SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-447

IN THE MATTER OF

DON X. BANCROFT,

AN ATTORNEY AT LAW

Decision

Argued: February 11, 1999

Decided: May 10, 1999

John Robertson appeared on behalf of the District X Ethics Committee.

Albert B. Jeffers appeared on behalf of respondent.

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

This matter was before the Board based on a recommendation for discipline filed by the District X Ethics Committee ("DEC"). The one-count complaint charged respondent with violations of RPC 1.1(a) (gross neglect) for failure to file a complaint for nine years; RPC 1.3 (lack of diligence) for failure to pursue the matter in a reasonably diligent fashion; RPC 1.4(a) and (b) (failure to keep client reasonably informed about the status of the matter and failure to promptly comply with reasonable requests for information); RPC 1.5(b)

(failure to communicate the rate of the fee in writing); RPC 1.15(a) (failure to safeguard property) for knowingly misappropriating and/or making unauthorized use of escrow funds; RPC 1.15(a) (failure to safeguard property) for negligently misappropriating and/or making unauthorized use of escrow funds; RPC 1.16(a)(2)(b) and (d) (declining or terminating representation) by "abandoning" the grievants when respondent dismissed their complaint without notice to them; RPC 3.2 (failure to expedite litigation) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) by misrepresenting to the grievants' attorney that the complaint had been filed, when, in fact, it had not. These charges stem from respondent's representation of the sellers in the sale of their house and subsequent agreement to represent the purchasers, the grievants in this matter, in an action to quiet title to a lot or lots with a roadway giving them access to their new house.

Respondent was admitted to the New Jersey bar in 1968. He maintains a law office in Kinnelon, Morris County, New Jersey.

In 1980 respondent was privately reprimanded for failure to protect his client's interests. In the Matter of Donald X. Bancroft, Docket No. DRB 89-036 (January 18, 1980). Respondent received a private reprimand in 1981 for demonstrating poor judgment in confronting a client and for failing to turn over the client's file. In the Matter of Donald X. Bancroft, Docket No. DRB 81-081 (August 14, 1981). Finally, respondent received a public reprimand in March 1986 for neglecting a matter, failing to carry out a contract of employment and for knowingly prejudicing or damaging his client. In re Bancroft, 102 N.J. 114 (1986).

In 1986 the grievants in this matter, Carol and Wilfred Klein, purchased a house in Butler, New Jersey, from Joseph and Irma Dominguez. The Kleins were represented by George van Hartogh, Esq. Respondent represented the sellers. The parties signed a contract of sale on May 1, 1986 and a subsequent contract on July 23, 1986. The closing occurred on October 31, 1986.

Prior to closing, a question arose as to the validity of access to the property by way of a macadam driveway-type roadway running behind the property. Sole vehicular access to the property was from the rear to a two-car garage, traversing across four different lots. Title to various lots over which the roadway ran was unknown. As a result, the title company refused to insure title.

Notwithstanding the uncertainty of ownership of the roadway and the Kleins' inability to obtain title insurance, they were persuaded to go ahead with the transaction as the result of an agreement, the terms of which were set forth in an addendum to the contract of sale and to the closing statement. The addendum to the contract of sale, executed by both the sellers and the purchasers, stated as follows:

> Parties agreed that certain efforts have been made on behalf of both parties to determine the validity of the access from 9 Oak Street to a certain unnamed roadway traversing lots 9 and 10, Block 45, between New and Oak Streets, which unnamed roadway provides access to the garage on 9 Oak Street, situate in the rear of the property. Notwithstanding the efforts of both parties and the assurance of the Borough of Butler, it is determined and agreed that the access way to the above referenced roadway is not an insurable aspect of the title.
>
> In consideration of the above, the Klein's [sic] have agreed to purchase the house notwithstanding the uncertainty above. The Klein's [sic] have

agreed to purchase the house for $155,000.00 as per the original contract, and the Sellers, the Dominguez's [sic], agree to escrow $5,000.00 of that money in the trust account of Don X. Bancroft, Esq., which money shall be used to pursue a Complaint for Quiet Title in the Superior Court of New Jersey. Dominguezes shall not be required to expend any more than $5,000.00, and should there by [sic] any monies remaining after completion of the case, then those monies should be the exclusive property of the Sellers, Mr. and Mrs. Joseph Dominguez.

