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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-476

IN THE MATTER OF

RON MARTIN KUBIAK

AN ATTORNEY AT LAW

Decision

Argued: February 11, 1999

Decided: May 10, 1999

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.

Steven K. Kudatzky 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 IIIB Ethics Committee ("DEC").

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

The complaint in this matter alleged violations of RPC 1.15(a) (failure to safeguard

the funds of a client or a third party), RPC 1.15(c) (failure to safeguard funds in which the attorney and a third party claim an interest), RPC 1.15(d) (recordkeeping violations) and RPC 8.4(d) (conduct prejudicial to the administration of justice). The crux of this matter is whether respondent's distribution of funds from a trustee account, including $2,500 to himself as a legal fee, constituted a failure to safeguard trust funds. The complaint also alleged that respondent violated the recordkeeping requirements of R. 1:21-6 when he wrote two checks payable to "cash" from the trustee account and failed to keep a record of receipts and disbursements for the account. Finally, the complaint alleged that respondent's letter to the grievants after the filing of the ethics complaint was an attempt to "unduly influence the grievants to dismiss the grievance."

* * *

In October 1987, Exxon Corporation accused an employee, Christopher Salamonczyk, of embezzling $10,235 from Exxon. On November 3, 1987, Salamonczyk's mother and stepfather, Zrlia and Wallace Lemanek, obtained a $10,265 treasurer's check from Bank of Pennsylvania payable to Exxon.[1] The check was to be used to make restitution to Exxon, in order to avoid the filing of criminal charges against Salamonczyk. However, on November 4, 1987, before the check was presented to Exxon, Exxon filed a criminal complaint.

[1] There is no explanation in the record for the discrepancy between these two amounts.

According to respondent, he was retained by Salamonczyk on November 9, 1987 for representation in connection with the Exxon complaint. Respondent testified that, during their November 9 meeting, Salamonczyk called his mother, who confirmed Salamonczyk's representation that the $10,265 belonged to Salamonczyk "to do with as he saw fit." Mrs. Lemanek denied that the conversation. [2]

Salamonczyk was accepted into the Pre-trial Intervention Program ("PTI"). Both respondent and Salamonczyk signed the January 7, 1988 PTI participation agreement. The agreement stated that, as a special condition of PTI, "applicant through his attorney [was] to repay Exxon $10,235."

Respondent testified that Exxon was not paid in accordance with the agreement because there was a question as to whether Exxon had already been reimbursed by its insurance company or through a bond. Respondent testified that he did not learn that Exxon was self-insured until June 1988. Thereafter, according to respondent, Exxon was not paid because Salamonczyk was uncertain whether he should continue in PTI or plead not guilty and go to trial on the charges.

On February 25, 1988, respondent sent a letter to the Lemaneks stating the following:

> I am trying to settle [Salamonczyk's] dispute with Exxon; however, the amount of the settlement is presently unknown. In order for me to negotiate a settlement, I must deposit the sum of $10,265.00 into my Trust Account.

After determining that the treasurer's check would have to be voided by the bank,

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[2] Salamonczyk died suddenly on September 18, 1997, prior to the ethics hearing.

respondent advised the bank and the Lemaneks to make the new check payable to "Ron Martin Kubiak, Attorney at Law, Trustee for Christopher Salamonczyk."

Instead of depositing the check into his trust account, respondent opened an interest-bearing money market account in the name of "Ron Martin Kubiak Trustee for Christopher Salamonczyk" ("trustee account"). The check was deposited into the trustee account on April 15, 1988. According to respondent, he opened a new account because Salamonczyk wanted to earn interest on the funds.

By letter dated May 19, 1988, George Haag, Salamonczyk's probation officer, advised Salamonczyk that, if Exxon were not paid by June 17, 1988, the court would hold a hearing to terminate Salamonczyk's participation in the PTI program. The hearing was ultimately scheduled for August 2, 1988.

On June 23, 1988, respondent met with Salamonczyk in connection with a divorce proceeding. During that meeting, according to respondent, Salamonczyk demanded that respondent remove $5,000 from the trustee account and give it to him. Respondent testified that he withdrew $5,000 from the trustee account by a check made payable to "cash." He then cashed the check and allegedly placed the cash in his office safe. Salamonczyk purportedly signed an "authorization" stating the following:

> I hereby acknowledge that [respondent] is Trustee for funds totaling $10,265.00 deposited into a trust account with me as beneficiary. This amount belongs to my mother, but resposibility [sic] for the expenditure of any amount is a right that belongs exclusively to me.
>
> I hereby authorize [respondent] to remove these funds from the bank and to hold these funds in a safe manner until futher [sic] authorization from me.

