

(F)

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 99-150

IN THE MATTER OF :
PHILIP JOHN HERBERT :
AN ATTORNEY AT LAW :

Decision

Argued: June 10, 1999

Decided: November 17, 1999

Richard J. Englehardt^{el} appeared on behalf of the Office of Attorney Ethics.

Respondent appeared *pro se*.

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE"), based upon respondent's disbarment in the Commonwealth of Pennsylvania.

Respondent was admitted to the New Jersey bar in 1981. He was admitted to the Pennsylvania bar in 1979. Respondent has no disciplinary history.

Respondent consented to disbarment in Pennsylvania based on his knowing misappropriation of client funds in four matters. On August 20, 1990, the Pennsylvania

Office of Disciplinary Counsel filed a petition for discipline with the Disciplinary Board of the Supreme Court of Pennsylvania. That petition outlined respondent's misconduct in four matters. In each case, respondent settled a personal injury claim without the client's knowledge, failed to notify the client when the settlement proceeds had been received and failed to promptly pay the balance of the settlement due the client. According to the petition, "[r]espondent misappropriated the funds of Arthurs, Lincoln, Huff, and Fuqua, which were entrusted to him, for his own use." The petition charged respondent with violations of *RPC* 1.3 (lack of diligence), *RPC* 1.4(a) (failure to communicate with client), *RPC* 1.15(a) (failure to safeguard client funds), *RPC* 1.15(b) (failure to promptly deliver funds to client) and *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

On March 27, 1992, respondent submitted a resignation statement pursuant to *Rule* 215, Pennsylvania Rules of Disciplinary Enforcement in which respondent acknowledged the truth of the material facts contained in the disciplinary petition. On May 1, 1992, respondent was disbarred in Pennsylvania. He failed to notify the OAE of his disbarment in Pennsylvania, as required by *R. 1:20-14(a)(1)*.

The OAE urged us to recommend respondent's disbarment.

* * *

Following a review of the full record, we grant the OAE's motion for reciprocal discipline and recommend respondent's disbarment.

Reciprocal discipline proceedings in New Jersey are governed by *R. 1:20-14(a)(4)*, which provides as follows:

The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:

- (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
- (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
- (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
- (D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;
- (E) the misconduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (D). With respect to subparagraph (E), although respondent was disbarred in Pennsylvania, a disbarred Pennsylvania attorney may seek reinstatement five years after the effective date of disbarment, pursuant to *P.R.D.E. Rule 218 (b)*. While in New Jersey attorneys who knowingly misappropriate client funds are disbarred, as in Pennsylvania, in our state disbarment is permanent. Accordingly, we believe that the imposition of discipline greater than was imposed in Pennsylvania is warranted.

Respondent knowingly misappropriated client funds in four matters. He used those funds for his own purposes, without even notifying his clients that he had settled their cases and received settlement monies in their behalf. Knowing misappropriation of client funds mandates disbarment. *In re Wilson*, 81 N.J. 451 (1979). No amount of mitigation will be sufficient to excuse misappropriation that was knowing and volitional. *In re Noonan*, 102 N.J. 157 (1986). It is enough that respondent used his clients' money without their consent, knowing that he had no authority to do so. *In re Wilson, supra*, 81 N.J. 451 (1979); *In re Noonan, supra*, 102 N.J. 157 (1986).

Respondent argued to the Board that any discipline in addition to that imposed in Pennsylvania would be excessive, pointing out that he has been on formal inactive status in Pennsylvania since 1990. He maintained that his misconduct occurred more than ten years ago and asserted that, because more than five years have lapsed since his disbarment, he intended to request reinstatement in Pennsylvania. Respondent suggested that, if he is disbarred in New Jersey, there would be little or no possibility of being reinstated in Pennsylvania. Finally, respondent explained that he had not notified the OAE of his disbarment in Pennsylvania because he had not been aware of the notification requirement.

We dismiss respondent's contention that permanent disbarment should not be imposed in this matter. The primary purpose of discipline is not to punish the attorney, but to protect the public. *In re Rutledge*, 101 N.J. 493, 498 (1986). The "principal reason for discipline is to preserve the confidence of the public in the integrity and trustworthiness of lawyers

in general.” *In re Wilson, supra*, at 456. “Disbarment is a guarantee to the public that the attorney will not return to the profession.” *In re Templeton* 99 N.J. 365, 376 (1985).

The public needs protection from this respondent. Respondent’s suggestion that he should not be disbarred in New Jersey because he has been disciplined in Pennsylvania is rejected.¹ In order to preserve the public confidence in the integrity of the legal profession, we unanimously recommend respondent’s disbarment.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: _____

11/17/85

By: _____



LEE M. HYMERLING

Chair

Disciplinary Review Board

¹ Even following disbarment in New Jersey, respondent may request reinstatement in Pennsylvania.

SUPREME COURT OF NEW JERSEY

**DISCIPLINARY REVIEW BOARD
VOTING RECORD**

**In the Matter of Philip John Herbert
Docket No. DRB 99-150**

Argued: June 10, 1999

Decided: November 17, 1999

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hyerling	x						
Cole	x						
Boylan	x						
Brody	x						
Lolla	x						
Maudsley	x						
Peterson	x						
Schwartz	x						
Wissinger	x						
Total:	9						

*Member Thompson is on a temporary leave of absence


Robyn M. Hill
Chief Counsel