleared the trust account on September 26, 1990. The investigator was unable to identify the payee on that check, since the bank's microfilm had been destroyed. T7.

The Special Master found that respondent's actions in this matter constituted knowing misappropriation of client funds, in violation of RPC 1.15 (a) and RPC 8.4 (c).

The Baek to Nunokawa Matter

Respondent represented Yung Shik and Hee Young Baek in the sale of their residence to Tadao and Sock Panne Nunokawa. On or about October 12, 1990, respondent received a down payment check from the Nunokawas in the amount of $40,500.00. C-2 (Sub-Exhibit B-1) (check photocopy). On October 15, 1990, respondent deposited that check to his attorney trust account. C-2 (Sub-Exhibit B-1) (trust account bank statement for month of October). Settlement occurred on November 15, 1990, approximately one month after the

respondent was temporarily suspended by the Court.[5] Nonetheless, respondent appeared at the closing on the Baek's behalf.

At closing, the Baeks received all the proceeds from the sale of their home, with the exception of the deposit money respondent was holding in his trust account. Respondent advised them to leave the $40,500.00 deposit in his account (instead of issuing a check to them at closing) so that they could realize interest on it for the entire month. T9. In fact, the money was not in respondent's trust account on that date. In response to a Supreme Court Order placing restraints on respondent's trust and business account (ancillary to the emergent suspension of respondent), the bank notified the OAE that, as of October 29, 1990, approximately two weeks before the closing, the trust account showed a balance of $13,865.03 and the business account showed a balance of only $29.83. Those amounts were drawn on the bank's checks to the Superior Court, C-2 (Sub-Exhibit B-4) and T8-9, as directed by the order suspending respondent. Even assuming that the deposit money had remained in the trust account on that date, respondent's trust account was non-interest bearing and, hence, could not produce the interest the Baeks thought they would receive by following respondent's advise. C-2 (Sub-Exhibit B-7) (letter from respondent's bank).

Following that closing, and beginning on December 1, 1990, the Baeks made several requests to respondent for the balance of the

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[5] Although the OAE investigator testified that an OAE attorney forwarded a copy of the Court's Order to respondent on October 18, 1990, there was no cover letter or other documentary evidence to support this assertion.

proceeds. C-2 (Sub-Exhibit B-6). Finally, on December 9, 1990, respondent issued to the Baeks a trust account check in the amount of $40,638.31. C-2 (Sub-Exhibits B-5 and B-6). Unfortunately for the Baeks, the trust account had already been closed, following respondent's temporary suspension by the Supreme Court. The check was, therefore, returned to the Baeks by the bank with a notation that the account was closed. C-2 (Sub-Exhibits B-5 and B-6). The Baeks subsequently filed a grievance with the OAE. C-2 (Sub-Exhibit B-6).

The Special Master found that, at the time that he represented the Baeks at closing, respondent was temporarily suspended from the practice of law and that his representation, therefore, constituted the unauthorized practice of law in violation of RPC 5.5(a). In addition, the Special Master found that, at the time of the closing, respondent's trust account did not contain the full amount of the remaining proceeds. Further, given the amount remaining in his trust account on the date of closing ($13,865.03), the Special Master concluded that there was no reasonable basis for respondent's belief that there were sufficient funds in his trust account when he finally issued a check to the Baeks on December 9, 1990. The Special Master concluded that, given the totality of the circumstances, respondent's conduct in this matter constituted knowing misappropriation of client funds, in violation of RPC 1.15(a) and RPC 8.4(c).

The Cerruto to Ascencio Matter[6]

Respondent represented Oscar Ascencio in the purchase of a residence from Alan and Anthony Cerruto. The closing took place on July 16, 1990. At the time of closing, there existed a mortgage against the property in the amount of $47,346.95 in favor of Mountain Ridge State Bank. Respondent withheld that amount from the closing proceeds, ostensibly to satisfy that mortgage. C-3 (Sub-Exhibit C-1). In late August 1990, the Cerrutos were notified by their bank that it had not received the mortgage payment for August. The attorney representing the Cerrutos then contacted respondent, who went through various charades to convince the sellers' attorney that he had, indeed, already forwarded the mortgage proceeds to the bank. C-3 (Sub-Exhibit C-1). After many telephone calls both to respondent and the bank, the sellers' attorney learned that, as of September 4, 1990, the mortgage still had not been satisfied. He notified the DEC and the OAE of respondent's action, by letter dated September 4, 1990. C-3 (Sub-Exhibit C-1). As a result of this grievance, a demand audit of respondent's books and records was scheduled to occur on September 11, 1990. Respondent finally paid the mortgage on September 11, 1990, the very day of the scheduled audit and fifty-eight days after the closing. T12. It was the OAE investigator's opinion that respondent might have used the Wilt/Burden funds to pay off the Cerruto mortgage due to the proximity in time between

[6] The complaint did not charge respondent with knowing misappropriation in this matter.

the date the Wilt proceeds were received (August 31, 1990) and the date the Cerruto mortgage was finally paid (September 11, 1990). T12.

