SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-066

IN THE MATTER OF

GEOFFREY P. LEBAR

AN ATTORNEY AT LAW

Decision

Argued: May, 1996

Decided: March 10, 1997

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

William D. Russiello appeared on behalf of respondent, who also was present.

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

This matter is before the Board based on a recommendation for discipline filed by Special Master Edward F. Seavers, Jr. The formal complaint charged respondent with recordkeeping violations and 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 1970. He has no prior history of discipline.

Respondent was the subject of a random audit on July 6, 1993. During the course of that review, the Office of Attorney Ethics (OAE) auditor discovered several instances in which respondent improperly disbursed fees to himself from deposits in real estate transactions prior to closing of title. The random auditor, therefore, referred the matter to the investigative auditing unit of the OAE. Thereafter, on May 4, 1994, the OAE conducted a demand audit of respondent's books and records. The audit essentially focused on respondent's conduct in three separate client matters.

THE LEE MATTER

Respondent was retained by Herman and Katherine Lee to represent them in the sale of their house to Jose and Laura Urenas. On or about June 12, 1991, the parties executed a contract for sale/purchase. The contract (not entered into evidence) apparently reflected that the buyers had given the realtor a $1,000 deposit and further required the buyers to make an additional deposit in the amount of $45,500 within ten days. That additional amount was reduced to $14,500 by respondent during the course of the attorney review period. A rider to the contract was executed by the parties on June 18, 1991, which required the contract deposit to be held in respondent's trust account until closing, scheduled for August 23, 1991. The rider further provided that, in the event of a breach, the aggrieved party would be entitled only to specific performance or actual damages, not liquidated damages.

In accordance with the rider to the contract, the buyers gave respondent their additional deposit check dated July 10, 1991, in the amount of $14,500 and made payable to respondent's trust account. On or about July 13, 1991, respondent deposited that check into what he believed was his attorney trust account at United Jersey Bank ("UJB") by use of a MAC card. (The card

allowed him to make only deposits, not withdrawals). However, unbeknownst to respondent, UJB had unilaterally closed respondent's trust account several months earlier, in March or April 1991, due to inactivity in the account. Respondent contended that, because no attorney trust account existed at the time of the initial deposit, the bank credited the deposit to his personal account. To make a long story short, upon learning from UJB that the deposit had been credited to his personal account, respondent opened a new trust account.

On July 23, 1991, respondent transferred $12,000 of the $14,500 deposit into his newly opened trust account. He testified that he retained the remaining $2,500 as his fee for a prior aborted transaction, for this real estate transaction and for his future appearance in Mr. Lee's behalf in an unrelated municipal court matter. Respondent, however, reflected that transaction on the Lee ledger card as "check of Urena Dep —— $12,000": nowhere on that ledger card did respondent indicate that he took a fee from a larger contract deposit. On August 19, 1991, respondent credited back $1,250 to the Lees as a partial fee refund by transferring a fee allegedly due him in another client matter (Roby) in the amount of $1667.67. To offset the surplus refund, however, respondent transferred $416.67 from the Lee ledger card to another client matter ledger card (Bergstein) on August 8, 1991 —— eleven days earlier than the transfer from the Roby card to the Lee card. The OAE contended that respondent had made the transfers to cover shortages in the Lee and Bergstein matters. Suffice it to say that respondent never adequately explained the transaction or his reasons for handling the partial fee refund in that manner.

In addition to the almost immediate fee disbursement to himself from the contract deposit, respondent disbursed to the Lees the sum of $5,000 on August 19, 1991, five days before

closing. He testified that he made that disbursement because the Lees desperately needed those funds in order to move to Nevada and in order to close title on the residence they were selling to the Urenas. Mrs. Lee was extremely ill. She suffered from several life-threatening conditions and her physician had recommended that she move to Nevada for her health. Because she was severely obese and an amputee, she needed to hire movers to pack their belongings. However, the movers had refused to begin work until they received an advance check.

