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SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 91-394

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IN THE MATTER OF :  
BRIAN P. MCKINNEY, :  
AN ATTORNEY AT LAW :

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Decision and Recommendation  
of the  
Disciplinary Review Board

Argued: February 26, 1992

Decided: April 14, 1992

John McGill appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear.<sup>1</sup>

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 VII Ethics Committee (DEC). The formal complaint  
filed in this matter charged respondent with knowing  
misappropriation of \$239,026.99 from a real estate closing, as well  
as failure to safeguard client funds.

The facts are as follows:

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<sup>1</sup> Attempts to locate respondent have been unsuccessful since  
at least March 1, 1988, when the sellers' attorney in the  
underlying matter tried to contact respondent at his law office.  
The complaint in this matter was sent by certified mail and notices  
of the DEC and the DRB hearings have been published in both a local  
Middlesex County newspaper and the New Jersey Law Journal.

The Club Kingsway, Inc. Matter

Respondent represented the Prodel Corporation, in the purchase of a piece of real property from another corporation, Club Kingsway, Inc. Continental Title Insurance Company provided the title insurance for this closing and brought the complaint in this matter.

On January 22, 1988, respondent served as the settlement agent in the above closing, which required him to pay off the entire first mortgage loan held by United Jersey Bank, in the amount of \$281,348.43. Rather than paying off the loan, respondent sent a check to the bank in the amount of \$13,923.12 on February 11, 1988 (P-1 in evidence, Attachment 2, Exhibit 37). The letter accompanying this check stated that the payment was intended to cover interest on the unpaid balance of the mortgage through the period ending February 28, 1988. It is the position of the Office of Attorney Ethics (OAE) that this interest payment demonstrates knowing misappropriation of the funds entrusted to him to pay off the mortgage and, further, that the interest payment was made in an attempt to forestall the bank from notifying the authorities (T11, T24-25)<sup>2</sup>

On June 28, 1988, Continental Insurance Company paid United Jersey Bank \$279,356.57 and became the assignor of the "Club Kingsway" mortgage that was never paid by respondent (P-10 in

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<sup>2</sup> T refers to the transcript of the DEC hearing of November 6, 1991.

evidence).<sup>3</sup> Respondent, who is still missing, has also been indicted for theft as a result of his actions in this case (P-7 in evidence).

William J. Morrison, a Certified Public Accountant hired by the OAE, testified concerning the results of his audit of respondent's trust account on March 18, 1988. He examined respondent's bank statements, canceled checks, and client files for the period of September 1, 1987 until March 18, 1988. Respondent was not present at this audit, nor did he leave in his office the records normally used in reconstructing an attorney's trust account, including the cash receipts journal, the cash disbursements journal, and the client ledger cards.

The following chart shows the deposits and disbursements from respondent's trust account from January 15, 1988 to February 24, 1988:<sup>4</sup>

<u>Date</u>	<u>Amount</u>	<u>Description</u>
Bank balance January 15, 1988	\$2,334.02	
Deposits:		
January 19, 1988	180,739.37	Connelly closing
January 25, 1988	400,000.00	Club Kingsway, Inc. closing
February 11, 1988	<u>133,625.16</u>	Lo Re matter
Funds available	\$716,698.55	

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<sup>3</sup> The attorney for Title Insurance Company testified that Title's monetary loss has exceeded \$385,000 (T22-23).

<sup>4</sup> These figures are reconstructed from Morrison's audit-letter of March 29, 1988 to the OAE (P-1 in evidence, Attachment 2).

## Disbursements:

1. Other Clients	(142,645.87)	Payments to clients for funds previously invaded
2. Connelly	(175,050.78)	
3. Lo Re	(132,787.16)	
4. Club Kingsway, Inc.	(146,234.24)	
5. Brian P. McKinney	( 41,800.00)	
6. Parents' mortgage	( 26,900.76)	
7. United Jersey bank interest	( 13,923.12)	
8. Carol Erickson five (5) weeks net pay	( 1,547.50)	
9. Personal debt	( 13,621.50)	
10. Real estates taxes	( 588.24)	
11. Bank charges	( 20.00)	
Bank balance on February 24, 1988	<u>\$21,579.38</u>	

An elaboration of the above items follows:

1. Other Clients (\$142,645.87) - Respondent invaded Club Kingsway funds to cover the disbursements, noted below, to clients whose funds should have been held in the trust account as of January 15, 1988; the balance on that date was only \$2,594.75 (P-1 in evidence, Attachment 2 at 3-5).

