SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-042

IN THE MATTER OF

HILTON DAVIS,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: April 17, 1991

Decided: June 28, 1991

John J. Janasie appeared on behalf of the Office of Attorney Ethics.

Richard L. Bland, Jr. 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 VA Ethics Committee. Respondent is charged with seven counts of knowing misappropriation of client trust funds.

Respondent was admitted to the New Jersey bar in 1970. He started a sole practice in 1972, after a Superior Court clerkship and a brief stint with the Attorney General's Office. His practice over the years consisted of cases in the areas of landlord-tenant, juvenile criminal defense, negligence, and matrimonial law.

Count One: The Stark Matter (1988 Misappropriation)

In January 1988, respondent closed his attorney trust account at Midlantic Bank, which contained $1,909.85, and transferred the funds to a new trust account at the same bank. Respondent testified that he closed the old trust account because checks were being returned for insufficient funds and he could not determine the cause therefor (3T36).[1] He then discovered that, between September 16, 1987 and November 10, 1987, his secretary had apparently cashed checks from the old trust account for her personal use, without his authorization (R-6 in evidence)[2]. Despite this claim, respondent was out of trust by $2,598.28 within three months of opening his new trust account, which was not subject to theft by the secretary.

William J. Morrison, CPA, who was retained by the Office of Attorney Ethics ("OAE"), testified that he reviewed the bank statements, deposit slips, canceled checks, client ledger cards, and cash receipt and cash disbursement books, as well as respondent's own analysis of his trust account records for the first three months of 1988 (1T32[3]; P-2 in evidence with accompanying Exhibits 1-3). Morrison's analysis showed the following:

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[1] 3T refers to the transcript of the proceedings before the District VA Ethics Committee on November 29, 1989.

[2] This theft is currently under investigation by the Division of Criminal Justice.

[3] 1T refers to the transcript of the proceedings before the District VA Ethics Committee on August 23, 1989.

Trust Account Balance per the bank statement (on March 31, 1988)	$133,805.37
Less outstanding checks	(20,535.90)
Adjusted bank balances (on March 31, 1988)	$113,269,47
Client funds held in trust according to client ledger cards	(115,867.75)
Amount out of trust:	**$ 2,598.28**

This shortage resulted from respondent's disbursement to himself by a trust account check in the amount of $2,500.00 claimed as a fee from a client named Starks on February 1, 1988. However, only $500.00 had been deposited in the trust account in behalf of this client (Exhibit 4 to P-2 in evidence). Respondent disbursed this $500.00 sum on March 30, 1988 directly to the client (Exhibit 6 to P-2 in evidence). No deposit for $2,500.00 was ever made to the new trust account in the Starks matter. Thus, when respondent disbursed $2,500.00 to himself, he was invading other client funds to cover his fee. The additional $98.28 of the $2,598.28 shortage represents bank charges for which resondent had made no provision.

When asked why he wrote the Starks' fee check, respondent gave the following explanation:

Q. Were any of the landlord/tenant matters that you represented her on ever for full fee?

A. Well, I have my files, and the ones that she has, she took back or was given back to her, there's got to be five or 600 cases of landlord things for her, but you would never get a retainer from - you would never get an advance at all from Mrs. Starks.

Q. Once the landlord or tenant matters were finished, individually or any of the 500, were you ever paid a full fee?

A. Oh, you got your money to the best of the ability that she thought you represented her. You would bill her, and she would send you money. Sometimes all of it, sometimes less and you'd argue with her. . . .
[3T44]

Q. Listen to my question. The $2,500 check was drawn to yourself, captioned Starks. How or why did you write yourself a $2,500 check captioned Starks?

A. To the best of my recollection, I mean sometimes you -- you know -- you take a stand, and I think this is one of the times that I took one and paid myself the money that she had said that -- that I said that she had owed me. You know, in retrospect and in thinking about it all, to the best of my recollection, it is one of the times that we were fighting about money or my fees.

Q. But you only had $1,900, give or take a couple of extra dollars, in that account to begin with.[4]

A. Yeah, but it should have been -- that was only the money that transferred over, right? And I couldn't rationalize all of Starks -- what I did on Starks because it just got too complicated and too many files are missing. I just can't answer it any better.
[3T47-48]

The committee found that respondent was out of trust in the amount of $2,598.28 as of March 31, 1988. It did not specifically state whether the resulting misappropriation was knowing or negligent, but violations of RPC 1.15 and RPC 8.4 (c) were found. The committee further found failure to safeguard client funds, in violation of RPC 1.15.