Respondent testified that, after he withdrew the funds from the account, he convinced Salamonczyk that the cash should be kept in his safe until Salamonczyk decided whether to continue with PTI.

On August 2, 1988, Salamonczyk waived the PTI termination hearing. The court then terminated his participation in the program. However, at respondent's request, the court ordered that, if Salamonczyk delivered the restitution money to Haag on or before August 16, 1988, the termination order would be vacated. Haag scheduled an appointment with respondent and Salamonczyk for 9:00 A.M. on August 16, 1988 for the delivery of the money. According to respondent, Salamonczyk had decided to complete the PTI program. When respondent was asked, at the ethics hearing, why he had not brought the money to court on August 2, 1988, he replied, "[g]ood question. I don't know."

On August 4, 1988, respondent withdrew all of the funds remaining in the trustee account, $5,398, by a check made payable to "cash." According to respondent, he withdrew the money at Salamonczyk's request and in Salamonczyk's presence, and put the cash into his office safe.

Respondent testified that, because Salamonczyk was again undecided about whether to complete the PTI program, respondent arranged for him to meet with a criminal trial attorney on August 12, 1988.[3] Respondent paid the attorney's $100 consultation fee with

[3] Apparently, respondent had advised Salamonczyk that he would not represent him in a criminal trial.

a check from his attorney business account. The attorney advised Salamonczyk to continue in PTI.

Respondent testified that Salamonczyk, immediately after meeting with that attorney, had instructed respondent to obtain a $5,235 treasurer's check payable to Exxon. There is no explanation as to why the check was not for the full amount of the restitution, $10,235. According to respondent, Salamonczyk wanted all of the funds that were in respondent's safe distributed. Respondent claimed that, when he reminded Salamonczyk that he was owed a legal fee, Salamonczyk promised to obtain $2,500 from his mother for that purpose.

According to respondent, he obtained a $5,235 treasurer's check from Horizon Bank on August 15, 1988, in Salamonczyk's presence, and gave it to Salamonczyk the following day. Respondent testified that, when he again reminded Salamonczyk of his legal fee on August 16, Salamonczyk replied that he had not yet received the funds from his mother and that respondent should take $2,500 from the funds in his safe.

Respondent testified that, on August 16, 1988, he made a full distribution to Salamonczyk of the remainder of the funds. Before distributing the funds, respondent had Salamonczyk sign an "authorization" stating the following:

> On behalf of Mr. and Mrs. Wallace Lemanek, I, Christopher Salamonczyk, hereby authorize distribution of the sum of $10,398.00 as follows:
>
> 1. To Christopher Salamonczyk for various legal expenses: $2500.00
> 2. To Ron Martin Kubiak towards legal services: 2500.00
> 3. To Ron Martin Kubiak for legal expenses: 63.00

4. To Carl D. Poplar for a legal consultation	100.00
5. To Exxon Corporation for restitution	5235.00
Total:	$10,398.00

With the exception of the $5,235 check to Exxon, the disbursements were in cash. According to respondent, Salamonczyk intended to pay the full amount of the restitution, $10,235, on that day. Respondent understood that Salamonczyk was going to obtain $2,500 from his mother to replace the money taken by respondent for his legal fee. Respondent's meeting with Salamonczyk began at 2:00 P.M. on August 16, 1988 in Collingswood. [4] Respondent did not remember when the meeting ended, although he testified that he personally prepared the "authorization" signed by Salamonczyk during the meeting. Haag's contemporaneous notes indicate that respondent called Haag at 4:05 P.M. on August 16, 1988 to ascertain the closing time of the probation office.[5] Haag advised respondent that he had already submitted the termination papers.

Salamonczyk appeared alone at Haag's office on August 17, 1988 and gave Haag the $5,235 Horizon bank check and a Midlantic Bank check in the amount of $2,500, both payable to Exxon. These sums totaled $2,500 less than the amount owed to Exxon. On August 19, 1988, after consulting with the court, Haag returned the two checks to

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[4] Although Haag had scheduled a meeting for 9:00 A.M. on August 16, 1988 for Salamonczyk to deliver the restitution monies, respondent denied knowledge of that meeting.

