SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-034

IN THE MATTER OF	:
KENNETH VAN RYE,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: April 17, 1991

Decided: May 23, 1991

Regina R. Ford appeared on behalf of the District IIA Ethics Committee.

Harvey Browne appeared on behalf of respondent.

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

This matter is before the Board based on a recommendation for public discipline filed by the District IIA Ethics Committee. The amended ethics complaint charged respondent with failure to account for rental income and with disbursement of unauthorized funds (first count); knowing misappropriation, by releasing escrow funds without the consent of the purchaser of real estate (second count); forgery of a client's signature on a mortgage and note, or improper notarization of a signature forged by another (third count); and recordkeeping violations (fourth count).

Respondent was admitted to the New Jersey bar in 1979. He is a sole practitioner in Elmwood Park, Bergen County.

In or about 1972, while still a high school student, respondent met Jean Miller ("Miller"), the grievant herein, during a political campaign in Elmwood Park, where both resided. Thereafter, respondent became a close friend of Miller and her husband. After he was admitted to the bar, he represented the Miller family members on numerous occasions, at no charge or for a reduced fee. More frequently, he provided legal assistance to one of the Millers' teenage sons, who invariably entangled himself in serious legal difficulties. Respondent's ties with the Miller family transcended professional boundaries, however. As Miller acknowledged, after she and her husband were divorced, she became dependent on respondent for legal and moral support, their friendship having continued to grow over the years.

In February 1984, Miller moved to Ohio, prompted by a job transfer and the desire to afford her two sons "a fresh start." One of her former co-workers rented her Elmwood Park house for $300 a month, which was, by all accounts, a pittance. Prior to leaving for Ohio, on February 8, 1984, Miller gave respondent a general power of attorney (Exhibit C-1) providing, among other things, for the collection of rental income from the Elmwood Park property and the use of those monies "to pay property taxes, etc., on said property." Pursuant to his responsibility as rental agent, respondent each month forwarded to Miller the $300 sum, which was equivalent to her rent in Ohio.

When Miller's tenant obtained another job and moved away from the area, respondent was able to lease the property for $950, a substantial increase over the prior rent of $300. According to

Miller, she instructed respondent to remit to her only $300 to cover her Ohio rent, and to apply the balance to the payment of certain outstanding debts, including a $20,000 loan made by Miller's mother to the now defunct business of Miller's ex-husband.

By Miller's own testimony, she also authorized respondent to reimburse himself for all outstanding legal fees incurred by her or the other family members:

> I didn't ask him, 'What are you doing with [the rental income]?' All I knew is he told me he was getting $1,000 a month. I said, 'Fine.' All you got to do with that 7 that's left is pay my mother, pay back yourself for going up for [my son], pay anything you have to. All I want is $300.
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> . . .
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> I never questioned his money. . . I didn't look at it [as if it were my money]. . . . It was his money. All I wanted him to do was send me $300. If he got $2,000 I didn't want to know about it. All I wanted was money for my rent in Ohio. . . . So I didn't care --

[T4/26/1990 41,43,44.]

Indeed, as disclosed by the audit conducted by an accountant retained by the Office of Attorney Ethics, between October 24, 1984 and February 3, 1986, respondent collected $11,480.47 as rental income in Miller's behalf, deposited it in a special account -- not a trust account -- and disbursed an equal sum for the payment of various expenses, including real estate taxes on the property ($1,100), water ($215.26), the loan from Miller's mother ($400), a credit union loan ($2,500), and reimbursements for his legal fees and loans/advances made to Miller ($3,257.80), to name a few (Exhibit C-8). It was respondent's testimony that he did not

reimburse himself for any monies to which he was not entitled by way of attorney's fees or monetary advances to Miller. According to respondent, the latter included delinquent 1984 and 1985 real estate taxes on the Elmwood Park house ($1,686.95) and cash loans to Miller, for which he had cashed his Christmas club check. Respondent also testified that he and Miller talked every week, at which time he would apprise her of all reimbursements made to himself. He never submitted a formal accounting, however.