<u>CLIENT</u>	<u>AMOUNT</u>	<u>TRUST ACCOUNT CHECK NUMBER</u>	<u>DATE OF DISBURSEMENT</u>
Ziegler	\$ 9,000.00	1973	1/20/88
	4,000.00	1974	1/20/88
Omblets	6,189.73	1981	1/21/88
Angerbauer	69,301.14	1996	2/2/88
Farrell	19,900.00	1997	2/2/88
Hart	8,500.00	1998	2/2/88
Francesco	25,000.00	1999	2/2/88
Andrews	245.00	2306	2/9/88
Neylon	510.00	2307	2/9/88

2. Connelly (\$175,050.78) and 3. Lo Re (\$132,787.16) - Both of these real estate closings had separate funds deposited in

January 1988 to cover their disbursements, which did not invade any Club Kingsway funds.

4. Club Kingsway, Inc. (\$146,234.24) - Five checks were legitimately distributed from these trust funds in relationship to the closing:

<u>Date</u>	<u>Payee</u>	<u>Check #</u>	<u>Amount</u>
January 22, 1988	Robert Mai & Club Kingsway	1984	\$100,862.52
January 22, 1988	Brand & Haughey, Esq.	1985	12,348.72
January 22, 1988	Bruce Associates	1986	28,000.00
January 22, 1988	Oak Insurance Agency	1987	2,950.00
February 10, 1988	Camden County Clerk	2309	2,073.00
			<u>\$146,234.24</u>

5. Brian P. McKinney (\$41,800) - Respondent issued \$41,800 in trust funds directly to himself. With the exception of one check, there was no notation on these fourteen checks indicating any legitimate basis for these withdrawals.

6. Parents' Mortgage (\$26,900.76) - Respondent's secretary indicated during the audit that respondent's parents had taken out a mortgage on their home to lend money to respondent. Respondent used Club Kingsway funds to pay off that mortgage.

7. United Jersey Bank Interest (\$13,923.12) - This interest payment would not have been necessary if respondent had paid off the loan, as required, at the time of the closing in January.<sup>5</sup> In essence, this entire payment should have gone toward the payment of principal.

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<sup>5</sup> \$2,000 of the \$13,923.12 went toward the principal of the loan. The rest of the money constituted interest for the five months until Continental Title Insurance Company paid United Jersey Bank (T26).

8. Carol Erickson (\$1,547.50) - On February 8, 1988, respondent paid his secretary's salary for the five forthcoming weeks with a trust check, utilizing Club Kingsway funds.

9. Personal Debt (\$13,621.50) - On February 9, 1988, respondent issued a check for \$13,621.50 to obtain a bank check for Andrew Gillet. A review of the Gillet file shows that respondent did not owe his client any money with regard to that case. Respondent's secretary indicated during the audit that the money represented repayment of a personal loan to respondent.

10. Real Estate Taxes (\$588.24) - Respondent paid real estate taxes on property he owned, again using Club Kingsway funds.

#### Failure to Safeguard Client Funds

The complaint also charges respondent with failure to safeguard other client trust funds. As an example, the complaint referred to the Club Kingsway settlement statement (P-1 in evidence, Attachment 2, Exhibit 39), showing a \$20,000 deposit. The OAE made the assumption that respondent was required to hold this deposit and that, in failing to do so, he did not safeguard these funds. This assumption is inaccurate, as it appears that the seller's attorney held the deposit funds in this matter.<sup>6</sup>

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<sup>6</sup> Confirmation that this procedure was followed can be deduced indirectly from the Lawyer's Fund for Client Protection ("CPF") action on this case. The buyer submitted a claim to the CPF but did not include the deposit as part of the funds stolen. Since the buyer listed all funds that he believed he lost due to respondent's actions to the CPF, it is reasonable to assume that the seller held the deposit funds in escrow and that respondent never had the \$20,000 in his possession.

