Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 90-321

IN THE MATTER OF

LEE JASPER ROGERS,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: January 16, 1991

Decided: March 1, 1991

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

Michael D. Schottland appeared on behalf of respondent.

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

This matter is before the Board based upon a presentment filed by the District IX Ethics Committee. This matter came to the attention of the Office of Attorney Ethics ("OAE") on March 16, 1987, when the Central Jersey Bank notified the OAE of a notice of overdraft on respondent's trust account. Thereafter, the OAE retained the accounting firm of Dolan, Mauthe and Marsella to conduct an audit of respondent's trust records (see audit report of February 10, 1988, Exhibit C-4, attachment 7). Following the audit, the OAE conducted a supplemental investigation that led to the following ethics charges against respondent (Exhibit C-12, amended formal complaint): knowing misappropriation of escrow funds, by converting to his own use $2,245.54 designed to satisfy

the balance of an outstanding mortgage (count one); knowing misappropriation of $2,300 in clients' funds by failing to turn over rents collected in his client's behalf (count two); failure to comply with a client's reasonable requests for information and to advise the client that the mortgage on his property had not been paid off (count three);[1] tampering with a witness, by counselling and assisting a client to sign a false certification (count four); and creating a conflict of interest situation by entering into a business transaction with a client without full disclosure of the relevant facts (count five).

Respondent has been a sole practitioner since his admission to the New Jersey bar in 1981. No prior disciplinary infractions have been sustained against him.

The facts of this matter are as follows:

COUNT ONE

In March 1987, Edmond and Donna Hull retained respondent to represent them in the purchase of real property located in Asbury Park, New Jersey, from Curtis and Cynthia Homer. Bernard Yagoda, the owner of a real estate and mortgage company, held the first mortgage on the property.

Closing of title took place on March 10, 1987, at which time

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1 At the conclusion of the district ethics committee hearing on September 11, 1990, the presenter withdrew the charge of knowing misappropriation found in paragraph 14(c) of count three.

respondent deposited $69,195.26 in settlement proceeds into his trust account. Among the disbursements respondent was required to make was $29,289.31 as payoff on the Yagoda mortgage. On March 11, 1987, respondent issued a trust account check to Yagoda in that amount. Yagoda, in turn, sent respondent the mortgage endorsed for cancellation. Respondent's check, however, was returned for insufficient funds as a result of a levy placed on respondent's trust account funds, on March 18, 1987, by American Express Travel Related Services Company ("American Express"). The levy, in the amount of $3,453.87, was designed to satisfy respondent's personal obligations to American Express.[2]

According to respondent's testimony, on the date of the closing, he was unaware of the levy. It was not until the check was dishonored, on March 19, 1987, that respondent telephoned the bank and was notified of the levy. Respondent knew that American Express had attempted to place a levy on his trust account in or about January 1987, without success. At that time, the bank informed respondent that the levy had not been accepted because the funds were trust funds (Exhibit C-22).

Following a telephone conversation with respondent, Yagoda agreed to accept an initial payment of $25,789.31 and to receive the $3,500 balance as soon as respondent's financial difficulties

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2 The audit report states that, but for the levy, respondent would not have been out of trust (Exhibit C-4, attachment 7).

were resolved.[3] Respondent's March 24, 1987 letter to Yagoda, enclosing a $25,789.31 certified check, stated that ". . . the balance of the monies in the amount of $3,500.00 will be paid to you in approximately one (1) weeks [sic] time" (Exhibit R-4). Respondent sent a copy of that letter to his clients, the Hulls. Respondent explained that he intended "to borrow [the money] or get it from somewhere" (T9/4/1990 64). Respondent also returned to Yagoda the mortgage endorsed for cancellation.

On March 31, 1987, the attorney for American Express promised respondent that the amount of the levy would be returned. According to respondent, in the interim he had several conversations with Yagoda, at which time respondent assured him that the payment would be made "as soon as [respondent] could" (T9/4/1990 65). It was not until May 21, 1987, however, that American Express wrote a check to respondent for $3,215.54 (the amount of the levy, $3,453.87, minus unspecified costs). Respondent did not deposit the monies into his trust account. A deposit slip dated May 28, 1987 shows that respondent deposited those funds in his <u>business</u> account (Exhibit C-14E). The monies were used for a partial payment to Yagoda ($1,000) and for respondent's business and personal expenses.