According to Miller, in late 1985, the property once again became vacant. By that time, she had already been served with a summons and complaint for foreclosure for failure to pay a $6,000 mortgage encumbering the property. Still according to Miller, she was unaware of the existence of that mortgage, although she acknowledges that the mortgage and the note bear her signature. After she forwarded the summons and complaint to respondent and he explained to her the consequences of the foreclosure action, Miller requested respondent's assistance in arranging for a loan in New Jersey to pay off the mortgage. Miller told respondent that she would not be able to get a loan in Ohio. Respondent then contacted several banks, to no avail. Eventually, he was successful in obtaining a $5,000 loan in Miller's name from a credit union affiliated with a New Jersey church of which she was a parishioner. The loan was to be secured by a mortgage on the Elmwood Park property.

On or about September 20, 1984, the credit union's office manager went to respondent's office to have the loan documents

executed. On that day, an unidentified female present in respondent's office signed Miller's name on the note (Exhibit C-3).[1] Respondent did not disclose to the general manager that the woman signing the documents was not Miller. The credit union's office manager testified that respondent's signature as Miller's attorney-in-fact would have been acceptable. Similarly, ten days before, on September 10, 1984, seemingly the same person signed Miller's name on the mortgage. Notwithstanding his knowledge that the signature was not genuine, respondent witnessed and notarized the signature on the mortgage. (Exhibit C-2).

Respondent did not deny that the signatures on the note and the mortgage were not Miller's. He admitted that he should have signed them as Miller's attorney-in-fact. He explained, however, that because he had Miller's consent, he asked someone to sign for -- not to pose as -- Miller.

In or about December 1985, respondent advised Miller that it was in her best interest to list the property for sale, in light of her dire financial straits. Miller agreed. On February 15, 1986, a contract of sale was executed between Miller, as seller, and Mario, Maria, and Giovanni Gambino, as buyers, for the purchase price of $158,000 (Exhibit C-5). On April 4, 1986, the Gambinos gave respondent a $15,650 down payment, which respondent deposited

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[1] Respondent was unable to recall the woman's identity.

in his trust account at the Valley National Bank.[2] The contract of sale provided that the deposit monies were to be held in escrow until closing of title, which was to take place on or before June 3, 1986. For unknown reasons, on April 7, 1986, respondent transferred $7,780, in trust for the Gambinos, and $4,000, in trust for Miller, to another trust account at the National Community Bank (attachments D-4 and D-5 to Exhibit C-8)[3].

In the interim, without the rental income, Miller's financial circumstances became more straitened. By her testimony, even food was scarce. She also needed to buy a car, as her old car had been totalled in an accident by one of her sons. In addition, she was anxious to put down a deposit on a condominium in Ohio, to take advantage of its reasonable purchase price.

It was against this backdrop that Miller requested respondent to release to her the deposit monies given by the Gambinos. Respondent's reply, at first, was that he could not release the monies until closing of title. Pressed by Miller's repeated requests, however, on April 22, 1986, respondent wrote to Frank Rivellini, the Gambinos' attorney, asking for permission to release

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[2] Although the contract provided that the deposit monies were to be held in escrow by the realtor, for reasons that respondent and the buyers' attorney cannot recall, respondent acted as the escrow agent.

[3] Although the record is not entirely clear as to whether the balance of $3,870 remained in the Valley National Bank trust account, there is no evidence that respondent misused those monies.

$3,875 of the deposit monies to Miller. The last paragraph of that letter stated that:

> [i]f you agree to the release of these funds, please confirm the same in writing at your earliest convenience. I will await your reply.
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> [Exhibit C-9.]

On April 29, 1986, respondent remitted to Miller the sum of $2,875 (Exhibits R-11C and D). Absent from the record is either a written authorization from Rivellini or a letter warning respondent not to release the deposit.