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[4] This refers to the $1,909.85 sum that was transferred from the old trust account, for which no client source was identified.

Count Two: Misappropriation 1981-1984

In count two of the complaint, respondent was charged with misappropriation, as evidenced by the fact that his trust account was increasingly out of trust from 1981 through 1984. Respondent was also charged in Counts Three through Seven with specific instances of knowing misappropriation during those years.

When respondent was first contacted by the OAE, in 1985, concerning these matters, he hired Anthony Santorelli, Jr. to examine his trust account for the period from 1981 through 1984. In 1985, Santorelli notified respondent that his trust account had been overdrawn for each year examined (Exhibits 1-4 to P-3 in evidence). The specific shortages were stated as follows:

December 31, 1981	-	$ 3,847.27
December 31, 1982	-	$ 4,663.77
December 31, 1983	-	$27,984.99
December 31, 1984	-	$30,178.79

In his answer, respondent contended that he was without sufficient information to either admit or deny his accountant's analysis. He also testified that he had contacted all of the clients for whom funds were supposedly due according to the analysis, and that they all had stated that there were no monies owed to them [3T52-53].[5]

[5] This testimony is contradicted by the fact that six clients have made claims to the Client Protection Fund ("CPF"). In 1989, the CPF paid $19,900 to two clients, Gilliam and the estate of Boiles.

The OAE accountant, William Morrison, testified regarding the bank balances at the conclusion of each year. Although his accounting figures verified Santorelli's, they showed a lesser amount out of trust in December 1983 because he gave respondent credit for a greater amount in fees (1T66-67). Morrison's reconciled bank figures for 1981-1984 are as follows:

As of December 31	Amount Out of Trust
1981	($ 3,847.27)
1982	($ 4,663.77)
1983	($26,556.66)
1984	($30,178.79)

Respondent received warning from his bank of these trust account problems during the years 1981-1984. Indeed, as noted by Morrison, on two occasions, June 14, 1983 and March 9, 1984 (Exhibits 18 and 19 to P-3 in evidence), the trust account was overdrawn. An overdraft charge was assessed against the account and recorded in the bank statement. Furthermore, seven trust account checks were returned for insufficient funds, two of which were checks drafted to respondent, personally. A separate $16 item charge for each of these returns was listed on the bank statements (Exhibits 20, 20A, 20B, 20C, 20D, 21 and 21A to P-3 in evidence).

Respondent testified that he tried to reconcile his bank statements on a yearly basis (3T49-50) and that, at a minimum, he did look at the bank statements on a monthly basis:

> Q. Do you recall looking at the monthly statements when they came in? Even if you didn't sit down to reconcile them, that you would at least -- I don't know if the secretary would open up the bank statements, that she would give them to you and you would glance at them in some way?
>
> A. Yes, uh-huh. And you would try to associate each one by putting a number of the check -- this is later on. You put like a - if there's a check for $18, was it -- was the check 1801 or 1802 on the --
>
> Q. On the bank statement?
>
> A. On the bank statement. So, at least, you would have all the bank statements because there's always an argument going around as to where -- what do you do with the deposit slips and the -- in retrospect, the deposits and the checks. Do you keep them in order? Do you keep them with the statement? Or do you put them back in the book or do you keep them with the file?
>
> Q. Let me ask you --
>
> A. So, you always try to make sure that, at least, the bank charged you off for each one of the checks that you knew -- you knew what the checks were --
>
> [3T235-236]

Finally, respondent acknowledged that his type of trust account lumped all client accounts together, so that if the account was overdrawn, all of his clients' trust funds were missing (3T191). Therefore, for the two months that his trust account was overdrawn, he had to know that all of his clients' funds had been invaded.

The committee found that the deficits in respondent's trust account from 1981 to 1984 clearly represented a failure to safeguard client funds, in violation of DR 9-102(B)(1), and knowing misappropriation, in violation of DR 9-102, and DR 1-102(A)(4) and (6).