[5] In order to obtain the additional $2,500 from his mother, Salamonczyk would have had to drive to West Reading, Pennsylvania, where his parents resided, then to Haag's office in Mount Holly, New Jersey before 5:00 P.M.

Salamonczyk because they were $2,500 short. According to Haag, Salamonczyk cried when he was told that he had been terminated from the PTI program. Apparently, there was no discussion as to why Salamonczyk had not tendered the full amount of the restitution. Haag advised Salamonczyk that he could do nothing further for him and that, if Salamonczyk wanted to continue in PTI, respondent would have to file a motion to vacate the termination order.

Although respondent admitted that, on August 18, 1988, he had been told by Haag that Salamonczyk had been terminated from PTI because he did not make the full restitution, respondent denied having been told by either Haag or Salamonczyk that he should file a motion to vacate the termination order.

The Lemaneks, in turn, testified that the $10,635 was to be used to make restitution to Exxon. They never authorized respondent or Salamonczyk to use the money for any other purpose. The Lemaneks also testified that, prior to August 1988, they had given an additional $2,500 in cash to Salamonczyk to pay for respondent's legal fees. Mrs. Lemanek also stated that, when Salamonczyk requested the $2,500 for legal fees, she confirmed the amount of the fees in a telephone conversation with respondent. Respondent denied that there had been such a conversation.

On January 17, 1989, the Horizon treasurer's check for $5,235 was cashed. The endorsement on the check stated "check not used for original purpose, cashed by purchaser." Although it appears that the check was endorsed by both Salamonczyk and respondent, respondent denied having endorsed it. The OAE could not ascertain what happened to the

$2,500 Midlantic check.

In April 1989, Salamonczyk was indicted for "theft by failing to make required disposition of property received." He pleaded guilty to the charges. Respondent did not represent him. Salamonczyk was sentenced to a period of probation and ordered to make restitution to Exxon in installment payments. At the time of his death, Salamonczyk had repaid $2,672 to Exxon.

The complaint charged respondent with failure to safeguard the Lemanek funds by using them for purposes other than restitution to Exxon.

* * *

As previously stated, Salamonczyk died on September 18, 1997. Five months later, respondent sent a sympathy card to the Lemaneks by Federal Express, overnight delivery, the day before the Lemaneks were to meet with the OAE. With the card respondent included the August 16, 1988 "authorization" signed by Salamonczyk and a copy of a newspaper article concerning a federal appellate court holding that the attorney-client privilege did not survive the death of a client. On the sympathy card, respondent wrote the following:

> There were times when [Salamonczyk] didn't follow my advise [sic] and really frightened me with his behavior. I thought that when [Salamonczyk] told you the truth about the distribution of the $10,398.00, you would withdraw your grievance. A full accounting was given on your behalf on August 16, 1988. At this time, I must decide whether I should keep secret all the information [Salamonczyk] gave me in confidence about his son Arthur,

his personal problems and all the difficulties with the law. I have enclosed an article for your information whether the privilege survives his death. Please call me if you want to talk to me. (609) 916-1700.

The sympathy card was sent after the OAE had filed the amended complaint. Respondent knew that OAE personnel were scheduled to meet with the Lemaneks on February 27, 1998 to discuss their testimony at the hearing, which was then scheduled for March 17, 1998.

The complaint alleged that respondent's communication to the Lemaneks was an attempt to influence them to dismiss their grievance, in violation of RPC 8.4(d).

The complaint also charged that respondent had violated the recordkeeping requirements of R. 1:21-6 because he wrote two checks payable to "cash" from the trustee account and failed to keep a record of receipts and disbursements for the account. Although respondent admitted that the trustee account was a "fiduciary" account, he argued that R. 1:21-6 was not applicable because it was not an attorney trust account.

* * *

The DEC found that respondent had violated RPC 1.15(a), RPC 1.15(c), RPC 1.15(d) and RPC 8.4 (d), as alleged in the complaint. It found that respondent had received $10,265 from the Lemaneks for the limited purpose of making restitution to Exxon, that he did not use the funds for that purpose and did not return them to the Lemaneks. The DEC rejected as "inconsistent," "incredible" and "without merit" respondent's contentions that (1) the

second check constituted an irrevocable trust for the benefit of Salamonczyk with respondent as the trustee or (2) that the funds were a loan to Salamonczyk and that Salamonczyk had full control over the disbursement of the funds. Furthermore, the DEC did not believe respondent's testimony that, on November 9, 1987, he had spoken to a woman who represented herself to be Salamonczyk's mother, who told him that the funds belonged to Salamonczyk. The DEC found that testimony to be "so incredible as to be damning."

