

Supreme Court of New Jersey  
Disciplinary Review Board  
Docket No. DRB 88-041

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IN THE MATTER OF :  
DALE W. BAKER :  
AN ATTORNEY-AT-LAW :

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Decision and Recommendation  
of the  
Disciplinary Review Board

Argued: June 21, 1989

Decided: November 7, 1989

Kenneth J. Doukas appeared on behalf of the District VIII Ethics Committee.

John J. Pribish appeared on behalf of respondent, who was not present.

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 VIII Ethics Committee. The presentment details respondent's misappropriation of client funds between 1984 and 1986.

At the time of his admission to the practice of law in 1980, and both during and prior to attending law school, respondent was employed as a police officer in New Brunswick. Once licensed as an attorney, respondent worked as an associate in a law firm until April 1984, when he opened his own office in New Brunswick.

In 1983, before respondent opened his own office, he began to represent his wife's parents, the Clements, who were facing

bankruptcy and a foreclosure action as a result of financial difficulties. Respondent eventually negotiated an agreement with the mortgagee that required all mortgage payments to be made through respondent. Respondent's father-in-law was to make payments of approximately \$880 per month directly to respondent, who would then forward his check to the mortgagees. Respondent knew, when this arrangement was made, that his father-in-law could not make the full payment, and anticipated covering the monthly \$150 expected shortfall on the first mortgage himself. Additionally, further problems existed with regard to payment of a second mortgage on the Clements' property, which was deferred by the mortgagees for more than six months.

Respondent's father-in-law did not forward the monthly checks in a timely fashion. A number of payments were never made, and three or four of his checks were returned for insufficient funds. At hearing, respondent calculated that, in a period of approximately eighteen months, his father-in-law failed to make or cover between eight and ten payments (1T 164)<sup>1</sup>. Respondent was fully aware of both the missing payments and the returned checks. Although he did not have sufficient personal funds in his trust account to cover these mortgage payments, he nonetheless made the payments to the mortgagee, thereby invading other client funds then on deposit. This misappropriation of trust funds on his in-laws' behalf began in August 1984 and continued until January 1986.

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<sup>1</sup> "1T" refers to the transcript of hearing before the District VIII Ethics Committee on June 22, 1987.

Shortly after respondent began to use trust funds to pay his in-laws' mortgage, he invaded the account for other uses. He paid approximately \$1200 for the partial tuition costs for one of his wife's brothers. He purchased a fur coat for his wife in October, 1984 using \$1400 in trust account funds. He also used client trust funds to purchase a \$2300 emerald ring for his wife.

Beginning in October 1984, and continuing to November 27, 1985, respondent wrote a series of fourteen additional checks, drawn to and endorsed by himself. The amount of each check varied, from a low of \$325 to a high of \$4500. None of these trust account checks bore any case reference or other explanation. These fourteen checks, admitted into evidence as Exhibit J-2, totalled \$24,025, as follows:

<u>Check Number</u>	<u>Amount</u>	<u>Date</u>
1389	4000	10/24/85
1212	600	12/24/84
1281	2000	3/11/85
1283	2500	3/12/85
1285	1200	3/21/85
1286	1300	3/22/85
1287	1400	3/22/85
1300	500	4/17/85
1301	600	4/19/85
1302	600	4/23/85
1303	325	4/29/85
1306	500	5/11/85
1374	4500	10/18/85
1409	<u>4000</u>	11/27/85
TOTAL:	24025	

Respondent's numerous misappropriations remained undiscovered<sup>2</sup> until an ethics grievance was filed against him by Kathleen and Arthur Mangino. Respondent had been retained by the Manginos in August 1985 to recast their mortgage. The closing occurred on October 29, 1985. Respondent was then to utilize the proceeds to pay off the original mortgagee, I.R.H.T. Mortgage Company. (I.R.H.T.) When Mrs. Mangino telephoned respondent to advise that she had received a late payment notice from I.R.H.T., respondent promised to look into the matter, although he stated that he believed the mortgage payoff check had crossed in the mail with the late payment notice. Two weeks later, when notified that the Manginos had received a second notice, respondent implied that he had taken care of the mortgage, and asked Mrs. Mangino to drop a copy of the notice at his office. On December 14, 1985, Mrs. Mangino was shocked to receive a notice from I.R.H.T. that the mortgage was in default and that foreclosure proceedings would begin. When contacted, respondent again assured Mrs. Mangino that he had taken care of everything, but that she should drop the notice at this office. When she then telephoned I.R.H.T., Mrs. Mangino learned that I.R.H.T. had received neither the mortgage payment nor any correspondence from respondent. She promptly filed an ethics grievance. Respondent thereafter paid off the I.R.H.T. mortgage and, on January 11, 1986, paid an additional \$170