Respondent contended that the reason he did not return the monies to the trust account was that he was "in a big hole financially" and -- as his counsel argued during his opening

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3 Respondent had dealt with Yagoda before in another matter where Yagoda also held a mortgage.

remarks -- "in his mind [respondent] substituted in place of $3,400 that he was short that was Yagoda's, he substituted his promise to pay that back, his own personal moral promise to pay that back. That's why he felt comfortable [in using those funds to pay bills]" (T9/4/1990 21,22).

Respondent testified that during this time he was in dire financial straits. In 1983, he had purchased a rooming house, a "dump," as he described it. Numerous and extensive repairs had to be made on the property, as required by the Department of Community Affairs. In 1985, respondent advanced $6,000 to a contractor who failed to perform the work. Although respondent obtained a judgment against the contractor, the latter was judgment-proof. In late 1986, the Department of Community Affairs filed suit against respondent for failure to make the required repairs. As a result, respondent was fined $11,000. After he exhausted his savings and borrowed monies from his mother, he was left with no funds. In addition, the mortgage payments on the property became delinquent when the rents received proved insufficient to cover the carrying expenses, including oil and electric bills. In October 1987, the mortgagee filed a foreclosure action.

Respondent was also beset with personal problems. He had received a letter from a matrimonial attorney, advising him that his wife had consulted with the attorney about starting divorce proceedings.

According to respondent, he owed $1,400 to the electric company. When he received the check from American Express,

> . . . it was kind of like Manna. I mean when the mailman walked into the office, I was standing in the dark.
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> . . .
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> Because Jersey Central Power and Light came by and shut my electricity off. That check was like Manna from heaven. I rationalized to myself. 'Well, hey, even if I give it to [Yagoda] it's going to be short because I owe him $3,500.' I said, 'Well, I already promised to pay him. What I will do is I'll use this money towards my debts and then I will take care of the mortgage as soon as I can.' I was arranging to refinance. I figured I would pay him off. I promised him he would get his money. I said, 'Okay, I will pay him off when we refinance.'
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> [T9/4/1990 66.]

Respondent acknowledged that, in retrospect, he should have paid Yagoda with the American Express check. He added, however, that

> I legitimately thought I had a right to use that money based on the promise that I had made to Mr. Yagoda, telling him that I would be responsible, I would make sure that he got his money. I felt I had a legitimate right to use it.
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> [T9/4/1990 69.]

Yagoda testified that respondent "may have" informed him of the receipt of the American Express check. He acknowledged that he had given respondent additional time to pay the balance of the mortgage:

> Q. Did you yourself personally make any special arrangements whereby Mr. Rogers could take his time in making payments of this loan?
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> A. Mr. Rogers and I discussed this over the phone. He asked for additional time. I gave him the time. Apparently he ran into more difficulty and he couldn't conform to the time frame that he volunteered and at the latter part the monies were not coming forward as

discussed. I can't give you a time frame, specifics or dates.

. . .

Q. At any time did you ask Mr. Rogers to sign a debt instrument such as a note or a bond and/or mortgage in connection with this obligation?

A. No, I think Mr. Rogers may have indicated that he would sign something to that effect.

Q. I mean you are in the mortgage business and I assume that you have access to forms for notes, mortgages and things like that. I am asking you whether or not you ever asked him to sign something like that?

A. The answer I gave you is the one that stands.

Q. What is the answer?

A. Mr. Rogers volunteered to sign something.

Q. What did you say?

A. I agreed as long as it was short term, very short term.

Q. Did you ever -- did he send you something?

A. He may have, I don't recall to be honest with you.

[T9/5/1990 277,281.]

Yagoda did not, however, consider his and respondent's understanding to be a loan:

Q. One thing, you were never consulted by Mr. Rogers about making a loan of that money that he owed you?

A. Well, I mean your using the term as a loan, he indicated that he needed some assistance and help because of his difficulty. I wouldn't

> classify that as a loan accommodation to someone in need for a short scope of time. I just expanded much more time than I felt that I agreed to.
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> [T9/5/1990 285.]

