BOOK

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-296

IN THE MATTER OF	:
MARC J. TERNER,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: January 27, 1993

Decided: March 9, 1993

William R. Wood appeared on behalf of the Office of Attorney Ethics.

Michael A. Querques 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 the District XI Ethics Committee ("DEC"). The formal complaint charged respondent with knowing misappropriation of $25,000 in client funds, by forging the signature of his client on a check representing settlement proceeds and misusing those funds for his own benefit.[1]

Respondent was admitted to the New Jersey bar in 1976. He maintained an office for the practice of law in the Township of

[1] By order dated August 8, 1990, respondent was suspended for three years, effective August 22, 1990, for misconduct in sixteen separate matters, including a pattern of neglect, failure to communicate, lack of diligence, and recordkeeping violations. The Court ordered that, prior to reinstatement, respondent produce proof that he was cocaine-free during the period of the suspension.

To date, the Client Protection Fund has paid to fourteen clients approximately $13,000 on claims filed against respondent.

Wayne, Passaic County, New Jersey.

In 1988, Francesca Campolattaro retained respondent to file a claim for physical injuries sustained in an automobile accident. Several years before, Ms. Campolattaro had been represented by respondent, when she was involved in another automobile accident in which she suffered physical injury.

In January 1990, respondent telephoned Ms. Campolattaro to inform her that the insurance carrier had made a $25,000 settlement proposal and had also offered to pay for Ms. Campolattaro's required nose surgery. Ms. Campolattaro instructed respondent to accept the settlement offer. Respondent then advised Ms. Campolattaro to undergo nose surgery forthwith, while the case was still open, to insure prompt payment by the carrier. Consistent with respondent's advice, Ms. Campolattaro scheduled the surgery for February 1990, for which she had to borrow $5,000 from her mother.

Following their January 1990 telephone conversation, Ms. Campolattaro telephoned respondent approximately twice a week to inquire about the settlement proceeds. She invariably reached respondent's secretary, who informed her that respondent would have to return her telephone call because he was in court, involved in a lengthy trial. From time to time, Ms. Campolattaro was able to reach respondent, who would suggest that she "be patient." Respondent would also explain that "these things take a long time," and would assure Ms. Campolattaro that he was "working on it." In May or June 1990, Ms. Campolattaro visited respondent's

office on a couple of occasions, at which time respondent informed her that he was "waiting for the check to come in." On a subsequent occasion, however, when Ms. Campolattaro telephoned respondent's office, she learned that respondent's telephone had been disconnected. She attempted to contact him at home, but discovered that that telephone, too, had been disconnected.

Her next course of action was to inquire of the insurance company about her settlement check. In July 1990, she was informed by the carrier that the $25,000 check had been mailed to respondent in January 1990. Able to reach respondent by telephone the next day, through the efforts of the chiropractor who had referred her to respondent, Ms. Campolattaro asked respondent about the check. Respondent replied that it was "probably lost in the mail." He counseled Ms. Campolattaro not to "worry about it. I'll call the insurance company."

In August 1990, respondent telephoned Ms. Campolattaro to inform her that he had her money. He instructed her to appear at the office of another lawyer to whom respondent had transferred his client files since his suspension in August 1990. At that lawyer's office were respondent, his father and respondent's two young children. According to Ms. Campolattaro, respondent quickly confessed to her that "I've done wrong. I've made a mistake. I took your money, and I have a problem." Respondent also acknowledged to her that he had a cocaine addiction. In fact, it was Ms. Campolattaro's understanding that respondent would be placed in a rehabilitation clinic that night or that weekend.

According to Ms. Campolattaro, after admitting that he had cashed the $25,000 settlement check, respondent assured her that he would repay her. He proposed to give her $7,000 immediately and to pay the balance, with interest, within 30 days. Respondent then signed a promissory note for $9,667, without interest, to be paid within 30 days. OAE Exhibit 10. Respondent also gave Ms. Campolattaro a $7,000 check from his trust account, dated August 9, 1990. OAE Exhibit 9. When that check bounced, respondent issued a certified check to Ms. Campolattaro's order. To date, however, Ms. Campolattaro has not received the balance of the monies, with the exception of a few hundred dollars. Ms. Campolattaro has retained an attorney to institute suit against respondent for the recovery of the monies.

At the DEC hearing, respondent recounted a different version of the events. According to respondent, upon receiving the settlement check, he informed Ms. Campolattaro that he was experiencing some personal problems and that he needed to borrow the funds. Ms. Campolattaro agreed to lend respondent the money and also consented to his endorsing the settlement check in her behalf. Respondent promised to repay her by June 1990. Sometime in July 1990, when he realized that he did not have the funds to repay Ms. Campolattaro, respondent arranged for a meeting with her. At that time, he gave her a check for $7,000 and she "agreed to wait a certain period of time" for the receipt of the balance.