In response to the Lees' request, respondent telephoned the buyer's attorney (Milanos) to attempt to obtain his consent for the early release of some of the contract deposit. He had also spoken with Milanos before taking his fee from the contract deposit. However, on each occasion, Milanos had refused to consent to any early release of any portion of the deposit. See also Exhibit C-23. Respondent considered Milanos' refusal to be both unreasonable and unethical. After Milanos refused to authorize release of the $5,000 to the Lees, respondent had the following conversation with Milanos:

> I told him I was going to do it come hell or high water and he wanted, as he indicated to the Office of Attorney Ethics in his affidavit, a second mortgage on their house, a title search to see whether there was equity there, he wanted all kinds of protection. And I told him he was crazy and I'm going to do it and he said, "Well, if you do it, you know what you're doing, you're responsible for it."
>
> I said, "I'll take the responsibility for that."
>
> [3T60][1]

[1] "3T" refers to the transcript of hearing before the Special Master on April 19, 1995.

Although respondent insisted that he was motivated to release the contract deposit to the Lees for humanitarian purposes, his determination to do so, notwithstanding Milanos' refusal to authorize any such release, extended to his removal of his own fees from that deposit:

> Q. So I assume then from your answer to this question that you took money without his authority. Isn't that correct?
>
> A. That's right.
>
> Q. And you say you did that for, was that humanitarian reasons, to do what you thought was right?
>
> A. That's part of the answer. It's also the legal thing to do, in my opinion.
>
> Q. Isn't it a fact though that the first cut, so to speak, of the deposit went to you, namely $2,500.00?
>
> A. That's right.
>
> Q. You said on direct testimony that you didn't put the entire $14,500.00 into your trust account because "I operate my law business on a cash basis and need cash to perform services for people."
>
> Is that a fair recollection of your testimony?
>
> A. That's right.
>
> Q. In other words, are you telling us that it's appropriate for you to invade trust funds to run your cash business.
>
> A. Yes, it is. I have to pay rent, I have to have telephone, I have to have insurance. If my office closes, there would be a worse scenario than a $2,500.00 invasion, your office would have to get a locksmith and break down my door to complete my files.
>
> [3T70-71]

In short, respondent believed that unauthorized invasion of client trust funds was justified to ensure that the closing of title was consummated:

Q. Are you telling us that the ends, in other words, invading the trust account, justified the means?

A. In this case, what I did I think is justified, that's right. I wouldn't have done it. I didn't do it to deceive anybody. I didn't do it to cheat anybody. Who was cheated? Who got hurt? Who was helped? When you add up the scales of justice, Miss Justice may be blind but she's not stupid.

[3T82]

At hearing before the special master, respondent maintained that his actions were justified not only on a "humanitarian" basis, but also by his determination that the closing of title was a virtual certainty, given that both a title binder and a mortgage commitment had been issued before his disbursements to himself and to the Lees. However, as noted by the special master, a number of additional conditions to the contract existed, which could have required the return of the entire deposit to the purchasers prior to the scheduled closing date. For example, while the mortgage commitment had been issued on or about July 22, 1991, the commitment itself was conditioned upon the occurrence of other events, such as a clear wood infestation report, verification of employment and satisfactory explanations of comments that had appeared on credit reports. In addition, certain other provisions could have resulted in withdrawal of the commitment, including interest rate increases and expiration dates for the commitments. Furthermore, although the commitment was dated one day earlier than respondent's deposit of the contract deposit into his newly-opened trust account, it was not sent to him until July 31, 1991 — nine days after respondent had already appropriated a portion of the deposit as his fee.

Similarly, as noted by the special master, although the title binder had been issued prior to respondent's appropriation of part of the contract deposit, it too was not complete. Specifically, the tax and judgment search was still out-standing and certain liens and judgments

had to be resolved either by payment or affidavit. In addition, there were inspection contingency clauses in the contract, including the right to inspect just prior to closing. As earlier noted, the rider to the contract gave either party the right to terminate in the event that the property sustained damage that would cost more than $15,000 in repairs. Finally, like the mortgage commitment, respondent was not aware of the title commitment prior to his appropriation of his fee from the deposit.