Count Three: Misappropriation due to home refinancing

In 1983, respondent refinanced his home in order to pay off two IRS tax liens totalling $56,383.14 (Exhibits 5-A and 5-B to P-3 in evidence.) Although respondent had hired an attorney to handle the refinancing, in fact respondent himself sent three loan request letters to the bank and personally wrote the trust account disbursement checks after depositing the bank loan into his own trust account (Exhibits 29A-E to P-3 in evidence; 3T218-222).

After respondent had paid off the prior mortgage and the closing costs of the refinancing from the loan proceeds, the IRS tax liens exceeded the total of the new loan proceeds by $13,407.50 (Exhibit 5 to P-3 in evidence). He testified that he borrowed money from his brother-in-law to make up the difference (3T56), but admitted that no deposit from outside sources was reflected on the trust account bank statement (3T220). Respondent had deposited his own personal check for $5,000 at the same time that he deposited the bank loan proceeds, but that personal check was returned for insufficient funds. On September 20, 1983, respondent nonetheless issued two checks from his attorney trust account to the IRS to satisfy the tax liens, thereby invading client trust funds for his

own benefit, in the amount of $13,407.50. The OAE contends that, because respondent handled all the loan funds and personally wrote the disbursement checks, which exceeded the available loan funds by over $13,000, he had to know at that point that he was invading client funds.

The committee found that respondent had knowingly misappropriated client funds to pay the balance of the tax liens not covered by the home refinancing. This action violated DR 9-102 and DR 1-102(A)(4). The committee also found that respondent had commingled personal and client funds, in violation of DR 9-102(A), and had failed to safeguard client funds, in violation of 9-102(B)(1).

Count Four: The WNJR Radio Loan

Respondent prepared legal matters for WNJR, a radio station. Mr. Robinson, the chairman of the station's board and majority stockholder, testified that, by 1983, the station owed respondent between $10,000 and $15,000 in legal fees. However, respondent did not bill the station for the fee. On January 11, 1983, he received a check in the amount of $5,000 with the notation that it was a thirty-day loan (Exhibit 6-B to P-3 in evidence). Although respondent never placed this loan into his trust account, on March 1, 1983, he issued a trust account check for $5,000 to WNJR, thereby invading client funds to pay back the personal loan. Respondent was charged with misappropriation of $5,000 in client funds.

In his answer to this count (R-2 in evidence), respondent contended that the money from WNJR was not a loan, but an advance on work to be done, which advance he returned to the client when the work was not done. At the committee hearing, respondent changed his answer, stating that the money was for work already done and that he had forgotten that accomplishment because of his alcoholism, until Robinson testified (3T157). Respondent alleged, as an affirmative defense, that he inadvertently wrote the check to WNJR against his trust account, instead of against his business account.

The committee found knowing misappropriation when respondent issued the trust account check to WNJR, in violation of DR 9-102 and DR 1-102(A)(4), and failure to safeguard client funds, in violation of DR 9-102(B)(1).

Fifth Count: The H.J. Matter

On February 21, 1983, respondent issued a trust account check for $500. This money was given to help another attorney who needed to raise funds quickly to pay a debt.

Q. With the Chair's indulgence, leading questions. Was Mr. [J] a client of yours?

A. Oh, no, he was not a client of mine. He was an attorney.

Q. Had Mr. [J] given you $500 to be placed into your trust account?

A. Mr. [J] had not given me -- had not given me $500, and I -- we all knew, quote, unquote, that Mr. [J] was going to give the money back, but I didn't even think when I gave the check in terms of -- I thought in terms of Mr. [J] and his problem, not in terms of where the check was coming from or what have you.

He was going to repay -- repay the money to those of us who paid his indebtedness.

Q. The $500 check that you wrote to him out of your trust account check, whose money did you think you were using for that $500?

A. I thought it was mine. I did not realize that -- and I can honestly say this without question -- I didn't really even realize that that money was coming out of a trust account because when they came into my office and they dropped the bomb on me about [Mr. J], I didn't go through the whole dialogue. I didn't go through the whole dialogue.

Q. You grabbed a checkbook?

A. Yeah, and I --

Q. Wrote a check?

A. Gave it to the committee, Mr. [J] and his committee and they said they'll give it back to me and that was it. I never got the money back, but --

Q. None of us got our money back. That's not before the committee.
In any event, you understand that you were borrowing client's money to assist Mr. [J], that that would be an ethics violation?