The DEC also rejected respondent's argument that he did not violate the recordkeeping requirements of R 1:21-6 because the trustee account was not a trust account.

Finally, the DEC found that respondent's communication to the Lemaneks on February 26, 1988 was an attempt to influence them to either withdraw their grievance or to stop cooperating with the OAE.

The DEC recommended that respondent be suspended for six months and be required to make full restitution to the Lemaneks.

* * *

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

The DEC properly found that respondent violated RPC 1.15 when he distributed the Lemaneks' funds to himself and Salamonczyk. Respondent knew that the Lemaneks

entrusted those funds to him for the sole purpose of restitution to Exxon. In fact, the first check had been made payable to Exxon. It was at respondent's request that the Lemaneks made the second check payable to respondent, as trustee for Salamonczyk. Furthermore, when respondent requested the change in payee, he specifically represented to the Lemaneks that the funds would be held in his trust account and used to "negotiate a settlement" with Exxon. After making such representations to the Lemaneks, he had an obligation to use the funds for their intended purpose, return them to the Lemaneks or obtain the Lemaneks' consent to their use for another purpose.

At the ethics hearing, for the first time, respondent testified that, on November 9, 1987, he had a telephone conversation with a woman, allegedly Salamonczyk's mother, who advised him that the $10,265 belonged to Salamonczyk "to do with as he saw fit." Although respondent had filed a detailed reply to the grievance, a comprehensive answer and two amended answers to the ethics complaint, he never mentioned that conversation. As found by the DEC, under these circumstances, respondent's testimony concerning the November 9, 1987 telephone conversation with Mrs. Lemanek was not credible.

Respondent's credibility was also adversely affected by his testimony regarding a July 10, 1989 meeting with Salamonczyk. According to respondent, Salamonczyk came to see him because he was to be arraigned on July 12, 1989. Despite the fact that the arraignment was for the theft from Exxon, respondent testified that the subject of Salamonczyk's prior PTI never came up. Furthermore, according to respondent, he never asked Salamonczyk why

he had been indicted and they did not discuss the fact that Exxon had not been repaid. That testimony lacks credibility. Indeed, respondent sent a letter to Salamonczyk summarizing their discussion during the meeting. The letter stated that respondent had "reviewed in detail" the arraignment procedures with Salamonczyk during their meeting. According to the letter, respondent had advised Salamonczyk to enter a "not guilty" plea to the charge of "Theft-Illegal Retention (NJSA 2C:20-9)" and to request that a public defender be appointed to represent him. Finally, the letter stated the following:

> As we discussed, based on the facts of your case, I feel that you may be guilty of ordinary negligence but that you did not commit a crime with criminal intent.

It strains credulity to believe that respondent and Salamonczyk would have discussed the arraignment "in detail" - respondent concluding that, "based on the facts" of the case, Salamonczyk might not be guilty of a crime - but would not have discussed why Salamonczyk had been indicted.

The DEC also properly found that respondent's "sympathy" card to the Lemaneks was an attempt to improperly influence them to withdraw their grievance and/or to stop cooperating with the OAE. Respondent knew that Salamonczyk had passed away and that the Lemaneks were the only OAE witnesses who could testify about the source of the $10,265. Respondent also knew that the Lemaneks lived out of state. As an attorney with twenty-eight years' experience, respondent should have been aware of the difficulties of obtaining the testimony of uncooperative, out-of-state witnesses.

Respondent's explanations of the timing of and the statements in the sympathy card were not credible. He stated that, even though he learned of Salamonczyk's death in October 1997, he did not send the sympathy card until February 1998 because he wanted to verify Salamonczyk's death. Even after respondent received a copy of the death certificate in October or November 1997, he did not send a sympathy card to the Lemaneks, ostensibly because he was "concerned about some of the entries" on the certificate and had requested clarification from the coroner. Respondent's explanation as to the timing of the sympathy card was simply not credible.