THE HANSIL MATTER

At some point prior to October 1992, respondent was retained by Stephen Hansil to represent him in a condemnation action of his bar and restaurant by the City of Englewood. After extended court actions and negotiations, the parties finally arrived at satisfactory settlements regarding the city's payment for the property and the relocation assistance to be provided to Hansil.

Although Hansil had sought to transfer his liquor license to a proposed establishment, the location for that establishment was rejected by the city. When it became apparent to Hansil that he would no longer be able to operate a business with a liquor license in Englewood, he decided to sell the license.

Through respondent, Hansil entered into negotiations for the sale of his liquor license to an entity known as Spylen of Englewood, Inc. (Spylen). Spylen was represented by Michael Ryan. Ultimately, the parties agreed upon terms and, on October 19, 1992, respondent prepared a contract for sale of the license. The contract was signed by the purchaser on November 2, 1992 and sent to respondent on November 6, 1992. At the same time, Ryan sent respondent a

deposit check in the amount of $10,280 made payable to respondent's trust account. The contract required the deposit to be "held in trust by Geoffrey Lebar, attorney for seller, until closing." The contract identified the "closing" date as December 1, 1992 — the date by which the parties expected approval of the transfer by the City of Englewood. The contract specifically provided:

> Should said approval not be granted by December 1, 1992, then this contract shall be void and of no effect, and any funds paid hereunder shall be returned to the party of the second part without any obligation to either party hereto. (Emphasis supplied).

[Exhibits C-24, R-68 and R-69 at 1]

Respondent deposited the contract deposit check into his trust account on November 12, 1992. Exhibit C-25. Over the next several weeks, beginning immediately after his deposit into the trust account, and despite the specific provisions of the contract, respondent began making disbursements against the contract deposit to himself as fees, to Hansil, to experts who provided services in Hansil's behalf and to various other entities in behalf of other clients in totally unrelated matters. Between November 18, 1992 and December 15, 1992 (the date upon which Ryan authorized release of the contract deposit), respondent made four disbursements to himself for fees, totalling $4,000. In addition, between November 13, 1992 (the day following deposit into the trust account) and December 15, 1992, respondent made numerous other disbursements to Hansil, to persons in Hansil's behalf and to entities in behalf of clients unrelated to Hansil's matter, totalling $4,469. By December 15, 1992, the date upon which the city adopted a resolution approving a person-to-person license transfer at an open meeting and the date upon which Ryan orally authorized release of the deposit, only $2,011 of the deposit remained in

respondent's trust account (an unexplained deposit of $200 was made by respondent on December 11, 1992).

When asked why he made these disbursements against the contract deposit prior to the triggering event for release — approval of transfer respondent testified:

> Because Mr. Hansil needed the money . . . . and others had to be paid, including myself and Mr. Hansil had to be paid to subsist . . . .
> [3T125]

Respondent further contended that he believed the authorization of the license transfer was a "done deal" from the very beginning — thus justifying his immediate disbursements against the contract deposit. 3T118-119. This was so for several reasons. First, respondent maintained that the purchaser would not even sign a contact for sale/purchase without first having received the unofficial word from the "political powers that be" that the transfer would be approved. (A city representative had put respondent in touch with Ryan, identifying Ryan as the representative of an interested party. Respondent alleged some ambiguous interrelationship between Spylen, Ryan and city representatives.) Second, respondent alleged that, because of this unofficial approval of the transfer, he and Ryan had reached an understanding that respondent could make disbursements against the contract deposit immediately upon its receipt. To support that "understanding," respondent offered into evidence the transmittal letter accompanying the deposit check, dated November 6, 1992. Respondent maintained that the letter contained "oblique" language that authorized immediate release of the contract deposit. 3T131. The specific language to which respondent referred read as follows:

> ... As soon as I receive the documents, I will file the application for transfer with the city of Englewood .... It is my understanding that the matter will go to the Mayor and Council without the need for review by the Planning Board or Police Department....
>
> [Exhibit R-25]

Respondent was not able to coherently explain why the contract he drafted required him to hold the deposit in his trust account until the date of "closing" when he allegedly had authorization for immediate release of the deposit.