A. Oh, yeah, I would have known that, yes.

Q. Was your intent to borrow $500 of somebody else's, a client of yours [sic] money in the trust account, with the intent of replacing it when Mr. [J] made good on his --

A. I just don't recall it, and I did not think of it in terms of borrowing money from any account, but giving [Mr. J.] -- whether it was from my own account, I just didn't think about it to tell you the truth.
[3T83-85]

The committee found that respondent knowingly misappropriated client funds when he issued the $500 trust check for attorney J., in violation of DR 9-102 and DR 1-102.

Sixth Count: Misappropriation from the Nora Bauknight Estate

There are two distinct transactions in this sixth count. In the first matter, on January 22, 1982, Paul Bauknight closed a checking account of Nora Bauknight, of whose estate respondent was the executor. Bauknight drafted a check in respondent's name for the $10,796.45 balance of that account (Exhibit 27-B to P-3 in evidence). These funds were never deposited in respondent's trust account between 1982 and 1984 and, on September 12, 1986, in a letter to Bauknight, respondent acknowledged that he owed approximately $8,000 of this $10,000 sum. In the letter, he indicated he would send Bauknight half of this amount in three months and the balance three months later (Exhibit 27-E to P-3 in evidence).

At the committee hearing, respondent was asked why he had not paid Bauknight these funds:

> Q. There then came a point in time when you and Mr. Bauknight -- and I apologize, I don't recall which one -- sought to enter into an agreement to pay him back monies that you acknowledged were his. Do you recall that?
>
> A. Oh, yes, sure.
>
> Q. To assist the panel, I'm talking about exhibit 27-E. How or why could you not pay him back his eight to $10,000 if it was in a separate bank account for Bauknight exclusively?[6]
>
> A. At that time and place I could have.

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[6] Earlier, respondent testified that he put this money in a separate trust account that retained the name of an earlier client, the Nesbitt account [3T93].

Q. Why didn't you? If you can answer it.

A. In the Bauknight matter, there -- I could have and, retrospectively, I should have, but I didn't. I didn't. . . .

[3T96]

Q. Very briefly, Mr. Chairman, on cross-examination, Mr. Davis, Mr. Janasie asked you, you still haven't paid Bauknight back. Do you remember that question?

A. I remember it, yeah. And the answer to the question was I have not, yes, uh-huh.

Q. If the account is frozen,[7] how could you pay him back?

A. I can't until they okay it.

Mr. Bland: I have nothing further.

RECROSS - EXAMINATION BY MR. JANASIE

Q. Just on that point, you admitted in 1986 to Paul Bauknight that you owed him?

A. Yes.

Q. You could have paid it back in 1986?

A. Absolutely.

Q. You could have paid it back in 1987?

A. Absolutely.

Q. You could have paid it back up until January 3, 1989?

A. Absolutely.

Q. But for that period of time, you didn't pay him a cent?

A. That's right.

[3T225-226]

In March 1983, respondent issued two checks from his trust account to the New Jersey Inheritance Tax Bureau in behalf of the

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[7] The Nesbitt account was frozen by the Court at the time of his temporary suspension.

Bauknight estate. One of these checks, in the amount of $3,255.66, was returned for insufficient funds, while the second check, for $578.87, cleared the bank. On April 1, 1983, he wrote a check to himself for $2,500 for legal fees in the Bauknight matter. At the time of these three transactions, no Bauknight funds were on deposit in respondent's trust account. Between March and April 1983, respondent disbursed a total of $23,348.99 ($578.87 + $2,500 + $17,014.46 + $3,255.66[8]) from the trust account on behalf of the Bauknight estate. Therefore as of April 28, 1983, respondent should have held $6,207.81 on deposit in his trust account.

The second transaction in the Bauknight estate concerns a trust account deposit for $29,556.80 in Bauknight funds on April 6, 1983. During the month of April 1983, respondent disbursed $17,014.46 of that amount to pay bills in behalf of the estate.

On or about May 20, 1983, respondent drafted seventeen checks, totalling $5,771.25, to pay other estate bills (Exhibit 27-H to P-3 in evidence). These checks were never disbursed. Indeed, as of May 20, 1983, respondent's trust account showed a balance of $2,564.91. This continued into June, where the balance was reduced to ($106.18) (Exhibit 10-A to P-3 in evidence).