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<sup>2</sup> Many of the checks issued by respondent for personal purposes invaded funds held in trust for the Sieczkowski estate throughout this period of time.

deficiency due. The investigation that followed the filing of the Mangino grievance resulted in an audit of respondent's attorney books and records by an accountant retained by the Office of Attorney Ethics (OAE). The accountant concluded that respondent's trust account was out of trust by \$47,693.59 as of January, 1986. A portion of this shortage resulted from the approximately \$12,000 in trust funds paid out by respondent on behalf of his in-laws, the Clements. The remainder of the deficiency was attributed to payment of respondent's "personal expenses."

Respondent's own accountants conducted a review. The OAE accountant's finding of a shortage of \$47,693.59 was not disputed by these accountants. However, their calculations showed a reduction in the shortage to \$40,856.22 by May 31, 1986, with an increase to \$44,533.04 as of June 30, 1986. At the time of the May 22, 1987 ethics hearing, respondent noted that no contributions had been made for more than fourteen months to reduce the existing shortage of \$39,483.37<sup>3</sup> (1T 31-32).

David J. Flicker, M.D., who is Board-certified in both psychiatry and neurology, was retained by the OAE to examine respondent. At the ethics committee hearing on April 23, 1987, Dr. Flicker testified that respondent told him he knew at the time he misappropriated the funds that it was not his money and further knew that he could lose his license to practice law (2T 92-93, 150-

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<sup>3</sup> Respondent disputed his accountant's conclusions, contending that his actual trust account shortage was \$2000 less than stated, or \$37,483.37.

151)<sup>4</sup>. Respondent told Dr. Flicker that he began to use client trust funds in an effort to impress his wife "...because she apparently had gone off with another man" (2T 97). Dr. Flicker concluded that, although respondent was somewhat depressed, he was able to understand the nature and quality of his acts, and knew the difference between right and wrong at the time he invaded his trust account (2T 98). Dr. Flicker was unable to find a loss of competency or comprehension of a magnitude that would make respondent's invasion of the trust account other than knowing and purposeful. Dr. Flicker concluded that respondent's mental capacity was never diminished to such a degree that he could not have conformed his behavior to the requirements of the law (2T 99).

Respondent acknowledged instances of knowing misappropriation of trust funds. He admitted to the unauthorized use of client trust funds to cover payments on the Clements' mortgage. He further admitted that he had used trust funds, without client authorization, to pay his brother-in-law's tuition and to purchase a fur coat and ring for his wife. He did not recall what use he had made of the remaining misappropriated client funds.

In explanation, respondent stated:

I used funds from my trust account to attempt to aid my wife's family with their financial crisis and also to try to buy my wife's attention and loyalty.  
[Affidavit of respondent dated April 25, 1986, admitted into evidence as Exhibit P-12.]

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<sup>4</sup> "2T" refers to the transcript of hearing before the District VIII Ethics Committee on April 23, 1987.

Respondent and his wife, Gloria Clements Baker, first separated in 1979 after six years of marriage. Respondent, who had been raised by neighbors because of his now deceased mother's alcoholism, was devastated by this separation, inasmuch as he regarded his wife as his only family. They reconciled more than a year later. During 1984, however, the marriage deteriorated. Mrs. Baker again left respondent in the fall of 1984. Respondent, who was despondent over her departure, began to neglect certain aspects of his law practice and to lose clients because he failed to complete his work in a timely manner.