As mentioned above, out of the $3,200 refund from American Express, respondent paid $1,000 to Yagoda and $1,000 to the electric company, and used the balance to pay other pressing personal and business debts. Within the next three months, respondent paid all but $1,000 to Yagoda. Ultimately, Yagoda had to sue respondent. On September 20, 1988, Yagoda and respondent signed a stipulation of settlement whereby respondent agreed to pay $1,273.80 in $200 monthly installments, commencing August 1, 1988. Respondent paid $200 or $250 when the stipulation was signed. When respondent failed to make any subsequent payments, Yagoda obtained a default judgment of $1,349.86 against respondent on May 26, 1989, having also brought suit against the Homers, the former owners of the property.

Meanwhile, the Hulls had contracted to sell their Asbury Park house. Closing of title was to take place on or about February 1989. When the attorney for the buyers discovered the Yagoda lien on the property, on June 14, 1989, the Hulls were forced to pay off that lien in the amount of $1,309.05. In turn, the Hulls received an assignment of the Yagoda judgment against respondent. On July 11, 1989, respondent signed a promissory note agreeing to reimburse the Hulls for the amount of the judgment and an additional sum of

$700, for a total of $2,003.[4] Respondent has been able to pay only $400 on this debt.

At the conclusion of the district ethics committee hearing, the panel found that respondent had violated RPC 1.15(a), "in that he did not hold the American Express refund check separately by depositing it in his trust account." The panel concluded that respondent had also violated RPC 8.4(c), in that his use of the funds involved conduct that was "dishonest, fraudulent, deceitful and was a misrepresentation to Mr. Yagoda with respect to the funds that he had received." In addition, the panel found that respondent had violated RPC 1.15(d), in that his trust account was not properly designated "attorney trust account," as required by R. 1:21-6.

COUNT TWO

Walter Perry is a lifelong friend of respondent. In fact, throughout respondent's childhood, respondent's mother led him to believe that Perry was his cousin. In respondent's words, "I have known Walter Perry for as long as I can remember." Perry, too, acknowledged that he and respondent have a close personal

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4 The $700 sum consists of monies given to respondent by the Hulls in 1988 in connection with the closing of another house. Respondent explained that, notwithstanding the fact that he was entitled to keep the $700 sum, he agreed to return it to the Hulls to compensate them for their difficulties with the Yagoda lien.

relationship and that they call each other "cuz." Perry acknowledged that he and respondent may be "distant cousins" (Exhibit C-4, attachment 28).

In 1987, Perry retained respondent to evict Mamie Boyd, a tenant in one of Perry's properties, for lack of rent payments. After respondent instituted summary eviction proceedings, an agreement was reached whereby Boyd would give the overdue and future rent payments directly to respondent, who would act as Perry's rental agent. Consistent with this understanding, on May 29, 1987, respondent prepared an agreement providing for respondent's obligations for collecting the rents and for leasing and renewing existing leases on the properties, in exchange for a five percent commission on the gross monthly income. The agreement further provided that

> [m]onthly statements of account showing itemized income and expenses will be given to you on or before the fifteenth of each month. I will set up and maintain a trust account in the name of the property and will forward to you a monthly check for all funds which exceed a base amount of $500.00 which will be kept to cover expenses and emergencies.
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> [Exhibit C-4, attachment 16].

On August 26, 1987, three months after the preparation of the agreement, Perry signed it and returned it to respondent.

By letter dated June 2, 1987, respondent notified Perry that, as of that date, he had collected $1,600 from Boyd (Exhibit C-4, attachment 17). According to respondent's testimony, Boyd paid him in cash. Respondent then placed the cash in his "cash receipts

box." Subsequent rent payments were deposited in respondent's personal account. On December 4, 1987, respondent gave Perry $500.

It is undisputed that respondent did not turn over all monies to Perry, but used $2,300 for his own purposes. Respondent explained that he used the monies because he was in "financial trouble," but contended that he had Perry's consent thereto. Respondent testified that, between the time he prepared the agreement, May 1987, and the time Perry returned it to him, August 1987, they reached an understanding for respondent's use of the rent payments as a loan (T9/4/1990 114). According to respondent,

> [Perry] knew that I was in a bind. I had told him about the levies and everything. He was aware of those and he agreed that I could make myself a loan from the monies that I collected provided I paid it back.
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> [T9/4/1990 110.]