Nonetheless, respondent paid out \$142,645.87 of Club Kingsway funds to other clients because respondent's account only had a balance of \$2,334.02 before the Kingsway deposit. The record clearly and convincingly shows that other client funds should have been in the trust account but they were not and respondent used the Club Kingsway funds to pay these obligations. This is certainly sufficient proof of failure to safeguard funds.

The DEC found that respondent "misappropriated client funds and failed to safeguard client funds" by his failure to pay off the Club Kingsway mortgage with the funds he received as settlement agent at the real estate closing, and by his use of those funds to make payment to clients for funds previously invaded by him.

#### CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is convinced that the findings of the DEC that respondent is guilty of unethical conduct are supported by clear and convincing evidence.

On January 15, 1988, respondent's trust account had a balance of only \$2,334.02. He then participated in three closings that led to substantial deposits of \$180,739.37, \$400,000.00 and \$133,625.16, respectively. Respondent appropriately paid out all but \$6,000 from the other two closings within two weeks, leaving the \$400,000.00 in Club Kingsway funds in the account. Respondent then proceeded to disburse \$84,458 from the Club Kingsway funds for his own personal obligations. He further used \$142,645.87 in Club Kingsway Funds to pay off other clients whose funds he had

previously misappropriated. Respondent's accounting records, which show only a \$2,334.02 balance on January 15, 1988, when juxtaposed with the large size of the disbursements for non-Kingsway purposes following the Kingsway deposit, demonstrate that respondent must have known he had misappropriated the Club Kingsway funds.

However, the proof of knowing misappropriation is not limited to accounting records alone.<sup>7</sup> Respondent was an experienced real estate attorney; he knew that he had an absolute obligation to pay off the Club Kingsway mortgage at the time of the closing on January 22, 1988. Indeed, sufficient funds were provided at closing to accomplish this result. Instead, on February 11, 1988, respondent wrote to the mortgagee, enclosing only an interest payment of \$13,923.12. Payment of the interest, rather than payoff of the entire mortgage, established that respondent knew that he had misused trust funds.

Finally, although it hardly merits comment, respondent's abandonment of his practice without paying off the Club Kingsway mortgage<sup>8</sup>, further confirms that he knowingly misappropriated the Club Kingsway funds.

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<sup>7</sup> The following described actions distinguish this case from In re Konopka, 126 N.J. 225 (1991), in which the Court rejected a knowing misappropriation finding by the DRB, which was based solely upon accounting evidence.

<sup>8</sup> Respondent left virtually no funds in his accounts when he abandoned his practice. On May 19, 1988, respondent's trust account balance of \$782.70 and business account balance of \$364.72 were deposited with the Superior Court (P-8 and P-9 in evidence).



When respondent failed to pay-off the mortgage (send the mortgage funds that he held in escrow) in the Club Kingsway matter, he violated the rule enunciated by the Court in In re Hollendonner, 102 N.J. 21 (1985). In that case, 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)." See, also, In re Klein, 117 N.J. 686 (1989) (Attorney who abandoned his practice, was disbarred for gross neglect which included failure to forward funds after a real estate closing).

Therefore, based upon the accounting records, the act of sending only the interest after the closing to the mortgagee, and respondent's abandonment of his practice without paying off the Club Kingsway mortgage, the Board finds that the record clearly and convincingly demonstrates knowing misappropriation of \$241,026.99<sup>9</sup> in escrow funds by respondent, in violation of RPC 1.15 and RPC 8.4(c), thereby subjecting respondent to the disbarment rule established in Hollendonner and Wilson.

Finally, the OAE's audit clearly and convincingly indicates that respondent also failed to safeguard other clients' funds, in violation of RPC 1.15(a).


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<sup>9</sup> The complaint lists the figure of \$239,026.99, instead of \$241,026.99. This difference, however, is based on a simple addition error originally contained in Morrison's report (P-1 in evidence, Attachment 2 at 1).

In view of the foregoing, the Board finds by clear and convincing evidence that respondent knowingly misappropriated escrow funds. Therefore, the Board unanimously recommends that respondent be disbarred. Three members did not participate.

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

Dated: 4/14/92

By:   
Raymond R. Trombadore  
Chair  
Disciplinary Review Board