[Exhibit P-3]

Respondent's responsibilities in connection with his pursuit of the action to quiet title were more fully described in the "Rider To The Closing Statement." According to the rider, respondent agreed to withhold $5,000 and

> [to] provide to George van Hartogh, attorney for the purchasers of the premises, Wilfred and Carol Klein, a title policy insuring ingress and egress by said Wilfred Klein and Carol Klein, his wife, their successors and assigns, to a roadway which is shown on the survey annexed hereto.
>
> [Respondent] agrees to commence a suit to quiet title on a declaratory judgment action within the next three (3) months and it is understood that the sum of $5,000.00 will be used to offset expenses occasioned by [respondent].
>
> If, at the end of twelve (12) months, [respondent] is successful, he will provide to Mr. and Mrs. Klein a title policy insuring the access road, at no cost and expense to them.
>
> If, at the end of the twelve(12) months, Mr. Bancroft is not successful in clearing the title, then he will advise Mr. and Mrs. Klein that he has not been successful in clearing the title, and he will then advise them as to his expenses to that date.
>
> At that point, Mr. and Mrs. Klein will have the option of authorizing their attorney to proceed further in this matter, using the balance of any monies which may be remaining, or they may decline, at this point, to proceed further, at which time any remaining funds will be returned to Mr. Dominguez.
>
> The decision at this point will be the decision of Mr. and Mrs. Klein.

> Mr. and Mrs. Klein agree to cooperate with [respondent] as far as signing any necessary papers in order to process this litigation with the understanding that no expense of any kind will be attributable to Mr. and Mrs. Klein.
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> [Exhibit P-4]

This rider was signed by the purchasers, the sellers and respondent.

Respondent did not file a suit to quiet title within the agreed upon time, January 31, 1987. In fact, it was not until 1994, some seven years later, that the Kleins learned of respondent's failure to act. This discovery came about as follows. In late 1993, the Kleins decided to convert their house into a two-family residence. In 1994, they retained attorney John Barbarula to file for a use variance in the Borough of Butler. The application was granted, subject to the Kleins' ability to establish access along the disputed roadway. When Barbarula informed Mr. Klein of the condition, Mr. Klein assured him that the matter had been resolved years earlier. The Kleins believed that, since they had not heard from respondent, he had remedied the problem. Because the Kleins were not entitled to any remainder from the escrow funds, they did not expect to receive an accounting of the escrow funds or documentation from the suit to quiet title. In fact the Rider to Closing Statement provided that only if respondent was not successful in clearing title was he required to "advise them as to his expenses to that date."

After Barbarula learned that the problem had not been resolved, he attempted to discuss the matter with respondent, but his efforts to contact him were unavailing. By letter dated September 28, 1994, Barbarula explained to respondent that he represented the Kleins in connection with a use variance application, that the question about the easement had to

be resolved and that it was his understanding that respondent was holding escrow funds for that purpose. Barbarula requested that respondent contact him about the status of the matter, but respondent failed to reply to Barbarula's letter. Thereafter, Barbarula made a number of telephone calls to respondent and left messages on respondent's answering machine. Those calls also went unanswered. Eventually, respondent appeared unannounced at Barbarula's office, told him that the matter had been resolved and gave him a letter from the township attorney asking for a new survey.

Under cover letter dated October 27, 1994, Barbarula forwarded to respondent a new survey and informed him that the quickest way to resolve the situation would be to obtain the right-of-way from the township. Barbarula requested that respondent pursue the matter as quickly as possible.

At some point in early 1995, respondent refused to take further action until he obtained a written authorization from the Kleins to file an action in their behalf. The Kleins angrily replied that the 1986 addendum to the closing documents gave respondent such authorization. By letter dated January 30, 1995 Barbarula informed respondent of his clients' position. He added that the Kleins believed that all legal fees and costs were to be taken from the escrow funds and requested respondent to provide him with copies of any pleadings in the matter.

Between Barbarula's January 30, 1995 letter and March 13, 1995, Barbarula left various messages on respondent's answering machine, attempting to ascertain the status of any action taken by respondent. On March 13, 1995, Barbarula again wrote to respondent,

requesting an acknowledgment of his letter and an update on the matter, including copies of any pleadings. Barbarula also attempted to contact respondent by telephone and even stopped at his office several times. His efforts to discuss the matter with respondent were fruitless.

Sometime between Barbarula's March 13, 1995 letter and May 10, 1995, respondent finally contacted Barbarula. According to Barbarula, respondent told him that he had filed the complaint. Barbarula paraphrased respondent's statement as follows: "He says, I filed it, it's done, I sent copies, you're getting them." T131.[1] It was Barbarula's understanding that respondent had obtained the necessary title work and had prepared and filed a complaint. After several weeks elapsed and respondent did not send copies of the pleadings to Barbarula, on May 10, 1995 Barbarula again wrote to respondent:

> It has been about three weeks since our last phone conversation wherein you indicated you had sent copies of what you had filed in order that I may keep Mr. Klein informed.
>
> I have had another conversation with Mr. Klein and he is very unhappy that in the past three weeks he has not received these documents. Will you please forward them to my attention as soon as possible so I can give them to him. He has asked me numerous times since our last conversation including an in-person visit.
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> [Exhibit P-10]

Exhibit P-11 is the complaint in the quiet title action. The date stamp on it shows that it was filed on May 25, 1995. According to Barbarula's testimony, respondent represented to him, on or about April 19, 1995, that he had filed the complaint. As seen below, however,

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[1] 1T denotes the transcript of the March 5, 1998 DEC hearing.

respondent testified that he had indeed filed the complaint sometime in April 1995 and that, because of a problem with the filing fee, it was not stamped "filed" until May 25, 1995, when the problem was resolved.