When he was asked about the absence of any writings memorializing this understanding, respondent explained that the agreement was "basically under the table," i.e., "[i]t wasn't supposed to last that long. I did it as a friend. I was supposed to replace the money within a short amount of time" (T9/4/1990 111).

Respondent conceded that he owed Perry $2,300 at least until April or May 1989, when Perry won two million dollars in the New Jersey State Lottery and forgave the debt. Prior thereto, in July 1988, Perry retained counsel to bring suit against respondent for the withheld rent monies and obtained a default judgment against

respondent for $2,250 plus costs of $75 (Exhibit C-11). Perry never attempted to collect on the judgment. Asked whether he had consented to respondent's use of the rent monies, Perry testified as follows:

> A. [m]aybe he said something to me about using my money because I don't know. I was trying to think it up and just maybe I did say it . . . Maybe I did say he could use the money . . . .
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> . . .
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> Q. When was he going to pay you back?
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> A. He said he was going to work it off like doing this, doing that. I guess I got a couple bills [sic] from him. I just thought nothing was ever going to come of this so I threw the stuff away.
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> Q. How long when you had this conversation with him when you said you were outside of the Elks [Club] the summer of '87 was there a time limit put on when he was going to pay you back what funds he used?
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> A. No, I don't know. I don't think so.
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> Q. Was there a limit to the amount of money that he collected? Could he use any of the money he collected or did you put a limit on it?
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> A. I didn't put no limit [sic] I didn't say, I don't remember saying that. It is out there, you know.
>
> Q. Do you know how much money you were going to loan him?
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> A. Doesn't make that much difference at that time.
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> . . .
>
> Q. Well, what made you change your mind because you went to [an attorney] to get this money back pretty shortly after?

A. Because I wanted the money for this piece of property. I was talking about trying to make a down payment on it. You know how it is maybe I just got angry.

Q. Why would you have gotten angry?

A. Sit down and brew, sometime mistakes you make with the mistakes you make [sic].

[T9/5/1990 239,240.]

Perry explained further that he retained counsel because he was unable to reach respondent and because his wife, Mrs. Perry, was angry over respondent's use of the monies:

Q. Let me ask you a question seriously. We are trying to find out what happened here. This man says, Mr. Rogers says that you essentially gave him permission to use your money. That's what he is saying. When you call it an agreement contract that's what I say, that you told him, he says you said that around the time that he got the money or thereabouts May or June of 1987 it is really important for us to find out what happened here. My question to you is whether or not that's true and I think you've tried to tell us that in your own way and you're ashamed to tell us that. My question is did you get in trouble with your wife over this?

A. Yes, she always hollers at me.

Q. Is that why you went to [an attorney]?

A. Well, I had to then.

Q. Why did you have to go to [an attorney]?

A. Because she was complaining about the money.

[T9/5/1990 248.]

. . .

Q. You have since forgiven this debt, is that correct, or is he still working it off?

A. He says if I got something for him to do paper paperwork he will do it, work it off.

Q. Let me ask this. I'm just a little confused. Was there something your wife said to you after you met with [Chief Auditor Smith] and I [the presenter] that caused you to remember differently what had occurred in the summer of '87?

A. Well, sometime I go out and have too much fun and I get slap happy with my money and what I say, that's it.

Q. Let me repeat the question once more. Was it something your wife said or something you independently recollected after we spoke?

A. She said just by my actions, just the way I do it. I go out and loan money out and do this and do that and forget about it and all of a sudden it comes up, sometimes somebody comes up and gave [sic] some money. I wonder what it was from. They told me so.

Q. Some money you lent to somebody that you had not been aware that you actually lent it?

A. That's it, yeah.

[T9/5/1990 240,241.]

The panel concluded that respondent's conduct had violated RPC 8.4(c), "in that he misrepresented to Mr. Perry the receipt of the rent monies and their disposition. He fraudulently converted those monies to his own use." The panel found further that respondent had violated RPC 1.15(a), by not keeping a client ledger card showing "receipt of the rent collection monies."