Respondent contended that he had Rivellini's consent to the release of part of the escrow funds. He testified that, after a conference call with Rivellini and the realtor, ". . . it was agreed to be done and it was then sent out the next day, being the 29th" (T5/22/1990 162,163).[4] Rivellini, in turn, denied having authorized the release of the monies.

During the following months, the Gambinos experienced difficulty in obtaining a mortgage commitment. Pursuant to the mortgage contingency clause in the contract of sale, either party could void the agreement by written notice, if the mortgage loan had not been obtained -- or if the buyers had not notified the seller of their decision to proceed with the transaction without having obtained a mortgage commitment -- within sixty days from the date of the agreement, or about April 15, 1986.

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[4] The realtor did not testify at the district ethics committee hearing.

According to respondent, after unsuccessful attempts to ascertain from Rivellini the status of the Gambinos' mortgage, on June 4, 1986, respondent sent a letter to Rivellini cancelling the transaction, relying on the relevant paragraph of the contract of sale. That letter stated, in part, that

> [t]he seller . . . [has] made every effort to assist the purchasers in this matter. . . . Additionally, I have contacted your office on numerous occasions to determine if your clients obtained their mortgage, if you have title work and if we can close on or about June 3, 1986. To date, I have not received answers and/or confirmation to any of the above questions.
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> Please be further advised that the two (2) special accounts that have been established in National Community Bank are in the process of being closed. The original deposit will be returned along with the interest earned on the Gambino account.

[Exhibit C-10.]

Despite the receipt of the above letter, Rivellini advised the Gambinos not to withdraw their mortgage application. He suggested to the Gambinos that, in the event they obtained a mortgage commitment and the property was still available, they might be able to proceed with the transaction. Indeed, several days thereafter, the Gambinos appeared at respondent's office with a mortgage commitment (Exhibit R-13). According to respondent, he told Rivellini that there were other parties interested in purchasing the house at an increased price, but that he might be able to persuade Miller to go ahead with the sale, if closing took place early in July and if the balance of the deposit monies was released to her. It seems that Miller, still burdened by financial

difficulties, presented to respondent as a matter of great urgency that she receive the deposit monies.

Still according to respondent, Rivellini agreed to the above conditions. Rivellini, on the other hand, denied having consented to the release of the balance of the deposit. In any event, by check dated June 13, 1986, respondent forwarded to Miller the sum of $11,870 from the deposit monies (Attachments D-5 and D-7 to Exhibit C-8). Notwithstanding the above, on June 14, 1986, respondent certified to the mortgage company to which the Gambinos had applied for a loan that he was holding a $15,650 deposit in an escrow account (Exhibit C-11).

On July 1, 1986, respondent sent a time-of-the-essence letter to Rivellini, scheduling closing of title for July 14, 1986. The letter also stated that ". . . [s]hould your clients fail to deliver the balance of the purchase price in accordance with the Contract of Sale, my clients shall retain the entire deposit and seek all available damages at law" (Exhibit R-7).

In the interim, troubled by the delay with the closing of title, Miller travelled to New Jersey on the scheduled closing date, July 14, 1986. Upon discovering that both respondent and Rivellini were appearing in court on that day on unrelated matters and that, obviously, the closing would not be taking place, Miller went to the realtor's office, personally contacted the other party interested in the house, and negotiated an agreement to sell it for $170,000. On July 15, 1986, respondent, as Miller's attorney-in-fact, signed a new agreement of sale with Ray and Janice Leitner

(Exhibit C-6). Closing was to occur on or before September 30, 1986.

On July 17, 1986, respondent wrote the following letter to Rivellini:

> Please be advised that since your clients were not able to fulfill the time of the essence demand on the above described transaction, my client has relisted this house for sale. Please be further advised that your clients' deposit monies will be returned once this premise [sic] is sold.
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> The deposit monies are being held pending the sale in order to insure the fact that my client will not incur any loss on this premise [sic] and that all her out of pocket expenses are paid by an increase in the purchase sale price [sic].
>
> If you have any questions, or need any additional information, please feel free to contact me.
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> [Exhibit C-12.]