Similarly, the Board found unbelievable respondent's explanation for referring, in the sympathy card, to Salamonczyk's "confidences" concerning himself and Arthur, the Lemaneks' grandson, and to the question of whether those confidences were still protected by the attorney-client privilege. Respondent testified that he referred to the confidences as "an attempt to convey [his] personal struggle in his own words...over an unresolved and perplexing issue." First, the complaint only concerned respondent's handling of the $10,625. Other than Salamonczyk's conviction for the theft from Exxon, which was already a matter of public record, there were no references in the complaint to Salamonczyk's personal or legal problems. The complaint did not even allude to Salamonczyk's son. Thus, respondent had no reason to believe that he would be required to testify about unrelated client confidences. Second, RPC 1.6(c)(2) provides that an attorney may reveal confidential information to establish a defense to a disciplinary complaint against the attorney based upon

the conduct in which the client was involved. Indeed, the form letter requesting respondent's reply to a grievance specifically states that the attorney is required to reveal otherwise confidential information to the extent necessary to establish a defense to the grievance. Therefore, respondent's contention that he was still "pondering" the issue of attorney-client privilege in the context of the ethics proceeding is without merit. Third, respondent testified that, at the time he sent the sympathy card, he knew that Salamonczyk had previously signed a waiver of the attorney-client privilege for the initial DEC investigator. Respondent claimed, however, that he was concerned because he could not find the waiver. Yet, rather than request a copy of the waiver from the OAE or the DEC, respondent allegedly continued to "ponder" and research the privilege issue. Again, respondent's explanation in this regard was not credible.

In sum, the timing of respondent's communication to the Lemaneks and his references to having to decide whether he should keep secret Salamonczyk's confidences about unrelated problems allow no other conclusion but that respondent was attempting to convince the Lemaneks to dismiss their grievance and/or to cease cooperating with the OAE.

Finally, the DEC properly found that respondent violated the recordkeeping requirements of R. 1:21-6 by writing two checks payable to cash from the trustee account and failing to keep a record of receipts and disbursements from the account.

Respondent argued that the trustee account was not subject to the recordkeeping rule because it was opened in the name of respondent as trustee and not as attorney. According to respondent, he relied on the OAE's Trust and Business Accounting for Attorneys (2d ed.

1988) in determining that he did not have to treat the trustee account as an attorney trust account. There are two flaws in respondent's argument. First, R. 1:21-6 requires that attorneys who receive funds "entrusted to the attorney's care" deposit those funds into an attorney trust account. The Lemaneks entrusted the restitution funds to respondent in his capacity as the attorney for their son. In fact, respondent represented to the Lemaneks that he was going to deposit their check into his trust account. Therefore, he was obligated to maintain the funds in an attorney trust account. The fact that he did not do so is itself a violation of R. 1:21-6. Second, respondent's reliance on the OAE's book is without merit. Respondent did not specify the section of the book on which he relied in determining that he did not have to treat the trustee account as an attorney trust account. However, the book makes it clear that, except for specified fiduciary accounts that do not involve an attorney-client relationship, "all other trust accounts where an attorney holds money on behalf of clients in a legal representative capacity" are attorney trust accounts. Trust and Business Accounting for Attorneys, supra at 38-39. Therefore, respondent's reliance, if any, on the book was misplaced.

There remains the issue of discipline. Respondent has no prior disciplinary history. A reprimand would be sufficient discipline for his failure to safeguard trust funds and his recordkeeping violations, particularly because the misconduct occurred ten years ago. See In re Banas, 144 N.J. 75 (1996) (reprimand where the attorney received $5,000 from his client's mother to be used for the client's bail; when bail could not be met, the attorney

applied the funds to his outstanding legal fees); In re Goldston, 140 N.J. 272 (1995) (reprimand where attorney failed to safeguard client funds and committed numerous recordkeeping violations). However, here, respondent also violated RPC 8.4(d) by sending an alleged "sympathy" card with veiled threats to reveal negative privileged information about the Lemaneks' deceased son and living grandson. That misconduct, which occurred in 1998, warrants a suspension.

Based on the foregoing, the Board unanimously determined to impose a three-month suspension. Two members did not participate. The Board declined to require that respondent make restitution to the Lemaneks. Although the Board has required restitution in select cases, the disciplinary process should not be employed as a collection agency for aggrieved clients or as an alternative to recourse to the court system.

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 Ron Martin Kubiak
Docket No. DRB 98-476

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 6/23/99
Robyn M. Hill
Chief Counsel