SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-310
District Docket No. XIV-2010-0090E

IN THE MATTER OF	:	
FENG LI	:	
AN ATTORNEY AT LAW	:	Dissent

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

This matter involves, among other things, an allegation that respondent Feng Li knowingly misappropriated client funds by taking from his attorney trust account money that he claims he was entitled to as attorney's fees. At the time, his clients were disputing the calculation of his fee, had instructed him not to disburse funds until the dispute was resolved, and were seeking a court order to enjoin any disbursements. It is beyond doubt that the respondent showed stupendously bad judgment, should not have distributed the funds under these circumstances, and patently violated several Rules of Professional Conduct.

However, we do not agree with the majority of the Board that there is clear and convincing evidence that his actions were a knowing misappropriation of client funds in violation of

RPC 8.4(c) and In re Wilson, 81 N.J. 479 (1979). The record is too equivocal. Respondent may have taken the money knowing some portion of it was not his. Then again, the evidence could equally support the conclusion that respondent reasonably believed that the money was his earned fee, and that his clients' fee dispute was contrived. All of respondent's questionable acts – while all of them wrong – could still have been done under a sincere belief that the money was his. While respondent should be sanctioned for his misconduct, knowing misappropriation has not been adequately proven and respondent should not be disbarred.

One fact sharply illustrates the problem with the proofs. In respondent's pending bankruptcy proceeding, it is possible the court will ultimately decide that respondent is entitled to every penny he took.[1] How can we conclude that respondent could not have reasonably believed the money was his when a court may yet rule that the money was his? Here, unlike other knowing misappropriation cases, no one can say with mathematical confidence that respondent must have known that at least some

[1] Respondent's clients filed an adversary complaint in the bankruptcy proceeding, asking the court to deny the discharge of the debt. Respondent filed a motion to dismiss that complaint. A review of the docket shows a hearing on these matters has been adjourned numerous times and is currently set for May 22, 2013. It is impossible to predict when, if ever, the court will decide whether the money taken as fees by respondent belongs to him or any portion belongs to his clients.

portion of the amount he took could not have been his and was undoubtedly the clients'.

A knowing misappropriation requires proof that the attorney is guilty of (1) "taking the client's money entrusted to him"; (2) "knowing that it is the client's money"; and (3) "knowing that the client has not authorized the taking." In re Noonan, 102 N.J. 157, 160 (1986). Each and every element must be proved by clear and convincing evidence. R.M. v. Supreme Court, 185 N.J. 208, 214 (2005); R. 1:20-4(a). It is the second indispensable element that we find missing from the record. The evidence plausibly suggests that respondent had a good faith belief that the money he took was his legal fee.

That is a viable defense. This Court has agreed that an attorney's "belief of entitlement, if reasonable, could save him from a finding of knowing misappropriation with respect to the disbursements as fees . . . ." In re Frost, 171 N.J. 308, 325-26 (2002), citing DRB recommendation in In re Callaghan, 162 N.J. 182 (1999). Even if a reasonable belief later proves mistaken, it would still negate knowing misappropriation. In re Rogers, 126 N.J. 345 (1991) (no knowing misappropriation where attorney reasonably, but mistakenly, believed funds he took were his fees); In re Cotz, 183 N.J. 23 (2005) (no finding of knowing misappropriation where attorney reasonably, though mistakenly,

believed that he had sufficient monies in his trust account to fund a disbursement).

The facts are not nearly as clear as the issue. Suffice it to say that respondent, then a brand new and inexperienced attorney, was retained to take over a New York lawsuit that had been languishing for 15 years. As noted in the special master's panel report, the seven clients were seeking to recover money relating to real estate investments. Respondent mistakenly used a form for a New Jersey contingent fee agreement that included the sliding scale of fees for tort actions and that precluded a contingent fee based on prejudgment interest. Importantly, the written agreement did not accurately reflect the fee agreement reached with the clients. The special master found that, contrary to the written agreement, respondent and each of his clients "all thought they were going to pay 1/3 of any recovery as a fee . . . ."