COUNT THREE

In September 1988, Edmond and Donna Hull once again retained respondent to represent them in the purchase of real property located in Neptune, New Jersey. The sellers were Steven and Susan Stockhamer.

Mr. Hull acknowledged receiving a copy of respondent's letter to Yagoda on March 24, 1987, enclosing a check for $25,789.31 and promising to pay the $3,500 balance in one week. The Hulls, however, were unaware of the subsequent developments, namely, respondent's failure to use the American Express refund check to pay off the mortgage, the lawsuit brought by Yagoda against respondent, the stipulation of settlement signed on September 20, 1988 (whereby respondent agreed to pay Yagoda $200 per month), and the judgment that Yagoda ultimately obtained against respondent. Respondent did not keep the Hulls apprised of these events. As stated above, it was not until a title search was conducted in connection with the sale of their Asbury Park house that the Hulls discovered, for the first time, that there was a lien on the property (the Yagoda judgment). The Hulls then paid off the judgment and, in turn, received an assignment of the judgment against respondent.

Ultimately respondent signed a promissory note agreeing to pay the Hulls the amount of the judgment. As of the date of the complaint, August 17, 1990, respondent had paid only $400 on this debt.

The panel found that respondent's conduct had violated RPC

1.4(a) and 1.4(b), by failing to keep the Hulls reasonably informed and by failing to disclose that the Yagoda mortgage on the Asbury Park house had not been paid off. The panel also found that respondent had violated RPC 1.15(d), by failing to maintain an attorney business account at certain times.

COUNT FOUR

Count four of the complaint charged respondent with tampering with a witness, Perry, by counselling and assisting him to sign a certification (Exhibit C-12A) on July 13, 1990, wherein Perry stated that he had made a loan agreement with respondent. That certification was prepared by respondent.

The panel concluded that the evidence did not clearly and convincingly show that respondent had induced or assisted Perry to testify falsely.

COUNT FIVE

Count five of the complaint alleges that respondent created a conflict of interest situation when he entered into a business transaction with Perry (the loan agreement), without disclosing to him the full circumstances of the representation or obtaining a proper waiver from Perry.

The panel found that, because respondent believed that he had an agreement with Perry,

> he was then charged with compliance with rule 1.8A [sic] which prohibits entering into business transactions with a client unless the transaction and terms are fair and reasonable to the client, are fully disclosed and

> transmitted in writing to the client to seek the advice of independent counsel before having a client consent in writing to the agreement.
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> [Hearing Panel Report at 7.]

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusions of the committee in finding respondent guilty of unethical conduct in counts one and three of the complaint are fully supported by clear and convincing evidence. The Board also concurs with the committee's recommendation that count four should be dismissed. For the reasons set forth below, however, the Board is unable to agree with the committee's finding that the evidence clearly and convincingly establishes that the conduct described in counts two and five was unethical.

As outlined in the factual recitation above, the first count of the complaint charges respondent with knowing misappropriation of escrow funds, by converting to his personal use $2,245.54 designed to pay off the balance of a mortgage held by Bernard Yagoda. The presenter urged the Board to find that respondent knowingly misappropriated the escrow funds, as alleged in count one of the complaint.

Because "dire consequences" may follow a finding of unethical conduct against an attorney, such a finding must be sustained by clear and convincing evidence. In re Pennica, 36 N.J. 401, 419

(1962). See In re Sears, 71 N.J. 175, 197 (1976); In re Rockoff, 66 N.J. 394, 396-397 (1975); In re Hyett, 61 N.J. 518, 520 (1972). To recommend the imposition of discipline, each Board member must thus be able to reach "a firm belief or conviction as to the truth of the allegations sought to be established" enabling him or her to find, without hesitancy, the truth of the precise facts at issue. See In re Boardwalk Regency Casino License Application, 180 N.J. Super. 324, 339 (App. Div. 1981), modified on other grounds, 90 N.J. 361 (1982); Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 162 (App. Div. 1960).

Like the district ethics committee below, the Board has carefully reviewed and independently assessed the record to determine whether respondent knowingly misappropriated escrow funds. The Board concludes that he did.