When asked why he had not specifically reduced his alleged understanding with Ryan to writing by way of a simple confirming letter, respondent suggested that he was protecting the integrity and professional licenses of Ryan and city officials, who according to respondent were clearly involved in less than above-board activities. 3T 134-135.

As in the Lee matter, respondent maintained in this matter that the disbursements were made for humanitarian reasons. Specifically, Hansil was in a difficult financial condition and needed money immediately in order to purchase a new business. The first substantial disbursement against the contract deposit was, however, to respondent — and only days after his deposit of the funds into his trust account. In fact, it was not until December 9, 1992 (the date upon which city officials, at a closed executive session, tentatively approved the transfer and nearly one month after he received the contract deposit) that respondent made his very first disbursement to Hansil.

Contrary to respondent's specific assertions, Michael Ryan, Spylen's attorney, testified that he never authorized release of the contract deposit prior to December 15, 1992. In fact, he recalled that respondent and he had spoken on or about December 1, 1992, the date by which

the contract anticipated city approval. During that conversation, there was some discussion regarding the possibility of early release of the deposit. Ryan then consulted with his client, who refused to authorize any such early release and Ryan, in turn, telephoned respondent and communicated Spylen's refusal.

Ultimately, the license transfer occurred during the first week of January 1993. By that time, however, the contract deposit had been exhausted.

THE BEGIN — KOEHLER MATTER

Respondent represented Barbara Begin — Koehler in an action for divorce from her husband, Paul Begin. At some point during the proceedings, the parties reached a property settlement agreement, incorporated into the final judgment for divorce, which required sale of the marital residence. The court entered two subsequent orders, which required Mr. Begin to vacate the marital residence and to execute documents in connection with the listing and sale of the property.

On or about June 1, 1992, the Begins entered into a contract for sale of the marital residence to Mark and Mary Aiosa, who were represented by Herbert Savoye. Begin was represented by Albert Ferry and respondent represented Barbara Begin — Koehler in the transaction. The contract identified a $1,000 initial deposit, which the purchasers had paid to Weichert Realtors, and required an additional $9,000 deposit within ten days followed by a further $10,000 deposit upon closing of title on the Aiosas' current residence on July 31, 1992. The contract required Weichert Realtors to hold all deposit monies in its trust account until closing of title, which was set for August 25, 1992.

The contract was modified by letter dated June 5, 1992 from Savoye to respondent and Ferry. That rider made it clear that the contract was subject to the sale of the buyers' residence in Teaneck and, in the event that property sale did not close by July 31, 1992, "either party may void this contract, in which event the deposit monies shall be returned to the buyer and this contract shall become null and void." Exhibit C-50.

Although no written change was made with respect to who would hold the contract deposit, it was agreed by all counsel that the deposit would be split 50% to Mr. Begin's attorney (Ferry and Ferry) and 50% to respondent as Mrs. Begin's attorney. Mr. Savoye transmitted $4,500.00 each to Respondent and to Mr. Begin's attorney by letter dated June 19, 1992, which stated that the deposit was to be held in accordance with the terms of the contract. Exhibit R-21.

Respondent deposited the $4,500 into his trust account on June 22, 1992. Exhibit C-32. Beginning only three days later, and over the course of the next ten days, respondent disbursed to himself fees in the amount of $3,400 for his services relative to Barbara Begin's divorce. See Exhibit C-9, C-33 and C-35. For some unexplained reason, respondent then deposited $100 on July 10, 1992, but disbursed another fee check to himself in the amount of $200 on July 15, 1992 and another in the amount of $100 on July 26, 1992.

Savoye sent the second part of the deposit from the Aiosas in the amount of $5,000.00 each to Respondent and to Mr. Begin's attorney on July 29, 1992. That $5,000.00, together with an additional $2,200.00, which was received by respondent as fees in other matters, was deposited by respondent into his trust account and credited to the Begin matter on July 30, 1992. (Exhibits C-9 and C-37).