The complaint asked that lots 8 and 11 on the tax maps of the Borough of Butler be declared a "public prescriptive easement," that the tax assessor conform the tax maps to demonstrate an accurate and true picture of a survey supplied in the matter and that the Butler planning board recognize lots 11 and 8 as property subject to public easement and accessible, without interference, by the rear driveway of lot 14.

Following Barbarula's receipt of the filed complaint, he continued to attempt to obtain information from respondent about the status of the matter. Barbarula left numerous messages on respondent's answering machine, to no avail. Finally, one year later, on March 13, 1996, Barbarula wrote to respondent memorializing his efforts to contact respondent on a number of occasions. Barbarula asked respondent to turn over the file to him as soon as possible, along with a substitution of attorney and any remaining balance of the escrow funds.

In the summer of 1995, respondent applied to the court for a voluntary dismissal of the complaint, without prejudice. Respondent's request was granted. The judge entered an order of dismissal without prejudice on September 1, 1995. Mr. Klein only learned of the dismissal when he retrieved his file from respondent. As excuses for the dismissal, respondent told Klein that he was not his client, that the amount of time spent in the matter had exceeded the $5,000 escrow, that his medical condition precluded him from continuing

in the matter and that he felt uncomfortable with the case. Respondent's medical problems apparently included his recovery, at that time, from alcohol addiction, three heart attacks and inoperable lung cancer.[2]

According to Barbarula, respondent never told him that he had taken a voluntary dismissal of the case. Respondent declared that his failure to notify Barbarula of the dismissal was an oversight on his part.

Barbarula testified that respondent's conduct has caused a financial hardship to the Kleins because the building inspector permitted the Kleins to do only preliminary work to convert their house. Moreover, Barbarula's examination of the Kleins' file revealed that he would have to "start from scratch" to clear title and that the Kleins were not, at the time, in a financial position to retain him for that purpose.

* * *

The escrow monies deposited into respondent's trust account to "offset [his] expenses" were exhausted by November 8, 1989. Both the rider to the closing statement and the addendum to the contract of sale were silent as to the rate of respondent's fee and the manner or frequency of the billing.

Linda M. Noce, respondent's former secretary, submitted a certification and testified at the DEC hearing. She was responsible for compiling client invoices and for the

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[2] The cancer is in remission, based on a course of chemotherapy and radiation treatments.

maintenance of respondent's bank accounts. Noce stated that she had prepared the bills in the Dominguez/Klein transaction. The only available bill, dated September 1, 1995, was prepared in 1996, in response to the DEC investigator's request for a reply to the grievance. Noce explained that she prepared the bill by utilizing a compilation of respondent's time records. Her certification stated as follows:

> Carbonized message books were used, and I would review those message books to gather the information with regard to phone calls. I would take information from the appointment calendar as to conferences, appointments, et cetera. I would record daily work in the Lawyer's Diary, and when preparing the invoices I would review the diary to determine the work done, when it was done, and time consumed. Lastly, I would review the file and compare the documents in the file to the items on the invoice to see that they were accurate.

A journal page that was apparently reconstructed after an OAE audit shows the following entries on a sheet entitled "Joe and Irma Dominguez-Quiet Title:" an initial deposit of $5,000 on November 5, 1986, a disbursement to the National Community Bank for $105.23 on November 26, 1986, legal fees to respondent for $883.30 on December 10, 1986, an entry to respondent for $1,000 on February 4, 1987, an entry to respondent for $1,000 on October 9, 1989 and, finally, an entry to respondent for $2,011.47 on November 8, 1989. After these disbursements, the account showed a zero balance.

Although Mr. Dominguez testified that he received at least two bills from respondent within a year or two from the closing, as noted above the only bill presented at the DEC hearing was the one dated September 1, 1995, addressed to Mr. and Mrs. Joseph Dominguez and prepared for the purpose of replying to the grievance. The bill consisted of entries from November 3, 1986 to July 31, 1995. The bill reflected total charges in the amount of

$7,683.30 and disbursements of $3,467.50. A notation at the bottom of the bill indicated that a disbursement in the amount of $105.23 was made to the National Community Bank at the request of the Dominguezes, a disbursement unrelated to the title resolution.