When asked, at the DEC hearing, whether he had drafted a note to protect Ms. Campolattaro's interest in the transaction,

respondent replied that "[t]he note is in my mind. I made a note to protect her. We trusted each other." T6/25/1991 165, 166. He also testified that Ms. Campolattaro did not want a note because "she trusted him." T6/25/1991 164. Respondent went on to explain that he had a "very social" relationship with Ms. Campolattaro and that they were "romantically involved" at the time of the "loan." When the hearing panel asked respondent how he had intended to pay Ms. Campolattaro back, in light of his statement that he owed a million dollars in January 1990, respondent replied that he would have repaid the loan to Ms. Campolattaro before he repaid other creditors. But when the DEC inquired why he had not repaid Ms. Campolattaro, respondent answered:

> "Because she filed an ethics complaint and that was not our agreement. It was a loan, and I promised to pay her back and she signed documents that I would pay it back. So when she filed the ethics complaint, that was it." [T6/25/1991 171]

Ms. Campolattaro, in turn, vehemently denied that she had an intimate relationship with respondent. She acknowledged that they had a cordial relationship and that, on one occasion, they had lunch together to discuss a possible business venture. According to Ms. Campolattaro, however, that was the extent of her social contact with respondent, outside of their attorney-client relationship. She also vigorously denied that she had extended a loan to respondent or that he had even asked for a loan.

* * *

At the conclusion of the hearing, the DEC found that

respondent had "use[d] the proceeds of the $25,000 personal injury settlement belonging to Francesca Campolattaro for his own personal use in direct violation of the principles enumerated in In re Wilson, 81 N.J. 451 (1979). . . ." Hearing Panel Report at 4.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent's conduct was unethical and is fully supported by clear and convincing evidence.[2]

It is the Board's unshaken conviction that respondent's use of the $25,000 settlement proceeds was not authorized by his client. At the DEC hearing, Ms. Campolattaro steadfastly and unequivocally denied that she had agreed to lend respondent the $25,000 settlement proceeds. Her testimony was corroborated by her fiancé and by the attorney she hired to sue respondent for the recovery of the monies. Indeed, why would Ms. Campolattaro grant respondent a loan, when she had to borrow $5,000 from her mother to undergo nose surgery? And why would she have contacted the insurance carrier,

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[2] At the Board hearing, the presenter contended that the DEC had erred in admitting into evidence a 1989 consent agreement between Ms. Campolattaro and the New Jersey Department of Insurance - Insurance Fraud Division. Pursuant to that agreement, while neither admitting nor denying a violation of N.J.S.A. 17:33A-4, Ms. Campolattaro consented to pay a civil penalty to the Department of Insurance in the amount of $5,000. The agreement further provided that "it shall not be used in a subsequent civil or criminal proceeding relating to any violation of this act..." (Exhibit R-4). It is the DEC's decision to admit this document into evidence that the presenter labelled erroneous. The presenter requested that the Board strike the document from the record. The Board, however, need not reach a determination on whether the DEC's action was improper to conclude that respondent knowingly misappropriated his client's funds. The remainder of the record, which included respondent's testimony, provided clear and convincing proof that respondent's use of his client's funds was unauthorized.

in July 1990, to determine the status of her settlement check, if she had agreed, in January 1990, to lend respondent the monies?

It is the Board's conclusion that the facts in the aggregate and the logical inferences drawn therefrom demonstrate clearly and convincingly that respondent's denial of unethical conduct is unworthy of belief, that his version of the events was contrived for the purpose of the ethics hearing, and that he knowingly misappropriated his client's funds.

In view of the foregoing, disbarment is the only appropriate sanction. In re Wilson, supra, 81 N.J. 451 (1979). See, also, In re Moser, 126 N.J. 221 (1991) (where the attorney was disbarred after he forged the name of his client on a settlement check and used the proceeds for his personal benefit), and In re Ellsworth, 98 N.J. 400 (1985) (where an attorney was disbarred following numerous findings of unethical conduct, including fraudulently obtaining real estate for his personal benefit and endorsing and cashing a check payable to his employer, without the employer's authorization).

The Board unanimously recommends that respondent be disbarred. Three members did not participate.

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

Dated: 3/9/93 By: Elizabeth L. Buff
Elizabeth L. Buff
Vice-Chair
Disciplinary Review Board