Respondent explained the additional deposit of $2,200.00 on July 30, 1992 as a reimbursement of fee previously taken because of a discussion he had with Mrs. Begin — Koehler about the total fee. By respondent's own testimony, however, that he did not have that discussion with Mrs. Koehler until approximately the date of closing, August 24, 1992.

Respondent continued to disburse fees to himself through the time of closing. He received one-half of the initial $1,000.00 deposit held by Weichert Realtors and deposited it to his trust account on August 11, 1992. He continued to draw funds against the contract deposit as fees or otherwise — additional unexplained disbursements on seemingly unrelated matters appear on the Begin — Koehler client ledger card.

Respondent maintained that, because the sale of the subject residence was court-ordered, closing of title was a virtual certainty and he was, therefore, justified in taking his fees from the contract deposit. Although Judge Conrad Krafte had, indeed, ordered Mr. Begin to sign all necessary documents to effectuate the sale, he himself testified that his order in no way guaranteed that this particular transaction would be consummated, as he had no control over the various contingencies to the contract or over the purchasers' actions.

When asked his interpretation of the court order and whether he had obtained the consent of the parties prior to making advance disbursements against the contract deposit, respondent testified as follows:

> A. This order speaks for itself, and I knew I was going to get my money one way or the other and everybody was going to get their money one way or the other. I had to have that money to keep my office open and Mr. Savoye was told that, Mr. Ferro was told that.
>
> Q. Mr. Ferro was told that?

A. That's right.

He had no problem with it because he had -- what he did with his half of the deposit I had no idea and no concern about, and he had no concern about my deposit.

Q. Did you speak to Mr. Savoye about this matter, to the best of your recollection?

A. Many times.

Q. What was Mr. Savoye's reaction?

A. He was on my side because he wanted his clients, who were friends of his or worked for him or whatever, to get this house. And he was working with me against Mr. Ferro, not personally but against Mr. Ferro's client to get this accomplished. His people got a good buy on this house. (Emphasis supplied).

[3T107]

Contrary to respondent's suggestion, Mr. Savoye denied that he had ever authorized the disbursement of the contract deposit prior to the closing date. Indeed, during his demand audit at the OAE on May 4, 1994, respondent admitted that Savoye had not authorized early release of or withdrawal against the contract deposit. Exhibit C-48 at 191.

* * *

The special master found respondent guilty of knowing misappropriation in all three matters. In the Lee matter, the special master found that respondent knowingly misappropriated funds in varying amounts from the contract deposit between July 22 and August 23, 1991. However, the special master's finding did not extend to respondent's $5,000 disbursement to the Lees on August 19, 1991. That was so because, "without Mr. Milanos present to testify,

considering the proximity to the actual closing, by which time it is likely that all contingencies had been met and the figures for closing made available, it is conceivable that respondent had an honest, but mistaken belief that the deposit had essentially become nonrefundable so as to justify his payment of $5,000.00 to the Lees on August 19." Special Master's Report at 9.

In the Hansil matter, the special master found no basis in fact to support respondent's claim that Ryan had authorized immediate disbursement of the contract deposit or that the transaction was a virtual certainty. The special master made particular note of the provision that declared the contract void in the event that the city did not approve transfer of the license by December 1, 1992: any disbursement made before that date was made at a time when the contract might still be rendered void and any disbursement made after that date, but before the date of approval, was made contrary to the explicit terms of the contract respondent himself prepared.

In the Begin — Koehler matter, the special master found no merit to respondent's contention that the court-ordered nature of the transaction gave rise to a certainty of closing.

The special master declined to find any recordkeeping violations charged, except for those admitted by respondent in his answer (failure to maintain trust receipts and disbursements journals; failure to maintain business account disbursement journal; failure to maintain a trust ledger card for bank charges and failure to record the source of deposited items on trust account deposit slips).