According to Mr. Dominguez, who testified at the DEC hearing via telephone, he understood that the $5,000 escrow was to be spent trying to clear title. Mr. Dominguez recalled that he had given respondent authorization to disburse $105.23 out of the trust account to pay mortgage interest not satisfied at the time of closing. Although Mr. Dominguez specifically remembered giving respondent this authorization, he recalled that it was not done in the presence of the Kleins. In addition, Mr. Dominguez recalled authorizing respondent to take $883.30 from the escrow account for services performed prior to closing. Mr. Dominguez did not remember whether such authorization was given in the presence of the Kleins. The Kleins, however, did not recall Mr. Dominguez' authorization for either disbursement.

For his part, respondent explained that he had not participated in drafting the contracts for the purchase of the property, the amendments to the contract of sale or the settlement statement. According to respondent, he agreed to take care of the clearing of title because the Kleins' attorney was about to retire. Respondent testified that he believed that the road in question belonged to the town of Butler and that he initially assumed that the problem could be resolved fairly simply with the municipality.

Respondent related that, even though he did not provide a retainer agreement to the Dominguezes, they were aware of his rate ($175 per hour) because it was stated in his bill

to them and because he had discussed it with them at the closing. Respondent also claimed that the rider to the closing statement was his retainer agreement with the Dominguezes. Respondent did not provide a retainer agreement to the Kleins, maintaining that they were not his clients.

Respondent testified that he had spent many hours working on the matter, but had forgotten to keep track of all of his time. He claimed that he had had a significant amount of contact with the Butler Borough attorneys, had commissioned a title search and a survey of the property and had spoken at length with a surveyor about the title issues.[3] Respondent also testified that, although he had spent a great deal of time conducting research in the matter, he had failed to keep a record of it. Respondent's testimony was corroborated by his former secretary. She confirmed that respondent would frequently forget to memorialize the time spent on various matters and that she would have no way of knowing how much time had not been recorded.

As to the use of the escrow funds, respondent testified that Mr. Dominguez had consented to use part of the funds to pay mortgage interest to the National Community Bank. Respondent asserted, however, that he was not required to tell the Kleins that he was using the escrow funds for that purpose. Respondent contended that Mr. Dominguez had also authorized the use of escrow funds to pay respondent $883.30 for a portion of legal fees incurred prior to the closing. Although respondent claimed that he only needed the

[3] Respondent's September 1, 1995 bill reflected payments to the surveyor in the amount of $1,107.50 and $685. There was also a payment made to Patriot's Title Insurance Company, in the amount of $1,500.

Dominguezes' authorization, he testified that their approval was obtained in the Kleins' presence. Mr. Klein, however, had no such recollection.

Respondent pointed out that the amount of the fee withdrawals that exhausted the escrow funds was substantially less than what he was owed. When questioned about the requirement to write down exactly what he was owed and what he had removed, respondent replied, "I didn't think that was necessary. That was my prerogative." Respondent added that he was taking only what he thought was "a modicum, maybe half of what was owed [to him]." According to respondent, he was satisfied that his work in the case far exceeded what was reflected in the bill.

Both respondent and his former secretary admitted that the September 1995 bill was constructed in response to the grievance. Respondent conceded that there were several mistakes in the bill, including items he had forgotten to record. Respondent explained that his former secretary had utilized earlier billing documents previously sent to the Dominguezes to reconstruct the bill dated September 1995. The earlier bills were available to her when she prepared the bill, but could not be located for the DEC hearing. Respondent was also unable to find his computer backup information or his research notes.

As to the action to quiet title, as noted earlier respondent stated that he had filed the complaint, but had not served it. Although respondent denied that he represented the Kleins, he admitted that he was listed as the "attorney for plaintiffs" on the complaint, disclaiming any intent to mislead the court. Respondent stated that "[t]o this day I don't feel any

conviction that I ever represented the Kleins at the time, until I filed this complaint. And I did this gratuitously."

With regard to his health problems, respondent testified that he was diagnosed with cancer in August 1995. At that time he ceased doing any work on the case. He testified that, because of his chemotherapy and radiation treatments, his law practice had become non-existent. It was for that reason, he claimed, that he wanted to be relieved of the representation and asked the court to dismiss the case without prejudice. Respondent added that, if the matter were dismissed without prejudice, it would give someone else a chance to work on it. Respondent stated that his mental processes at the time were not very clear. He also admitted that he had failed to advise the Kleins or their attorney, Barbarula, of the dismissal, citing an oversight on his part. Respondent acknowledged that he should have taken care of the title problem sooner, stating that, once he discovered that the matter was more complex than anticipated, he did not know what to do next.

As further mitigation, respondent stated that earlier, in 1994, he was involved in a car accident that resulted in the death of an occupant in the other vehicle. Respondent stated that he had been profoundly affected by the accident. Respondent also testified that he was then in the late stages of alcoholism, during which, he remarked, individuals have a tendency to procrastinate. Additionally, respondent stated, he had had one heart attack prior to being diagnosed with cancer and had suffered two additional heart attacks after he had begun treatment.