> Misappropriation is 'any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.'
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> [In re Wilson, 81 N.J. 451,455 n. 1 (1979).]
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> The misappropriation that will trigger automatic disbarment under In re Wilson 181 N.J. 451 (1979), disbarment that is 'almost invariable,' id. at 453, consists simply of a lawyer taking a client's money knowing that the client has not authorized the taking. It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of Wilson is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind, is irrelevant: it is the mere act of taking your client's money knowing

that you have no authority to do so that requires disbarment.

[Matter of Noonan, 102 N.J. 157, 159-160.]

There is no dispute that respondent did not utilize the American Express refund to pay off the Yagoda mortgage. The check was made out to respondent, not to respondent's attorney trust account. He endorsed the check, deposited it in his business account, paid $1,000 to Yagoda, and used the balance to satisfy his own financial obligations.

Without expounding on respondent's responsibilities, as closing attorney, to his clients (the Hulls), to the sellers of the property (the Homers, the debtors of the Yagoda mortgage), to the new mortgagee (the bank that financed the Hulls' purchase of the Asbury Park house), and to the title company, the crucial question on the issue of knowing misappropriation of the escrow funds is whether there was an agreement between respondent and Yagoda for the payment of the balance of the mortgage, or whether respondent's testimony that he believed that there was such an agreement was credible and, further, whether said belief was reasonable.

A review of Yagoda's testimony leaves no room for doubt: he did not consider his and respondent's arrangement to be a loan. He simply agreed to give respondent a short time to remit the balance of the mortgage, on the basis of respondent's representation that the monies would be forwarded "within a week's time." When respondent was unable to meet this timeframe, he assured Yagoda, on subsequent occasions, that payment would be made "as soon as he

could." It is obvious that, aware that American Express had placed a levy on respondent's trust funds and further aware that respondent had taken steps to obtain the return of the monies from American Express, Yagoda agreed to wait for full payment until respondent received the refund check from American Express. Yagoda did so as a courtesy to respondent, with whom he had dealt in a prior matter.

Unfortunately for respondent -- and for Yagoda -- it took American Express two months to process the refund check. It is clear from the record, nevertheless, that in that intervening period of time the nature of respondent's arrangement with Yagoda did not change from an accomodation to a loan. Yagoda continued to labor under the assumption that the single obstacle delaying the full payment of the mortgage was the return of the monies by American Express. As the president and owner of a real estate and mortgage company, Yagoda knew how to negotiate loans. Yet, Yagoda's testimony made it clear that he and respondent did not discuss or consider any terms or conditions for the payment of the remaining $3,500. The Board cannot but conclude that Yagoda's cooperation with respondent was nothing more than an act of generosity in the face of respondent's temporary misfortune.

Respondent testified that he legitimately thought that he had the right to treat the monies as his own based on his promise to Yagoda "to make sure he got his money" (T9/4/1990 69). The Board finds this testimony not credible. Respondent's straitened financial circumstances, his awareness of Yagoda's demonstrated

willingness to wait for payment, the opportunity to simply affix his personal endorsement on the American Express check without the obligation to treat the refund as trust monies, the fact that he returned to Yagoda the mortgage endorsed for cancellation (thus eliminating any reasonable belief that his promise to pay Yagoda superseded or extinguished the mortgagors' obligations), his admission to the OAE Chief Auditor that he "dipped a little deeper than he should have" (Exhibit C-5 and T9/5/1990 268) all provide clear and convincing evidence that respondent knowingly misappropriated the escrow funds, in violation of RPC 1.15.

The Board is not persuaded, however, that the proofs manifestly demonstrate that respondent's use of the Perry funds was unauthorized, as alleged in the second count of the complaint.

To say that Perry's testimony was equivocal is an understatement: respondent "might have said something" about using the monies; "maybe" Perry did say that respondent could use the monies; "probably" there was a verbal agreement for respondent's use of the monies, and so on. Contrary to the panel's determination below, the Board does not find clear and convincing evidence that respondent knowingly misappropriated the Perry funds. The fact that Perry subsequently sued respondent to recover the monies does not necessarily mean that respondent did not have Perry's consent to use the funds. It may simply mean that respondent's failure to repay Perry prompted him to resort to legal

action to be made whole. In view of the foregoing, the Board recommends that the allegations contained in the second count of the complaint be dismissed.