The special master further declined to find respondent guilty of a violation of RPC 8.4(c) incidental to his knowing misappropriation of escrow funds. That was so because "respondent was completely honest and aboveboard with everyone with respect to his intended and actual use

of the funds." Id. at 19. Although the special master did not view respondent's actions as dishonest, he noted:

> I have the impression, however, that respondent still has not accepted the fact that his actions were improper. Respondent seems to feel that violation of ethical rules is appropriate where the circumstances of a particular case so require in the sole opinion of the attorney representing a particular client. The rules exist for protection of confidence in the legal system as a whole, not for particular clients in particular circumstances. Further, the interest of purchasers in all three cases were not considered despite the possible required return of those funds. (Emphasis supplied).

[Special master's report at 21]

The special master recommended that respondent be disbarred for his conduct in accordance with In re Hollendonner, 102 N.J. 21(1985) and In re Warhaftig, 106 N.J. 529 (1983), the latter of which involved a pattern of fee advancements.

* * *

Following a de novo review of the record, the Board is satisfied that the special master's conclusion that respondent's conduct was of unethical is clearly and convincingly supported by the record. In each matter, respondent obligated himself to hold escrow funds in which both buyer and seller — client and non-client — had an interest. As such, respondent had the absolute duty to hold those funds in accordance with the terms of the escrow agreements. In each of these matters, the contract provided for release of the escrow funds on one condition only, closing of title — not probability or virtual certainty of closing of title. While the Board agrees with the result reached by the special master in Lee, the Board disagrees with the

special master that respondent's early release of funds to his client was even arguably justified. All contingencies were not met, nor was the consent of all parties in interest obtained prior to the early release, respondent's conduct in Lee therefore violated RPC 1.15.

In all of these matters, respondent sought authorization from the purchasers or their counsel and disbursed the funds in all three matters, despite denial of the requested authorizations, and without regard for potential negative consequences, should the contracts fail. Indeed, in one of these instances (Lee), respondent refused to secure the early release by way of a only executed by his clients in favor of the purchasers, telling the purchaser's attorney "you're crazy", prior to disbursing the funds.

Although respondent contended that his actions were motivated by "humanitarian" concerns, since his clients needed the money, his actions belie that claim: in each instance, respondent paid himself first from the escrow funds. Respondent's actions demonstrate that he was clearly aware of his professional obligations. He balanced these obligations against his personal needs, and determined that his personal needs were more important. In each of the three cases reviewed by the Board — Lee, Hansel and Begin-Koehler — respondent knowingly and intentionally invaded escrow funds in the face of objections by parties in interest. In so doing, respondent violated RPC 1.15. In addition, his actions violated RPC 8.4(c): in Lee, respondent misrepresented the amount of the deposit on the ledger card, recording instead the balance of the deposit after deducting the amount taken by him as his fee; in Begin-Koehler, took a deduction from the deposit without first discussing the matter with his client, and, in all three matters, his knowing violation of his responsibilities as a fiduciary almost from the moment those funds were entrusted to his care was clearly dishonest and deceitful.

Respondent can hardly claim a basis in good faith that use of the funds either his client or himself was authorized. See In re DiLieto, ___ N.J. ___ (1995). Nor does the fact that, respondent eventually would have been entitled to seek payment for his legal services justify the taking of advance fees from the escrow funds. See, e.g. In re Warhaftig, 106 N.J. 529 (1987).

In re Wilson , 81 N.J. 451, 453 (1979) requires disbarment whenever the record demonstrates, to a clear and convincing standard, that knowing misappropriation of client funds has occurred. There is no distinction, in this regard, between client trust funds and escrow funds belonging to a non-client. In re Hollendonner, 102 N.J. 21 (1985).

(I)t is a matter of element any law that when two parties to a transaction select the attorney of one of them to act as the depository of funds relevant to that transaction, the attorney receives the deposit as the agent or trustee for both parties (citations omitted). The parallel between escrow funds and client trust funds is obvious.

In re Hollendonner, supra., 102 N.J. at 28.

The Board finds that the record clearly and convincingly establishes that respondent knowingly misappropriated escrow funds thereby triggering the automatic disbarment rule of Wilson, supra. The Board, therefore, unanimously recommends that respondent be disbarred. Two members did not participate.

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

Dated: 3/10/97

LEE M. HYMERLING
Chair
Disciplinary Review Board