Respondent testified that he stopped drinking in March 1995. He offered the testimony of his Alcoholics Anonymous sponsor and of Dr. William Pursley, the Administrative Director of the Seton Center for Chemical Dependency at St. Elizabeth Hospital in Elizabeth, New Jersey. Pursley is not a psychiatrist, but holds an E.D.D. degree in alcohol abuse addiction and treatment. Respondent met with Pursley only once. As a result of that single meeting and based on information given to him by respondent, Pursley opined that, if not for the "debilitating effects of alcoholism and the traumatic stresses of the last five years," respondent would not have been involved in this disciplinary case.

Respondent's attorney stipulated that the testimony of Pursley was to be considered only as mitigation.

* * *

The DEC determined that, at the Dominguez/Klein closing, respondent had signed a contract agreeing to resolve the title question on the property and to disclose the details of his progress. The DEC found that respondent had made efforts to resolve the problem by contacting the Borough of Butler, attending a public meeting, speaking with municipal attorneys, commissioning a survey and a title search and engaging in various discussions with the surveyor and title company. The DEC concluded, however, that respondent had not provided sufficient information to show his efforts, if any, in ascertaining who held title to the property.

The DEC found that respondent violated RPC 1.1(a), by failing to fulfill his obligation to clear title and file suit within three months of the closing. The DEC determined that, by executing the October 31, 1986 addendum to the contract of sale, respondent had agreed to resolve the title problem for the Kleins. The DEC, thus, rejected respondent's contention that the filing of the complaint was merely a formality and that he only represented the Dominguezes. The DEC concluded that respondent's representation of the Kleins began on October 31, 1986 and that thereafter he failed to represent their interests diligently, in violation of RPC 1.3.

The DEC also found a violation of RPC 1.4(a) and (b). The DEC found no evidence of any communication to the Kleins from the date of the closing, October 31, 1986, until 1994, when the Kleins realized that respondent had failed to file suit. Yet, the 1986 agreement required respondent to notify the Kleins, in October 1987, if he had been successful in clearing title and to inform them of the amount of money expended to date. That was not done. Moreover, the DEC concluded that, after the Kleins became aware that respondent had not handled the matter, respondent did not comply with their request for information about the case and did not inform either Barbarula or the Kleins that he had applied for a voluntary dismissal of the complaint. The DEC determined that there were three separate instances of failure to communicate with the Kleins: 1) when respondent failed to communicate with them within twelve months after the closing, as required by the contract; 2) when respondent refused to reply to the Kleins' and Barbarula's requests for

information; and 3) nine years after the closing, when respondent agreed to a dismissal of the complaint and did not apprize either Barbarula or the Kleins of this circumstance.

Additionally, the DEC found that respondent breached a duty to communicate in writing, his hourly rate to the Kleins and to the Dominguezes, in violation of RPC 1.5(b).

The DEC did not find clear and convincing evidence of knowing misuse of the escrow funds. The DEC found that, by November 9, 1989, when the funds were finally used up, respondent apparently had performed only $900 worth of work. The DEC added that, although ultimately a $5,000 fee was justified, it appeared that most of the work had been performed after November 1989, that is, after the funds had been depleted. The DEC concluded, however, that respondent's conduct in this regard did not constitute knowing misappropriation but, instead, failure to safeguard escrow funds, in violation of RPC 1.15.

The DEC also determined that respondent's use of the escrow funds for payment of outstanding interest on the Dominguezes' mortgage was inappropriate because the escrow funds were specifically earmarked to clear title. The DEC reasoned that a payment for any other purpose required the agreement of both the Dominguezes and the Kleins. The DEC, thus, found that respondent's use of the escrow funds for the payment of outstanding interest violated RPC 1.15 (failure to safeguard property).

The DEC further found clear and convincing evidence of a violation of RPC 1.16(a)(2), (b) and (d). The DEC determined that respondent had willfully declined to pursue the clearing of title on behalf of the Kleins in 1994 and that, once the complaint was filed, he had withdrawn it unilaterally, without advising either the Kleins or their attorney.

The DEC concluded that respondent was not permitted to withdraw from the representation without an agreement with the Kleins and, moreover, was not entitled to withdraw the complaint without the Kleins' consent.

Finally, the DEC did not find clear and convincing evidence of a violation of RPC 8.4(c), dismissing the charge that respondent had made misrepresentations to Barbarula about the filing of the complaint.