As to count three of the complaint, the Board agrees with the panel that respondent violated RPC 1.4(a) and (b), by failing to keep the Hulls reasonably informed about the unfortunate developments and by failing to disclose to them that the Yagoda mortgage on the Asbury Park house had not been paid off. Only after a title search was conducted at the time of the sale of that house, did the Hulls discover the existence of the Yagoda lien thereon. Confronted with this unexpected circumstance, the Hulls were forced to postpone the closing of title on the house and to satisfy the $1,300 judgment. Although the Hulls thereafter obtained an assignment of the Yagoda judgment against respondent, as of the date of the district ethics committee hearing, respondent had paid only $400 on this debt. Respondent's unethical conduct caused his clients emotional and financial injury.

With regard to count four of the complaint, the Board concurs with the panel's conclusion that the evidence does not show, to a clear and convincing standard, that respondent induced or assisted Perry to testify falsely. Although the certification was authored by respondent, Perry acknowledged that he reviewed it, discussed it

with respondent, "couldn't see that much wrong with it," and then signed it (T9/5/1990 242). The Board recommends that count four of the complaint be dismissed as well.

As to count five, the Board finds no improper conduct on the part of respondent. Because of the special relationship between the parties, respondent's failure to advise Perry to seek the advice of independent counsel cannot be deemed unethical. The record is clear that respondent's and Perry's understanding about the use of the monies could not be characterized as a business deal between lawyer and client but, rather, an accomodation or a favor between close friends who also regarded themselves as cousins. The Board recommends the dismissal of count five.

* * *

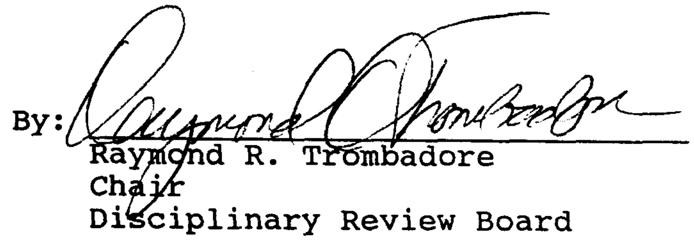
Having found that respondent's conduct, described in the first count of the complaint, constituted a knowing misappropriation of escrow funds, the Board -- not without a sense of compassion -- must recommend that he be disbarred. In Matter of Hollendonner, 102 N.J. 21 (1985), the Court for the first time addressed the near identity of escrow and trust funds, making it clear that ". . . henceforth an attorney found to have knowingly misused escrow funds will confront the disbarment rule of In re Wilson, 81 N.J. 451 (1979)." Matter of Hollendonner, supra, 102 N.J. at 28-29. In

light of this pronouncement, the requisite majority of the Board recommends that respondent be disbarred.

Three members voted against disbarment. In those members' view, respondent's good faith belief that he had a loan arrangement with Yagoda constitutes a defense to the knowing misappropriation charge. More specifically, those members believe that Yagoda's acquiescence to respondent's pledges that he would pay Yagoda as soon as possible, coupled with respondent's expectation that he would obtain a bank loan, served as a reasonable basis for respondent's belief that his promise to pay Yagoda superseded his obligation to pay off the mortgage out of the escrow funds. Those three members would recommend a two-year suspension based on the totality of respondent's ethical violations. In their opinion, the two-year suspension is justified by respondent's serious acts of misconduct, which posed substantial risks and caused financial detriment to his clients -- the Hulls -- and to the parties who had reason to rely on him as escrow agent. Those include the Homers, who entrusted respondent with funds specifically designated for the satisfaction of the mortgage, who remained obligated thereunder, and who were subsequently sued by Yagoda as respondent's co-defendants; the title company, trusting that it was insuring clear title; and the bank that financed the Hulls' purchase, relying on the reasonable premise that it was holding a first mortgage on the property.

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

Dated: 3/1/1991

By: 
Raymond R. Trombadore
Chair
Disciplinary Review Board