Respondent recovered for his clients the "Rabine Funds," $516,854 that had been withheld for years in another attorney's trust account. After a bench trial, respondent also won for his clients a $3.5 million judgment. More than half the judgment was pre-judgment interest. Respondent successfully defended the judgment on appeal. With post-judgment interest, respondent had deposited in his trust account approximately $4.1 million that he had obtained for his clients.

Some of respondent's clients then decided to dispute the calculation of the legal fees. The special master concluded that the fee dispute seemed disingenuous, raised only after the judgment was awarded when the clients "decided to benefit by the mistaken graduated scale and preclusion of lawyer fees on the interest awarded." Rather than abiding by the understood fee of one-third of the total recovery, the clients decided they wanted to try to apply the sliding scale fee agreement and to exclude prejudgment interest and the Rabine Funds from the calculation of fees.

Despite the dispute, respondent disbursed $1.2 million as his fees. The amount disbursed was less than the maximum one-third respondent could arguably have been entitled to, but far more than his clients claimed was due.[2] Respondent deposited the funds directly into bank accounts under his children's names. Respondent claimed that he did not have his own account in which to deposit the funds. He also disbursed to the clients their net shares of the money in the trust account together with a statement explaining all disbursements. Respondent compounded his problems by later wiring the funds in his children's accounts to China while an application was pending for an order

[2] The clients allege that respondent's legal fees should have been only $326,000, roughly 8% of the recovered monies.

to restrain him from disbursing any funds. Respondent has since filed for bankruptcy.

The evidence would support a conclusion that respondent believed that the funds he took were his. That is what respondent said in his sworn testimony. Even the OAE described the event this way during the ethics hearing: "monies had been taken out [of] Mr. Feng Li's trust account to pay him for fees that he thought he was entitled to." The special master likewise concluded that respondent should not have disbursed the funds "regardless of his belief that he was entitled." The special master made no finding that respondent knew the money he disbursed was his clients' or that he could not have reasonably believed the money was his.

The Board majority nevertheless inferred from respondent's conduct that he must have known the money he took was not his. Admittedly, "circumstantial evidence can add up to the conclusion that a lawyer 'knew' or 'had to know' that clients' funds were being invaded." In re Davis, 127 N.J. 118, 128 (1992). But a valid evidentiary inference is not simply one of several possible conclusions that can be drawn from a proven fact. An inference is a probability, not a possibility. A permissible inference arises only when a proven fact makes it more likely than not that the other, inferred fact is true. Schwendeman v. Wallenstein, 971 F.2d 313, 316 (9th Cir. 1992),

cert. denied, 506 U.S, 1052 (1993), citing Ulster County v. Allen, 442 U.S. 140, 166 n. 28 (1979). If the evidence can equally support two possibilities, no valid inference can be drawn. McNamara v. United States, 199 F. Supp. 879 (D.D.C. 1961). The inferences drawn by the majority seem to be no more than conjecture, or are too weak to constitute clear and convincing proof.

First, that respondent took the money despite his clients' direction not to disburse funds until the fee dispute was resolved is direct evidence of the third element of a knowing misappropriation charge ("knowing the client had not authorized the taking"), not of the missing second element. It is also a clear violation of a RPC 1.15(c). But wrongfully disregarding the clients' directive and disbursing disputed funds does not make it more likely than not that respondent did not believe the funds he disbursed were his earned fees. The special master concluded that the clients' position was contrived. So could have respondent.

Second, that respondent included the $516,854 Rabine Funds as part of the amount subject to the contingent fee does not show that he knowingly misappropriated client funds. In setting the appeal bond, the New York court had previously entered an order treating the Rabine Funds as part of the recovered

judgment. Respondent cannot be said to have been unreasonable in believing the same thing the New York court believed.

Third, that respondent did not limit his fees to the terms of the written contingent fee agreement does not show a knowing misappropriation. As the special master found, all the parties intended that the fee would be one-third of the total recovery. The evidence would support a conclusion that the clients and respondent all understood that the written agreement did not govern. The bankruptcy court may yet agree.