In mitigation, the DEC considered respondent's health problems, his alcoholism and the death of the individual involved in the 1994 car accident. The DEC, however, pointed out that, if respondent had diligently pursued the matter, his personal difficulties from 1994 to 1996 would have been of no moment as the matter would have been concluded years earlier. The DEC noted that, as late as 1994 or 1995, respondent could have reduced the damage to the Kleins by seeking other counsel to take over the matter. The DEC pointed out that, even after Barbarula tried to assume responsibility for the case, respondent did not turn over the file to him or execute a substitution of attorney.

The DEC considered respondent's prior ethics history, which included two private reprimands and a public reprimand. The DEC noted that two of the prior matters involved issues relating to neglect. In light of the mitigating factors, however, including respondent's efforts to deal with his alcoholism and personal problems, the DEC recommended the imposition of a three-month suspension.

* * *

Following a de novo review of the record, the Board was satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

The Board rejected respondent's argument that he was not the Kleins' attorney. The Board found that, when respondent became a signatory to the "Rider To Closing Statement," he agreed to represent the Kleins by filing an action to quiet title on the property. Moreover, the Board found that, regardless of respondent's denials, the Kleins reasonably believed that respondent was acting as their attorney. Starting on the date of the closing, October 31, 1986, respondent assumed the responsibilities inherent in an attorney/client relationship. As the Kleins' attorney, respondent was required to provide them with a retainer agreement setting forth his fee, but failed to do so, in violation of RPC 1.5(b).

Respondent also grossly neglected the handling of the matter. Indeed, the Kleins recognized that there was a serious problem with the title to the access road to their house. They felt pressured to go forward with the transaction and only agreed to close on the property because of respondent's assurances that he would start a suit to quiet title on their behalf.[4] Respondent failed to comply with the terms of the addendum to the contract of sale and to the rider to the closing statement. He failed to file an action to quiet title within three months, as required by the agreement. Also, at the end of twelve months, respondent failed to advise the Kleins that he had not been successful in his efforts and failed to give them an

[4] Respondent was not charged with a conflict of interest, in violation of RPC 1.7 or RPC 1.9. The complaint was correct in not charging respondent with such violations, since both the buyers and the sellers were represented by counsel at the time of the agreement and, furthermore, their interests were common (the quieting of the title).

accounting of his expenses to date, as required by the rider to the closing statement. Respondent also failed to provide the Kleins with the option of using another attorney to proceed in their behalf by "using the balance of any monies which may be remaining." Respondent's conduct, thus, violated RPC 1.1(a) and RPC 1.3. Once respondent filed the complaint, he also failed to expedite litigation, in violation of RPC 3.2 by failing to serve the defendants. Respondent's health problems cannot be viewed as an excuse for his inaction because the health problems occurred years after he should have filed suit.

In addition, respondent failed to keep the Kleins apprised of his actions in the matter and to reply to Barbarula's requests for information about the case and the status of the escrow funds. In fact, it was not until Barbarula attempted to obtain a use variance for the Kleins that respondent's failure to take action came to light. At that point, respondent dragged his feet in complying with Barbarula's requests for information about the status of the matter. Respondent's failure to communicate with his client, to reply to Barbarula's requests for information and to advise the Kleins that he had the matter dismissed violated RPC 1.4(a) and (b).

Eventually, in May 1995, respondent filed the complaint, eight years after he had agreed to do so. The DEC did not find that respondent made a misrepresentation to Barbarula about the filing of the complaint. Barbarula's correspondence to respondent, however, suggests otherwise. Specifically, on May 10, 1995 Barbarula wrote to respondent complaining that "it has been about three weeks since our last phone conversation wherein you indicated you had sent copies of what you had filed in order that I may keep Mr. Klein

informed." Exhibit P-10. This letter memorialized a conversation in which respondent had told Barbarula that he had filed the complaint. That conversation had taken place three weeks earlier, on or about April 19, 1995. The complaint, however, was not filed until May 25, 1995. While it is true that the complaint was dated April 19, 1995, respondent's bill to the Dominguezes contained an entry that stated "5/25/95 To Morristown to file complaint Filing fee $175.00 paid." Respondent's explanation was that the complaint had been sent for filing earlier, but that a problem had arisen in connection with the filing fee; hence his decision to drive to Morristown that day to pay the fee, rather than mail it. The Board rejected respondent's explanation for this entry on the bill, finding a violation of RPC 8.4(c) for his misrepresentation to Barbarula about the date of filing the complaint. Moreover, at the Board hearing, respondent's attorney conceded that respondent had made a misrepresentation.

Three and one-half months later, on September 1, 1995, respondent wrote to the court requesting an order of dismissal without prejudice in the matter. Respondent failed to send a copy of that letter to the Kleins, the Dominguezes or Barbarula or to otherwise notify them of the dismissal of the complaint on September 8, 1995. He also failed to give the Kleins the opportunity to have another attorney take over the case. It was not until a year later, when Mr. Klein came to retrieve his file, that respondent told him that he was no longer representing him in the matter and did not consider him to be his client. At that time, respondent informed Mr. Klein about the dismissal of the complaint and turned over the file

to him. Respondent, thus, violated RPC 1.16 by unilaterally terminating his representation of the Kleins.