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[8] Please note that it is not clear from Morrison's analysis that this check was not resubmitted and paid and, therefore, it has been included in the analysis to give respondent the benefit of the doubt. If it was not paid, respondent owes the estate an additional $3,255.66.

The OAE argued that the fact that respondent withheld these checks is evidence of his knowledge that his trust account contained insufficient funds to cover these payouts in May and June of 1983, and that he, therefore, knew he was invading other clients' funds during those months. Finally, none of the $6,207.81 sum that should have been held in trust by respondent has ever been returned to Bauknight.

The committee found that respondent misappropriated $6,207.81 in trust funds that should have been held in behalf of the Bauknight estate as of April 28, 1983. Respondent admitted that he owed $8,000 of the additional $10,000 sum, and that he has consciously not repaid this money for more than five years. Therefore, the committee found both knowing misappropriation and failure to safeguard $16,207.81 in client funds, in violation of RPC 1.15.

Seventh Count: Advancement of Legal Fees

Respondent disbursed funds to himself from his trust account in advance of either earning or depositing to his trust account corresponding fees from clients on seven occasions, between August 26, 1981 and November 14, 1983. As demonstrated by the following chart, although respondent left certain client fees on deposit in the trust account during this period, his practice resulted in invasion of other funds for twenty-seven months of this twenty-eight month period.

Date	Description	Amount Disbursed	Balance + or (-)	Exhibit to P-3 in evidence
1981				
8/26	Disbursement	$ (2,000.00)	$ (2,000.00)	28
1982				
2/19	Fee - Jessie	487.50	(1,512.50)	
2/25	Fee - Harris	225.50	(1,287.00)	
10/15	Fee - White	195.09	(1,091.91)	
11/01	Fee - Robbes	100.00	(991.91)	
1983				
1/6	Disbursement	(500.00)	(1,491.91)	
3/7	Disbursement	(1,000.00)	(2,491.91)	
3/8	Fee - Davis	50.00	(2,441.91)	28-A
3/21	Fee - Beasley	100.00	(2,341.91)	
8/8	Fee - Pickens	700.00	(1,641.91)	
8/8	Fee - Whitney	105.00	(1,536.91)	
9/6	Disbursement	(1,000.00)	(2,536.91)	
9/23	Fee - Jones	4,130.00	1,593.09	28-B
10/5	Disbursements	(1,000.00)	593.09	
10/21	Disbursements	(2,000.00)	(1,406.91)	
10/31	Fees - Linton	100.01	(1,306.90)	28-C
11/14	Disbursements	(1,000.00)	(2,306.90)	
12/17	Fee - Kornegay	1,700.00	(606.90)	28-D

[P-3 in evidence, at 12]

Indeed, as of March of 1983, respondent was out of trust by nearly $2,500 based on these advance disbursements alone. Although respondent admits that he left fees in his trust account, he denied that he did so deliberately to replenish client funds that he had knowingly misappropriated when he advanced funds to himself (3T159). During this same time period, and specifically on August 12, 1983, respondent disbursed $600 to a client, Harriet Coleman, together with a $300 fee to himself, twenty-six days before he

deposited the covering funds. Similarly, on August 22, 1983, respondent issued another $1,100 fee to himself in the Deakias matter, twenty-one days prior to the deposit of the related settlement proceeds (P-3 in evidence, at 4-5).

Respondent testified that this occurred because, while he was on vacation, his secretary did not deposit the settlement proceeds, as requested (3T159-160). However, respondent voided two checks in the amount of $400 payable to his client, Mary Jenkins, between August 1983 and January 1984. He did not remit the settlement proceeds to her until February 9, 1984, giving rise to the presumption that he knew his trust account could not cover that disbursement, when he wrote the August and January checks.

The OAE charged that respondent had demonstrated a pattern of using client money to advance funds to himself and deliberately leaving subsequent fees in the trust account to replenish those earlier disbursements.

The committee found advancement of legal fees in 1983 only, which constituted knowing misappropriation, commingling of personal and client funds, and failure to safeguard funds, all in violation of RPC 1.15. The committee considered the proofs to be insufficient with regard to the charge of advancement of fees in 1981 and 1982.

Mitigating Factors and Affirmative Defenses

Respondent presented evidence that, in 1987, his secretary stole trust funds. He offered this as a defense to the knowing misappropriation charged in the first count. However, this alleged

theft occurred before respondent opened his new account in January 1988 It is, thus, inapplicable to the first count.