The Special Master found that respondent unduly delayed payment of the outstanding mortgage in this matter and that his conduct amounted to lack of due diligence, in violation of RPC 1.3 and failure to promptly deliver funds, in violation of RPC 1.15(b).

Failure to Cooperate with the Disciplinary System

In response to the grievance filed by the Cerrutos, the OAE scheduled a demand audit of respondent's books and records for September 11, 1990. Although respondent appeared for the audit on that date, he did not bring with him all of the records requested by the OAE for review. Continuation of the audit was scheduled for September 18, 1990. After respondent failed to appear on that date, the OAE moved for respondent's emergent suspension, which was granted on October 16, 1990. C-2 in evidence (Sub-Exhibit B-2).

At the conclusion of its investigation, the OAE filed a five-count formal complaint against respondent. As previously noted, respondent did not file an answer to the formal complaint and did not appear at the pre-trial conference held by the Special Master. Similarly, respondent did not reply to any of the letters sent by the Special Master, soliciting his position on documents marked in evidence at the pre-trial conference. Finally, although he was

notified of the hearing date by both the OAE and the Special Master, respondent did not appear at the June 19, 1992 hearing.

The Special Master found that the respondent's failure to produce the items requested by OAE at the September 11, 1990 audit, as well as his failure to appear for the subsequent continuation demand audit, constituted a failure to cooperate in an ethics investigation, in violation of RPC 8.1(b).

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the Special Master's findings of unethical conduct are fully supported by the record.

The respondent engaged in a disturbing pattern of misconduct that warrants serious discipline. In the Wilt/Burden matter, although respondent received funds for a specific purpose, he failed to use those funds to satisfy that purpose. While it cannot be clearly established that respondent converted those funds specifically to his own use,[7] such proof is not essential to a finding of misappropriation. The relevant inquiry is whether the lawyer took his client's money, knowing that it was the client's money and knowing the client had not authorized the taking. In re Noonan, 102 N.J. 157, 160 (1986) (citing In re Wilson, 81 N.J. 451 (1979)). While the escrow funds did not strictly belong to

[7] As noted by the Special Master in his decision, tracing the uses of the misappropriated money was rendered impossible due to respondent's lack of cooperation, compounded by the destruction of the bank microfiche.

respondent's client, respondent did, indeed, owe a fiduciary duty to all concerned to discharge his obligations and satisfy the mortgage. He was acting as agent for all concerned. In re Hollendonner, 102 N.J. 21, 28 (1985). In addition, as made clear in Hollendonner, there is no distinction between client funds and escrow funds in the disciplinary context. The Court gave ample notice in that case that attorneys who misuse escrow funds will face the automatic disbarment rule of Wilson. Given the fact that the balance in respondent's trust account fell below that amount necessary to satisfy the mortgage in question on several occasions and given respondent's admission, it is unquestionable that respondent did not use the escrow funds for their intended purpose.

The same is true of respondent's action in the Baek matter, though, there, his actions were even more blatantly deceptive. Not only did respondent fail to hold escrow funds intact until the date of closing, but he also persuaded his clients to forego immediate payment of $40,500 until the end of the month so that they could ostensibly collect interest on their money for the entire month. Aside from the fact that, at that point in time, the trust account did not contain the full amount of funds previously entrusted to him, respondent did not even have an interest-bearing trust account. His story was nothing more than a sham. To further compound matters, after respondent finally issued a trust account check to his client (after many repeated requests), the check was

returned to Mr. Baek because the account had been long closed by order of the Supreme Court.

Respondent's cavalier attitude toward other people's money is further accentuated by his conduct in the Cerruto matter. It can be inferred that, but for the grievance of Mr. Campisano and the consequent demand audit, respondent would not have satisfied that mortgage either. The fifty-eight day delay in paying off the seller's mortgage, coupled with his deceptive explanation to both the sellers' attorney and the OAE, certainly supports a finding of lack of diligence and a failure to promptly disburse funds.

Finally, it is clear that respondent failed to cooperate with the OAE's investigation, in violation of RPC 8.1(b). An attorney has an absolute duty to cooperate in an ethics investigation. In re Grinchis, 75 N.J. 495, 496 (1978), In re Kern, 68 N.J. 325 (1975). Respondent also failed to appear at either the pretrial conference or the hearing in this matter. Such conduct evidences an absolute disrespect for the disciplinary system. The Court has held that disrespect to an ethics committee, here, a Special Master, is tantamount to disrespect to the Court itself. In re Grinchis, supra, 75 N.J. at 496.

Respondent's proprietary treatment of his clients' funds constituted knowing misappropriation, for which he must be

disbarred.[8] The Board unanimously so recommends. One member abstained. One member did not participate.

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

Date: 12/3/1992

Raymond R. Trombadore
Chair
Disciplinary Review Board

[8] Given the Board's decision in this matter, it need not reach a determination of whether respondent's representation of the Baeks represented the unauthorized practice of law.