By far the most troubling aspects of this matter involve the allegations of either knowing or negligent misappropriation of escrow funds. The DEC determined that there was sufficient evidence in the record to show that respondent had done a considerable amount of work in the matter, even though his records were inadequate and he failed to memorialize the amount of time he spent. The DEC, therefore, did not find a knowing misappropriation, believing that respondent was entitled to the fees that he had removed from the escrow funds.

Respondent contended that he did $4,900 worth of work, was entitled to every penny and did nothing wrong by taking these fees from the escrow. Although the record demonstrates that respondent took some action in attempting to clear title, it is impossible to determine exactly how many hours he spent doing so or the precise actions he took in that regard.

Apparently, the bulk of the disbursements from the escrow funds was for fees to respondent, including an $883.30 disbursement on December 10, 1986 for work purportedly done prior to the closing. Although it is difficult to believe that respondent could have forgotten to bill 22.92 hours, the amount of time respondent would have had to work at a rate of $175 to justify the remaining fee disbursements to himself for $4,011.47[5] respondent testified that he had forgotten to record considerable services that he performed. Respondent's secretary's testimony confirmed that he often failed to record the amount of

[5] Inexplicably, the total of the disbursements and fees exceed the $5,000 escrow. The record does not disclose which funds were used to pay for the disbursements.

time he spent working on a file. The DEC apparently believed respondent's explanation, finding that he was entitled to the fees, despite the insufficient documentation and billing records presented. In essence, the DEC found no clear and convincing evidence that respondent was not entitled to the fees. The Board agrees. The record provides only clear and convincing evidence of respondent's failure to maintain adequate billing records. This, however, is a violation of RPC 1.15(d) and R. 1:21-6, rather than RPC 1.15(a) (failure to safeguard escrow funds).

There remains the charge of failure to safeguard the escrow funds. The rider to the closing statement and addendum to the contract of sale was equivalent to an escrow agreement. It is clear from respondent's testimony that he did not believe that he needed the Kleins' approval to disburse the funds from the escrow account. Assuming that respondent was entitled to remove his fees when allegedly earned, there are still two disbursements that are questionable: the payment of interest in the amount of $105.23 to National Community Bank and the $883.30 in legal fees for work done prior to the closing. Respondent contended that the Kleins did not need to know about the disbursements in the escrow account. This contention is faulty. The escrow funds were deposited in respondent's trust account for the Kleins' benefit, to file a suit to quiet title to the property. The terms of the "escrow" agreement were clear: the "Sellers . . . agree to escrow $5,000 . . . in the trust account of [respondent] which money shall be used to pursue a Complaint for Quiet Title...." (Emphasis added). The rider to the closing statement added that "the sum of $5,000.00 will be used to offset expenses occasioned by [respondent]." Since the Kleins were both parties

to the addendum and the rider, as well as clients of respondent, their consent was required for the disbursement of funds not authorized by either agreement. It is well-settled that an escrow holder acts as an agent for both parties to the agreement. Respondent, therefore, owed a fiduciary duty to both the Dominguezes and the Kleins. Respondent should not have disbursed the funds without obtaining authorization from both. Respondent, thus, improperly utilized some of the escrow funds for purposes other than those intended, without the Kleins' consent. The question is whether this amounted to knowing misuse of escrow funds or to a mere failure to safeguard escrow funds.

This case is to be distinguished from the recent decision in In re Gifis, 156 N.J. 323 (1998), where the attorney was disbarred for utilizing for his own benefit monies required to be held in escrow and in which he had no interest. The escrowed monies were either deposits in real estate transactions or settlement funds. The attorney there alleged that he had obtained the consent of his client, one of the parties to the escrow agreement. He admitted, however, that he had not consulted with the other party to the agreement. Finding that the attorney had knowingly misused the escrow funds for himself, the Court ordered his disbarment. Here, not only did respondent release escrow funds to himself, as a fee, but he also released money to pay the interest on the Dominguezes' mortgage. As the Court recognized in In re Susser, 152 N.J. 37 (1997), premature release of escrow funds to a party-in-interest, absent some evidence of malice or other ill motive on the attorney's part, constitutes a breach of the escrow agreement, but does not rise to the level of knowing misappropriation. This is so because, in that situation, the attorney does not misuse the funds

for either his/her benefit or for the benefit of another who is unrelated to the escrow agreement. Here, respondent used $105.23 for the benefit of the Dominguezes. Because the Dominguezes were parties to the escrow agreement, respondent's conduct in this context was not knowing misappropriation.