Furthermore, the conduct charged in the first count occurred three years following the audits both by respondent's own accountant and by the OAE's accountant. Respondent had been given clear notice of the requirement that he maintain proper trust account procedures. The presenter questioned respondent on how he could "inadvertently" be overdrawn again, given the experience of the audits of 1985:

> Q. So whatever you gleaned from those conversations from other attorneys, despite the fact you had no formal education as far as the running of the trust account, you knew from those conversations certainly that it was important that you pay attention to it, right?
>
> A. Sure.
>
> Q. And certainly when Santorelli told you in 1985 that you were $30,000 short, you knew it was important to take care of your trust account, isn't that right?
>
> A. Absolutely, sure.
>
> Q. And when you opened your new account up in 1988, inside of three months, according to Morrison's report, you are already out $2,600, isn't that right?
>
> A. That's what his report showed.
>
> [3T196]

Respondent's second defense to all of the charges of misconduct is that he suffered from alcoholism. Dr. Alan Clark, a neurologist who for ten years has been involved with the impaired physician program, testified in respondent's behalf. Dr. Clark testified that he first treated respondent in the spring of 1988 for a neurological disorder often caused by alcohol, and that respondent had been hospitalized for alcohol treatment in January

1989. Laboratory reports showed evidence of liver dysfunction, which cleared once respondent began to abstain from alcohol (2T115).[9] According to Dr. Clark, consultation with family members indicated that, for four to five years before 1988, respondent had changed greatly due to alcohol; he began to have black-outs and to miss appointments, and had become estranged from his wife and children (2T94, 2T110, 2T118). However, despite these overall symptoms, Dr. Clark was unable to say, with medical certainty, that respondent did not know it was wrong to take client funds:

> Q. Being an alcoholic wouldn't stop that attorney from knowing that it is wrong to help himself to that client's money whether it is for his purposes or others?
>
> A. Oh, it might. It might very well affect his ability to know that, particularly if he were, A, directly under the influence of alcohol at the time; B, suffering from some post-binge state; or, C, if he had a chronic brain problem secondary to the poisoning of alcohol.
>
> Q. Have you found any of that in this instance as far as Mr. Davis is concerned?
>
> A. Oh, I do think he suffered from those things while he was actively drinking. That's why we sent him away to treatment. Otherwise, why would we send him to treatment?
>
> [2T137-138]
>
> . . .
>
> A. In an alcoholic's disease, there are times when an alcoholic does not know what is right and wrong as manifested by the drunken state or other states related to that.
> Like the fugue state, there are states in which patients are -- their mental function, their mental capacity, their understanding about the world about them, themselves, et cetera, is distorted, sometimes completely obliterated.

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[9] 2T refers to the transcript of the proceedings before the District VA Ethics Committee on October 19, 1989.

Q. So you wouldn't be able to function at all?

A. At times, an alcoholic does not function at all.

Q. So then if he's going to court, if he's running his office, if he is showing up for work, that would be an indication that he's not in a fugue state but that he knows what's going on. A person in a fugue state, in other words, wouldn't show up for work, isn't that right?

A. That's true.

Q. And he wouldn't show up for court; is that right?

A. I emphasized that a fugue state is limited and that, at the same time, he may do this at one minute and the next minute he's not. I mean, that's the characteristic of alcoholism.

Q. So, there's basically a total helplessness that's involved here?

A. No, sir. I emphasize to you that it is periodic, specific areas of dysfunction that may occur for an hour to weeks, intermixed with time when the person is able to function. That happens all the time.

Q. But an alcoholic -- a severe alcoholic can nevertheless have the capacity to look at his bank account after he has written a check, realized that the money isn't in the bank and then void that check out so that it isn't cashed against his account and bounced; isn't that correct? He'd have the capacity to do that?

A. Some do, some don't, depending upon what stage you find them.

Q. Mr. Davis in 1983 was able to refinance and manage the refinancing of his own home in Linden. Basically, he did his own closing, although there was an indication that there may have been another attorney involved, and was able to consciously sign trust checks and pay off two outstanding IRS tax liens.
That wouldn't be an indication that he was in a fugue state at that time, would it, sir?

A. No, sir.

Q. When Mr. Davis in 1986 admitted to a client of his that he owed $8,000 to the heir of a particular estate and then tried to work out payments over a period of time, that wouldn't be an indication that he was in a fugue

state at that time, would it, sir? Acknowledging a debt and then trying to work out a plan to repay it?

A. Counsellor, of course not. That doesn't indicate a fugue state, but that doesn't mean that he is not suffering from alcoholism.

Q. I am not quibbling with that.

A. But that he may have a fugue state.

Q. But at that particular time, he was not?

A. No, he was functioning fine.

Q. And if a person makes a conscious decision to close out one trust account and re-open another one, that would also be an indication of his ability to function is okay, isn't that right?

A. In my judgment, it would tend to indicate that.

Q. And during the period of time that you have testified about, about within the last -- well, let's say five years going back from the intercession as you have indicated, there are indications in the record and the documents, et cetera, that Mr. Davis was representing clients, was representing clients on personal injury cases, was negotiating settlements on their behalf and was receiving checks into his trust account or representing the funds that were awarded to his clients on these personal injuries cases.
These would all be indications that he was able to function as an attorney during this period of time, isn't that correct?

A. It means at that period of time, he was able to function well.

[22T142-146]

With regard to these affirmative defenses, the committee found that respondent had failed to show that his alcoholism rendered him incapable of distinguishing between a knowing and unknowing misappropriation. The committee also found his defense that his misconduct was somehow related to his status as a minority attorney to be "an insult to every black attorney in this State."

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the full record, the Board is satisfied that the conclusions of the committee in finding respondent guilty of unethical conduct are fully supported by clear and convincing evidence.

The Board agrees with the committee's determination that seven counts of knowing misappropriation were clearly and convincingly proven. Count one charged that one month after he opened a new trust account, respondent drafted a $2,500 trust check for fees to himself in the Starks matter. Only $500 had been deposited for Starks in the new account. When asked why he did this, respondent did not indicate that he had no recollection, or that he was inebriated. Rather, he testified that he decided to take a conscious stand with regard to fees that he believed he was owed by Starks. A trust account that began with a $1,900 balance, to which $500 from Starks was added, cannot generate $2,500 in fees one month later.

At the Board hearing, respondent's counsel urged the Board to accept that respondent truly believed he was not misusing client funds, but rather believed he was taking out fees that he had left in the trust account. The Board cannot accept this explanation, particularly for a 1988 misappropriation that occurred only one month after opening this new trust account. Respondent's 1985 experience, when his own accountant had advised him that he was out of trust for every year from 1981 through 1984, should have taught

him to exercise caution in operating his trust account. Yet just one month after opening a new account, he took "legal fees" in excess of what he had deposited. At the very least, his trust account withdrawal posed a "realistic likelihood" of invading client funds. In re Skevin, 104 N.J. 476 (1986). In Skevin, the Court held that an attorney who acts with willful blindness satisfies the requirement of knowledge and invokes the Wilson sanction.

Count two charged a pattern of misappropriation, over three years, of increasing amounts up to $30,000. Respondent testified that he did look at his bank statements on a monthly basis. Again, it is impossible that, when he reviewed these statements, he did not consciously understand the significance of the return of seven checks for insufficient funds, when the checks had supposedly been drawn against existing client funds; or that he did not realize the significance of the fact that the account as a whole had a negative balance on two occasions.

The evidence in count three, which involved the payment of the IRS liens, also clearly and convincingly establishes knowing misappropriation. Respondent deposited a total of $60,872.00 and, within one week, used his trust account to pay $56,381.14 to the IRS and to pay off the prior mortgage of $9,273.90. Client funds were obviously used to complete this transaction. Clearly, respondent had to be aware that he had gone beyond the $60,000 sum, thereby invading client funds. His ability to process the paperwork involved in this new mortgage and to pay the IRS also

negates the defense that his alcoholism had rendered him incapable of understanding his actions. His completion of this complicated set of transactions belies the claim that he was continually in a dependent state due to alcohol abuse.

With regard to the WNJR loan, charged in count four, respondent explained that he had made a mistake when he had drawn the check from his trust account, rather than from his business account. A simple look at the check, which has printed "Hilton Davis, Trustee" at the top, renders such a defense unconvincing.

In response to the fifth count, respondent indicated that he did not even think from which account he had drawn the $500 sum as a loan to another attorney. As discussed above, such willful blindness has already been addressed by the Court. In Skevin, supra, 104 N.J. 476 (1986), the Court disbarred an attorney who maintained a practice of advancing legal fees to himself before the receipt of settlement proceeds. The Court found that each advance posed at least a realistic likelihood of invading the accounts of another client:

> [w]hile such evidence might not sustain a finding of criminal intent to deprive others of their funds, the evidence clearly and convincingly demonstrates that defendant [sic] knew the invasion was a likely result of his conduct, a state of mind consistent with the definition of knowledge in our statute law. N.J.S.A. 2C:2-26(2).
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> [In re Skevin, supra, 104 N.J. at 486]

Respondent wrote the check for $500 on February 2, 1983. As of December 31, 1982, his unreconciled bank balance showed $1,303.62, which was further reduced to $1,041.96 by the January

31, 1981 bank statement. Clearly, writing a $500 trust account check as a personal loan posed a realistic likelihood of invading the trust funds of another client.

In the sixth count, the OAE clearly demonstrated the receipt of $10,000, which was never deposited into any identifiable trust account. Furthermore, although respondent acknowledged to his client that he owed at least $8,000 of this money, he has never returned any of it. The OAE has clearly and convincingly met its burden of proving the knowing misappropriation of client funds. Respondent offered the defense that he has safely kept these funds in a mismarked "Nesbitt" trust account, but he has not supported this claim with any reliable evidence.[10]

Respondent, therefore, has not carried his burden of coming forward to prove his defense in this case. Furthermore, he has not addressed the additional $6,207.51 sum still owed to the Bauknight estate. Therefore, the Board concludes that respondent has knowingly misappropriated $16,207.51 in Bauknight funds.

Finally, the Board concurs with the committee that the proofs in count seven (advancing fees) were properly limited to the year 1983. A glance at the chart on page 15, supra, indicates that the paucity of items noted in 1981 and 1982 does not justify a finding, to a clear and convincing standard, of knowing advancement of fees

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[10] Respondent would have to provide convincing evidence that the money has all along been deposited in an appropriate trust account. In addition, respondent would have to submit a certification from Nesbitt that the funds in the account that bears his name do not belong to Nesbitt.

in those earlier years. However, the six disbursements in 1983, ranging from $500 to $2,000, clearly and convincingly demonstrate a pattern of knowing misappropriation.

Seldom is there an outright admission by an attorney that he or she knew, at the time of the occurrence, that he or she was misusing client funds. In the absence of such an admission, circumstantial evidence may lead to the conclusion that a lawyer knew or "had to know" that client funds were being invaded. See In re Johnson, 105 N.J. 249, 258 (1987). Like the committee, the Board concludes that the evidence clearly and convincingly establishes that respondent knew he was invading client funds for his personal benefit, in all of the seven counts charged. The Board does not give credence to respondent's claimed lack of awareness. As the court stated In re Johnson, supra, 105 N.J. at 260 (1987):

> We will view "defensive ignorance" with a jaundiced eye. The intentional and purposeful avoidance of knowing what is going on in one's trust account will not be deemed a shield against proof of what would otherwise be a "knowing misappropriation." There may be semantical inconsistencies, but within our ethics system, there is sufficient difference between intentional ignorance and legitimate lack of knowledge.

It simply strains credulity that respondent did not know of his many instances of misuse of client funds over this extensive time span.

Finally, although the record is clear that respondent was an alcoholic during the time of the events in question, and that he has made strides toward rehabilitating himself, neither factor can save respondent from disbarment under current law. The Court has

determined that ". . .[t]here may be circumstances in which an attorney's loss of competency, comprehension or will may be of such magnitude that it would excuse or mitigate conduct that was otherwise knowing and purposeful." In re Hein, 104 N.J. 297, 302 (1986), citing In re Jacob, 95 N.J. 132, 138 (1984). In this case, however, the proofs offered by respondent's own expert witness do not demonstrate that respondent ". . . was unable to comprehend the nature of his act or lacked the capacity to form the requisite intent." In re Hein, supra, 104 N.J. at 303. Disbarment is, therefore, required. In re Wilson, 79 N.J. 154 (1979).

Accordingly, the Board unanimously recommends that respondent be disbarred.

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

Dated: 6/28/91

By: Raymond R. Trombadore
Chair
Disciplinary Review Board