Fourth, that respondent transferred the funds into accounts in his children's names and then wired the money to China while an application for a restraining order was pending was a serious lapse of judgment. There is evidence that the money was wired to China to pay pre-existing debts. The evidence also shows it was wired just hours before the New Jersey court entered a temporary restraining order. Even if we assume respondent was trying to put the money beyond the easy reach of the courts and clients, it does not necessarily follow that respondent must therefore have believed the funds were his clients'. There is any number of reasons why a person might move his own money out of a claimant's reach. Each of respondent's acts could just as readily have been done by someone who considered the money his. They do not give rise to a valid inference that respondent knew the money belonged to his clients.

Respondent flagrantly violated several RPCs. We cannot, however, simply conflate these other violations into proof that respondent must have known that the money he was taking was not his fees and instead belonged to his clients. It may yet be adjudged by a court that the money respondent took is all his (in which case, a disbarment for knowing misappropriation would be incongruous and indefensible in hindsight). Or it may be adjudged that some of the money is his clients'. But this uncertainty does not mean that respondent could not have reasonably believed at the time that the money represented his earned fees. The problem is that

> the evidence about respondent's state of mind is no more compelling in the direction of knowledge than it is in the direction of unhealthy ignorance; and before we will disbar on the basis of a lawyer's knowing misappropriation, the evidence of that knowledge must be clear and convincing.
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> [In re Johnson, 105 N.J. 249, 258 (1987).]

Quite simply, the evidence here is too ambiguous to find clearly and convincingly a knowing misappropriation.[3]

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[3] There is a question as to who has the burden of proof concerning the reasonableness of Mr. Li's belief that the money was his. In re Minishohn, 162 N.J. 62, 73-74 (1999), commented that the "respondent failed to offer evidence that his belief [that he was not overdrawing trust funds] was reasonable or justifiable." That does not sound like a ruling on burden shifting. The burden always remained on the OAE to prove by clear and convincing evidence each element of a knowing misappropriation charge, including that Mr. Li took money "knowing that it is the client's money." R.M. v. Supreme Court,

Not surprisingly, knowing misappropriation is not the only charge here. Respondent's troubling actions fell far short of several other Rules of Professional Conduct. He should have memorialized the one-third contingent fee, if that was the parties' intent. He should have resolved the fee dispute before disbursing his fees, or at most disbursed only the amount that was not subject to dispute. He also should have respected the court by not disbursing funds while the restraining order application was pending and, later, by trying to recover the funds after the restraining order was entered. We agree that there is clear and convincing proof that respondent violated:

1) RPC 1.15(c)(failure to safeguard funds) by failing to segregate and hold disputed fees, contrary to his clients' instructions;

2) RPC 8.4(d)(conduct prejudicial to administration of justice) by wiring funds to China while an application for a restraining order was pending and failing to comply with a court order by trying to return the funds;

3) RPC 8.4(c)(conduct involving dishonesty, fraud or misrepresentation) by misrepresenting his income – omitting the $1.2 million in fees – on his bankruptcy petition;

4) RPC 1.15(d) and R. 1:21-6 by allowing his non-lawyer wife to have signature authority on his trust account checks; and

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supra, 185 N.J. at 214; R. 1:20-4(a). That respondent said he believed the money was his and not his client's is a denial of the element, not an affirmative defense. It does not shift the settled burden of proof. In any event, unlike Minishohn, respondent offered evidence that his belief was reasonable.

5) R. 1:21-6(a)(2) by depositing legal fees into his children's bank accounts, rather than into his attorney business account.

In mitigation, respondent's transgressions related to a single matter and a single group of clients. He has no other ethics history. Moreover, he was a new and inexperienced attorney at the time, just a year out of law school and practicing alone, when he was hired to take on these clients' litigation. In re Downer, 144 N.J. 1, 15 (1996) (O'Hern, J., dissenting)("This young inner-city attorney, lacking the support staff and peer counseling that can be found in larger offices, 'lost his ethical compass'. . . .") Respondent's inexperience does not come close to excusing the RPC violations, but it lends some context.

Based on respondent's RPC violations, Member Clark voted for a three-month suspension. Member Doremus and Member Zmirich voted for a one-year suspension.

Disciplinary Review Board
Bruce Clark, Esq.
Robert Zmirich
Jeanne Doremus

Dated: April 3, 2013

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel