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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 99-278

IN THE MATTER OF

ROBERT V. KELLY

AN ATTORNEY AT LAW

Decision

Argued: November 18, 1999

Decided: February 22, 2000

Lee A. Gronikowski 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 based on a recommendation for discipline filed by special master Susan D. Davis.

Respondent was admitted to the New Jersey bar in 1970 and maintains an office for the practice of law in Belmar, New Jersey. He has no prior disciplinary history.

The complaint alleged violations of RPC 1.15(a) (knowing misappropriation of escrow funds), RPC 1.15(b) (failure to promptly notify a client or third person of the receipt of property in which the client or third person has an interest and failure to promptly turn over the property), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 1.15(d) and R.1:21-6 (recordkeeping violations).

* * *

In 1993, respondent incorporated National Recovery Services, Inc. ("NRS"), a business that located persons who were owed funds from bankruptcy proceedings. The purpose of the NRS was to solicit those persons' authority to recover their funds for a fee. Respondent was the sole shareholder, officer, director and employee of NRS.

In soliciting business, respondent used letterhead that stated, "Robert V. Kelly, Attorney At Law." He signed the solicitation letter as "Robert V. Kelly, Esq." In the letter, respondent advised a potential claimant that, "my client," NRS, had located money due the claimant and stated that "[w]e are willing to arrange recovery of these funds on a contingency fee basis." With the letter, respondent sent a "Funds Recovery Contract" and a "Limited Power of Attorney." The contract provided for the claimant's agreement to compensate "Robert V. Kelly of National Recovery Services, Inc." Through the power of attorney, the claimant appointed "Robert V. Kelly of National Recovery Services, Inc." to act as the claimant's attorney solely for the recovery of unclaimed funds.

In respondent's motion to the bankruptcy court for the payment of the unclaimed funds,

he identified the applicant as "Robert V. Kelly, Attorney at Law, of National Recovery Services, Inc." and signed the motion as an attorney representing NRS. The motion stated that "the applicant" had been "retained" by the claimant. Similarly, in the "Affidavit of Document Authenticity" and in the proposed order directing payment, submitted with the motion, respondent identified himself as an attorney and as the "authorized applicant" for the funds.

In May 1996, the United States Bankruptcy Court for the Eastern District of New York advised the Office of Attorney Ethics ("OAE") that, in October 1995, respondent had received funds due to a Robert Cehauskas, but had not remitted the funds to Cehauskas. On May 1, 1996, respondent advised the court that he had not disbursed the funds because of a "bookkeeping error." Thereafter, the OAE conducted an audit of respondent's attorney records. Initially, respondent refused to produce NRS's records, arguing, among other things, that NRS was not engaged in the practice of law. In respondent's motion seeking to quash the OAE's subpoena duces tecum, he also represented that he had "not engaged in the practice of law in New Jersey during 1995, 1996 and the first calendar quarter of 1997." Respondent's motion was denied.

The OAE audit revealed that, between February 1995 and June 1996, respondent had deposited funds due eight claimants, D. E. McNeel, M. Ableser, R. Cehauskas, J. Lisovitch, A. Senders, Texfi Industries, Flag Imports, Inc. and L. J. Severt, in an NRS checking account and had not immediately remitted the funds to the claimants. Payments were not made to the claimants for periods ranging from eighteen to 471 days. In the interim, respondent invaded

the funds to pay for business and personal expenses and to pay other claimants. The OAE auditor testified that, during the time periods respondent should have been holding the various claimants' funds, the NRS account balance frequently fell below the amounts belonging to the claimants. For example, respondent received $2,779.41[1] due to T. E. McNeel on February 13, 1995, but did not remit the funds to McNeel until May 29, 1996, 471 days later. During that time, the NRS checking account balance fell as low as $33.65. The OAE auditor calculated that for 314 of the 471 days NRS's bank balance was less than $2,779.41. When respondent finally paid McNeel, he used funds that had been deposited for another claimant, Flag Imports, Inc.

Also, funds belonging to two claimants, S. R. Moore and B. Brouse, were deposited in respondent's attorney trust account in November and December 1995 and were not disbursed to Moore and Brouse for 227 and 133 days, respectively. Again, in the interim, the funds were invaded and used for respondent's personal and business expenses and to pay other claimants. On November 13, 1995, respondent deposited the $1,002.78 Moore funds in his trust account, but did not remit them until June 27, 1996. During that time, the trust account balance fell as low as $587.48. Ultimately, Moore was paid from the NRS account from funds that had been deposited for another claimant, Severt. Also, respondent paid claimants Ableser and Lisovitch from the trust account, even though their funds had been deposited in the NRS account.

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[1] In calculating the amounts respondent should have been holding for the claimants, the auditor deducted respondent's fee.

The auditor testified that, in most instances, respondent dissipated the funds due to a claimant, then used funds received for another claimant to pay the earlier claimant, a practice known as "lapping." According to the auditor, he was unable to identify the source of the funds ultimately used to pay Texfi Industries, Flag Imports and L. J. Severt, due to respondent's failure to keep required records, including client ledger cards, receipts and disbursements journals and trust account reconciliations.

* * *

Prior to the hearing, respondent had petitioned the court for an assigned counsel, alleging indigence. However, that attorney was later relieved as counsel because of respondent's failure to cooperate with him. The court assigned another counsel and warned respondent that, if he did not cooperate with his new attorney and the new attorney asked to be relieved as counsel, respondent would have to proceed pro se. The new attorney represented respondent during the first hearing day. One week prior to the second hearing date, the new attorney filed a motion to be relieved as counsel, which motion was denied. However, at the hearing, respondent discharged his attorney and requested that the hearing be adjourned because he was not prepared to proceed. The special master denied that request. Respondent proceeded pro se. Except for a short statement, respondent relied on his answer and two amended answers.

Respondent did not dispute that he held himself out to the claimants and to the bankruptcy courts as an attorney, but contended that he only acted as NRS's attorney, not as attorney for the claimants. According to respondent, he used his attorney letterhead for correspondence to claimants because "the people receiving these solicitations are generally very suspicious ... and I thought it just might try [sic] to quell their suspicions if they saw the letters, the correspondence coming from an attorney...."

Respondent testified that, despite his representations to the claimants and the courts concerning his status as an attorney, he did not believe his representation of NRS constituted the practice of law because, at the time, it was not necessary to be an attorney in order to file an application with the bankruptcy court, on behalf of a claimant, for the turnover of unclaimed funds. Because he did not believe he was engaged in the practice of law, respondent continued, he did not pay his annual assessments to the New Jersey Lawyers' Fund for Client Protection ("CPF") in 1995 and 1996. Respondent testified that he paid the 1995, 1996 and 1997 assessments in 1997 because the bankruptcy court for the District of New Jersey had changed its rules to require only an attorney — or a claimant, pro se — to file a motion for the payment of unclaimed funds.

Respondent admitted knowing that, because he had not paid his CPF annual assessments, he could not practice law in New Jersey. Respondent stated that he was not admitted to practice in any other state. However, he argued, he continued to use his attorney letterhead in correspondence to clients because it was his "understanding you still consider

yourself an attorney at law even though you're not allowed to practice ... I don't think the failure to pay the annual fee changes your status as to your profession. Whether or not if [sic] you can actually practice it is something else." When asked why he had appeared before the bankruptcy courts when he was ineligible to practice, respondent replied: "Well, in this particular court, it didn't matter whether you appeared before them as an attorney or as a non-attorney."

Respondent testified that his remittances to the claimants were delayed for a number of reasons, including bookkeeping errors, inability to locate claimants who had moved without notifying him, misfiling of a claimant's address, hospitalization of a claimant and, in the case of a corporate claimant, the death of the contact person in the corporation.

It was his practice, respondent testified, to deposit claimants' funds in the NRS account. Occasionally, funds were mistakenly deposited in the trust account, due to the fact that he was overwhelmed by his recordkeeping responsibilities. Also, respondent claimed, funds were sometimes deposited in the trust account as a "precautionary measure" because he was concerned that the IRS might place a lien on the NRS account.

Respondent did not dispute the OAE's schedules showing that, after he had deposited the funds of ten claimants in the NRS account or his trust account, he had used the funds for other purposes. Respondent testified that he did not know that the claimants' funds had to be placed in his trust account He stated that, since 1962, he had been employed by various corporations as a tax accountant and that, although he was admitted to the bar in 1970, he

continued working as a tax accountant for more than twenty years after his bar admission and did not practice law during that time period. According to respondent, he was not familiar with the attorney recordkeeping rules and, because he did not believe that his actions on behalf of NRS constituted the practice of law, he did not familiarize himself with those rules. Respondent admitted that he had not kept the attorney records required by R.1:21-6.

Respondent also testified that, although his account balances fell below the amounts belonging to the claimants, he frequently delayed depositing checks in the NRS account because of his concern about an IRS lien. Therefore, he claimed, he had more funds available for distribution to claimants than what was shown in the NRS account. Respondent offered no evidence to support his contention.

Respondent did not dispute that he had issued trust checks to pay his business and personal expenses. He explained that he had done so "in an effort to short cut and reduce the overall recordkeeping responsibilities which overwhelmed [me] as a sole practitioner and not in an attempt to knowingly misappropriate funds" and that he was "simply not cognizant of the fact that such procedures were incorrect or deficient."

Respondent testified that, from 1992 to early 1997, he suffered from depression caused by his divorce from his wife, loss of his accounting job and estrangement from his daughter. According to respondent, his depression affected his ability to properly handle his business affairs. During that time period, respondent testified, he also abused alcohol. However, he did not seek psychological or medical help and did not take any medication for his depression

and alcohol abuse.

On March 3, 1999, a psychiatrist, John J. Verdon, Jr., evaluated respondent. Dr. Verdon opined that respondent suffered from the following:

1. Dysthymia, in remission. This term refers to a persistent depression which waxes and wanes over more than a two year time frame. Currently his mood is buoyant.

2. Alcohol Abuse, in remission.

Dr. Verdon concluded that, from 1992 through mid-1997, respondent's depressed mood "significantly interfered with his ability to conduct his personal and business affairs in a proper fashion." Dr. Verdon's report was attached to respondent's second amended answer, but Dr. Verdon did not testify at the hearing and his report was not entered in evidence.

Two friends of respondent, one of whom is an attorney, testified that, during the relevant time period, respondent appeared depressed and drank excessive amounts of alcohol. They further testified that, more recently, they noted an improvement in respondent's mood and a reduction in his alcohol consumption.

* * *

The special master rejected respondent's contention that he was not acting as an attorney for the claimants. She found that respondent had a duty to maintain his clients' funds in trust and that he did not do so. The special master also rejected respondent's claim that depression and alcohol abuse caused his misconduct. Finding that respondent had knowingly

misappropriated client funds, the special master recommended that he be disbarred.

* * *

Upon a de novo review of the record, we are satisfied that the special master's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. The special master correctly concluded that respondent acted as the attorney for the claimants when he petitioned the bankruptcy courts, on the claimants' behalf, for payment of the unclaimed funds. She also correctly found that respondent was obligated to hold his clients' funds in trust until properly disbursed to his clients.

Respondent held himself out as an attorney to the claimants and to the bankruptcy courts. In fact, he testified that he used his attorney letterhead and identified himself as an attorney to assuage any possible suspicions by the claimants. Also, in the contracts, the claimants agreed to pay respondent a contingent fee and, in the power of attorney, the claimants appointed respondent as their attorney, albeit for a limited purpose. Furthermore, in respondent's motions to the bankruptcy courts, he identified himself as an attorney and as the authorized representative of the claimants.

In light of the foregoing, there is no merit to respondent's contention that he was not the claimants' attorney and that his activities did not constitute the practice of law. It is immaterial that the bankruptcy courts apparently permitted persons who were not attorneys to file motions on behalf of claimants, seeking to recover unpaid funds. Respondent's

contemporaneous representations establish that he was acting as the claimants' attorney. Having used his attorney status to obtain clients and to file motions, it is disingenuous of respondent to argue that he was not the claimants' attorney and that he was not engaged in the practice of law.

As the claimants' attorney, thus, respondent had a duty to hold their funds in trust until properly disbursed to them. It is undisputed that respondent used the funds to pay personal and business expenses and to pay other claimants. He then replaced certain claimants' funds from monies due to other claimants. Such misuse of clients' funds, known as "lapping," constitutes knowing misappropriation and requires disbarment. In re Devlin, 109 N.J. 135 (1988). See also In re Howard, 121 N.J. 173 (1990).

Even if we were to accept respondent's contention that he did not believe that he was the claimants' attorney and that he did not know that his actions constituted knowing misappropriation, we would still find that respondent was guilty of knowing misappropriation. It is well established that ignorance of the law is no excuse. In re Eisenberg, 75 N.J. 454, 456-457, n.1 (1978). See also In re Barlow, 140 N.J. 191 (1995) (attorney argued that he had taken client funds from his trust account and deposited them in his business account because he intended to pay for title insurance and surveys for the client's real estate matter. However, he did not pay those invoices for months and, in the meantime, paid personal debts from the business account. In disbarring the attorney, the Court rejected his argument that he had honestly believed that his actions did not constitute knowing misappropriation).

Respondent's actions would warrant disbarment even if he were not the claimants' attorney. In In re Severance , 102 N.J. 286 (1986), the attorney had taken approximately $40,000 from investors with the promise that he would double their investments. He then failed to return their money. Although the investors were not clients of the attorney, they were aware of and relied on his status as an attorney. Despite the absence of an attorney-client relationship, the attorney was disbarred. See also In re Imbriani, 149 N.J. 521 (1997) (disbarment for theft of funds from a business partnership); In re Siegel, 133 N.J. 162 (1993) (disbarment for misappropriation of funds from a law partnership); In re Spina, 121 N.J. 378 (1990) (disbarment for theft from an employer).

It is also immaterial that the claimants were ultimately paid. "Even when the lawyer 'borrows' without permission rather than steals, we have invariably imposed disbarment. Misappropriation 'includ[es] not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.'" In re Freimark, 152 N.J. 45, 57 (1995) (Citation omitted).

Respondent claimed that he suffered from depression and abused alcohol during the relevant time period. Although a report from a psychiatrist was attached to respondent's second amended answer, the psychiatrist did not testify at the hearing and the report was not entered in evidence. However, even if the psychiatrist's findings were to be accepted, they would fall short of the proofs needed to excuse knowing misappropriation. For an attorney to escape disbarment for knowing misappropriation, the attorney must establish "by competent

medical proofs that [the attorney] suffered a loss of competence, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing volitional and purposeful." In re Jacob, 95 N.J. 132, 137 (1984). Recently, the Court affirmed the viability of the Jacob standard and stated that, in determining whether an attorney "lacked competency, comprehension or will, we have considered whether he or she was 'out of touch with reality or unable to appreciate the ethical quality of his [or her] acts.'" In re Greenberg, 155 N.J. 138, 156-157 (1998), quoting In re Bock, 128 N.J. 270, 273 (1992).

There is no indication in the psychiatrist's report that respondent was out of touch with reality or could not appreciate the nature and quality of his actions. Respondent did not seek psychiatric treatment and did not take any medication for his depression or alcohol abuse. Despite the lack of treatment, respondent's problems were in remission as of the March 1999 psychiatric evaluation. In describing respondent's problems during the relevant time period, his two witnesses testified that he appeared depressed and that, when drinking, he slurred his speech. There was no testimony that respondent suffered the loss of competency, comprehension or will that could excuse the knowing misappropriation of trust funds. In fact, at the hearing before us, respondent stated that his psychiatric and alcohol problems were never so severe that he could not differentiate right from wrong. Rather, he described his problem as causing him to be "very indifferent ... very apathetic."

In sum, the evidence clearly and convincingly establishes that respondent knowingly misappropriated trust funds. Therefore, we unanimously determined to recommend that

respondent be disbarred from the practice of law. One member did not participate.

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

Dated: 2/22/00

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD VOTING RECORD

In the Matter of Robert V. Kelly
Docket No. DRB 99-278

Argued: November 18, 1999

Decided: February 22, 2000

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling	x						
Cole	x						
Boylan	x						
Brody	x						
Lolla	x						
Maudsley	x						
Peterson							x
Schwartz	x						
Wissinger	x						
Total:	8						1

By Robert Frank 3/9/00
Robyn M. Hill
Chief Counsel