Respondent sought counseling with Carlo Joseph Baril, M.D., a psychiatrist, in March 1986 and continued in therapy until November of that year. He did not return to Dr. Baril until April of 1987, just prior to the first ethics committee hearing. Dr. Baril testified that, at the time respondent began treatment, respondent was experiencing a "major depression with melancholia." He also determined, as a secondary diagnosis, that respondent had a narcissistic personality disorder, which meant that he was very self-centered and selfish in a relationship. The loss of his relationship with his wife triggered the major depression, which resulted in strong self-destructive impulses by respondent. Among respondent's self-destructive acts were the trust account invasions. Dr. Baril testified that respondent's condition may have contributed to, but did not cause, his invasion of the trust

account (3T 30)<sup>5</sup>. He further stated that, at the time of the misappropriations, respondent was not out of touch with reality, knew right from wrong, was neither hearing voices nor having hallucinations and his mind was not deranged (3T 34-35). From his meetings with respondent, Dr. Baril concluded that respondent was:

... a very desperate man who was about to do anything to get his wife back even though in that process, he was destroying himself. Like destroying his practice to the point that he kept that as a secret from his wife and he never revealed that to her (3T 36).

The committee concluded that, on at least twenty-seven occasions over a period of one year and five months, respondent wrote checks either payable to himself or to cover his in-laws' financial obligations, thereby knowingly misappropriating client funds. The committee noted respondent's selective recollection as to disposition of many of the checks in question and concluded that "on the issues most germane and critical to this matter ... the respondent's testimony is not believable." Discrepancies between respondent's testimony before the committee and the contents of his affidavit filed with the Court on April 25, 1986 (P-12 in evidence) which further reflect on respondent's credibility, were also noted by the committee. The committee further concluded that respondent had failed to demonstrate by even a preponderance of the credible evidence that he "suffered from a disease of the mind which ... rendered him unable to tell right from wrong or to understand the

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<sup>5</sup> "3T" refers to the transcript of hearing before the District VIII Ethics Committee on June 5, 1987.



nature and quality of his acts.'" The principles of In re Wilson, 181 N.J. 451 (1979) were therefore deemed by the committee to be controlling.

#### CONCLUSION AND RECOMMENDATION

Upon a 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.

Respondent has acknowledged that he knew that he was using client funds when he used his trust account to cover the Clements' mortgage payments, to pay his brother-in-law's tuition and to purchase expensive gifts for his wife. He told Dr. Flicker that he began to use trust account monies in an effort to impress his wife. In his defense, he contended that the "major depression" that resulted from his wife's desertion may have contributed to his self-destructive acts, including his invasion of client trust funds.

Respondent's supposed defense does not go far enough. In the face of what appears to be, from all the facts, a series of knowing misappropriations, the Board must determine whether respondent "...suffered such a loss of competency, comprehension or will of such magnitude as would excuse conduct that was otherwise knowing or purposeful." In re Jacob, 95 N.J. 132, 137 (1984). Respondent has not established by a fair preponderance of the evidence that

the depression that he suffered following the departure of his wife led to a loss of competency of the magnitude required by Jacob. Respondent's claimed lack of appreciation of the consequences of his acts does not alter this conclusion. The record herein simply does not "...reflect an impairment of respondent's will sufficient to excuse or mitigate the knowing misappropriation of clients' funds." In re Goldberg, 109 N.J. 163 (1988). To the contrary, the testimony of both psychiatrists establishes that respondent fully comprehended that he was taking funds that were not his own when he wrote the various trust account checks. Moreover, respondent lied to the Manginos and endangered their home to protect himself. Additionally, the committee expressed valid concerns about respondent's candor and credibility during the ethics hearing.

The primary goal of the Board in disciplinary cases is not to punish the individual, but to protect the integrity of the profession. Matter of Pauk, 107 N.J. 295, 305 (1987). While the Board is cognizant of the troubles faced by respondent in his personal life, it is even more cognizant of its obligation to protect the integrity of the bar. As in all cases where knowing misappropriation has been established, mitigating factors are irrelevant to the mandated result of disbarment. In re Wilson, 81 N.J. 451 (1979); Matter of Lennan, 102 N.J. 518 (1986). Therefore, the Board unanimously recommends that respondent be disbarred.

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

Dated:

11/7/83



Raymond R. Trombadore  
Chair  
Disciplinary Review Board