The question now is whether respondent's act of withdrawing $883.30 in fees incurred by the Dominguezes before the escrow agreement constituted knowing misappropriation. There is evidence that respondent obtained the Dominguezes' consent to that withdrawal. He did not, however, obtain the Kleins' permission. To date, the Court has not disbarred attorneys who have removed fees from trust funds in the same circumstances, so long as there was a colorable entitlement to the fees, no malice or fraud was involved and the attorney held the reasonable belief that the withdrawal was allowed. See In re Frost, 156 N.J. 416 (1998). Here, unless it is found (1) that respondent was not entitled to the fee at all, (2) that, knowing this circumstance, he nevertheless removed the money, (3) that, in doing so, he acted with malice and dishonesty, and (4) that he could not have had a reasonable belief that he could take the $883.30 fee from those funds, then respondent's conduct amounted to no more than breach of an escrow agreement for his failure to obtain the Kleins' permission to the withdrawal.

Parenthetically, even if it were found that respondent knew that he was not entitled to take those fees from the escrow funds, there are questions of whether this would be knowing misappropriation because the escrow funds were, in essence, a retainer for respondent's fees. It has never been found that an attorney's removal of fees from a retainer

before the fees are actually incurred constitutes knowing misappropriation. In fact, a retainer does not have to be deposited into a trust account; it may be deposited in the attorney's business account and the attorney may thereafter make withdrawals against the retainer without the client's consent. In re Stern, 92 N.J. 611 (1983).

In sum, respondent's conduct included violations of RPC 1.1(a), RPC 1.3, RPC 1.4(a) and (b), RPC 1.5(b), RPC 1.16(b) and (d), RPC 3.2, RPC 8.4(c), RPC 1.15(a) (failure to safeguard escrow funds), RPC 1.15(d) and R. 1:21-6 (recordkeeping violations). Respondent's violations were serious and exacerbated by the fact that he neglected the Kleins' matter for almost ten years and failed to keep them apprised of what transpired in the interim.

Unless the invasion of escrow fund rises to the level of a knowing misappropriation, as in In re Hollendonner, 102 N.J. 21 (1985), the violation of an escrow agreement, without more, usually warrants the imposition of an admonition or a reprimand. See, e.g., In re Spizz, 140 N.J. 38, (1995) and In re Flayer, 130 N.J. 21 (1992). Had respondent's only impropriety been a violation of the escrow agreement, then perhaps either an admonition or a reprimand would have been appropriate. Respondent's conduct, however, was compounded by multiple violations, the extreme period of time that elapsed before he filed the complaint, the unilateral dismissal of the action with notice to no one and a significant aggravating factor – his ethics history. Respondent's medical problems do not serve to mitigate his ethics offenses. As the DEC correctly reasoned, if respondent had been diligent,

the matter would have been resolved prior to the onset of his emotional and medical problems.

Discipline imposed in other matters with similar multiple ethics violations has ranged from a reprimand to a short-term suspension. See, e.g., In re Bildner 149 N.J. 393 (1997) (reprimand for lack of diligence and failure to communicate for two years after client's matter dismissed with prejudice); In re Chen, 151 N.J. 477 (1997) (three-month suspension for gross neglect, failure to communicate and misrepresenting status of matter to client; prior public reprimand and three-month suspension); and In re Olitsky, 154 N.J. 177 (1998) (three-month suspension where, in three matters, the attorney engaged in gross neglect, lack of diligence, failure to keep a client reasonably informed about the matter and failure to prepare a written retainer; the attorney's disciplinary history included a private reprimand, an admonition and a three-month suspension).

Based on the foregoing, the Board unanimously determined to impose a three-month suspension for the totality of respondent's ethics infractions. Two members did not participate.

The Board also determined to require respondent, prior to reinstatement, to provide proof of fitness to practice law from a psychiatrist approved by the Office of Attorney Ethics.

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

Dated: 5/10/99

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

*SUPREME COURT OF NEW JERSEY*

## *DISCIPLINARY REVIEW BOARD VOTING RECORD*

**In the Matter of Don X. Bancroft**
**Docket No. DRB 98-447**

**Argued: February 11, 1999**

**Decided: May 10, 1999**

**Disposition: Three-Month Suspension**

| Members | Disbar | Three-Month Suspension | Reprimand | Admonition | Dismiss | Disqualified | Did not Participate |
|---|---|---|---|---|---|---|---|
| Hymerling | | x | | | | | |
| Zazzali | | x | | | | | |
| Brody | | x | | | | | |
| Cole | | x | | | | | |
| Lolla | | | | | | | x |
| Maudsley | | x | | | | | |
| Peterson | | x | | | | | |
| Schwartz | | x | | | | | |
| Thompson | | | | | | | x |
| **Total:** | | 7 | | | | | 2 |

Robyn M. Hill 6/28/99
Robyn M. Hill
Chief Counsel