Asked by a hearing panel member about how he intended to arrange for the return of the monies in the event that the Leitner transaction should not be consummated, respondent replied that, by his calculations, the amount of the damages sustained by Miller exceeded the $15,650 deposit.

By letter to respondent dated July 21, 1986, Rivellini demanded the return of the deposit monies. The letter also stated that, after respondent declared the agreement null and void and the Gambinos delivered to respondent a mortgage commitment, there had been no agreement about a closing date, there had been "nothing in

writing to revive this deal," and that, accordingly, respondent's time-of-the-essence letter was deemed unilateral and of no effect.[5]

On November 5, 1986, the date the Leitners closed title on the property, the deposit monies were finally returned to the Gambinos.

At the conclusion of the district ethics committee hearing, the panel found that respondent had improperly kept his books and records, as disclosed by the audit report, in that client ledger cards and some journals were incomplete, in that respondent had withdrawn legal fees directly from the Miller special account without first depositing them into his business account, and in that he had failed to designate the Miller special account as "attorney trust account." The panel also found that respondent had misrepresented to the credit union the identity of the person signing the loan documents and that, knowing that the signature on the mortgage was forged, he had improperly notarized it as Miller's. More significantly, the panel concluded that respondent had wrongfully disbursed escrow funds to his client, without the knowledge or consent of the other party.

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[5] The record contradicts Rivellini's protestations that, at the time that respondent sent the time-of-the-essence letter, there was no enforceable agreement between Miller and the Gambinos because respondent himself had cancelled it long before, on June 4, 1986. Exhibit C-15 demonstrates that Rivellini believed that the deal was still alive. That exhibit is a handwritten note by Rivellini on July 11, 1986 (five weeks after the time-of-the-essence letter), wherein he indicates that he had spoken with the mortgage company and that the earliest date the closing could take place was July 30.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the entire record, the Board is satisfied that the findings of the district ethics committee that respondent was guilty of unethical conduct are fully supported by clear and convincing evidence. The Board is unable to agree, however, that the evidence clearly and convincingly establishes that respondent misused the escrow funds.

Indeed, respondent's and Rivellini's testimonies in this regard are at sharp variance. Respondent, on the one hand, swore that Rivellini consented to the release of $2,875 in April 1986, and that Rivellini also authorized the release of $11,870 in June 1986, as a condition to the continuation of the transaction. Rivellini, on the other hand, denied having given permission to the release of the deposit monies. In light of their conflicting testimonies and absent other competent evidence, the Board cannot find that the applicable standard of proof has been satisfied. Regrettably, the panel report provides little assistance to the Board in this regard. After weighing the evidence presented at the district ethics committee hearing, the panel found that respondent had, in fact, disbursed the funds to his client without the knowledge or consent of the other party. The panel report, however, makes no mention of the basis for this finding. It does not even allude to the credibility of the witnesses, having been afforded the first-hand opportunity to observe their demeanor, an intangible aspect not transmitted by the written record. Because

the Board is unable to conclude that an ethical violation in this regard has been demonstrated by clear and convincing evidence, the Board recommends that the second count of the complaint be dismissed.

Although the Board finds that respondent's misuse of escrow funds has not been proven by clear and convincing evidence, the Board is convinced that the applicable standard of proof has been met as to numerous other ethical violations. The record establishes that respondent did not maintain his attorney books and records in accordance with generally accepted accounting principles, in violation of R. 1:21-6 and RPC 1.15(d); failed to submit a written, formal accounting to Miller on the rental receipts and disbursements, in violation of RPC 1.15(b); failed to properly designate the Miller special account as an "attorney trust account", in violation of R. 1:21-6 and RPC 1.15(d); withdrew legal fees directly from the Miller special account without first depositing them into his business account, in violation of R. 1:21-6 and RPC 1.15(d); falsely certified to the mortgage company that he was holding the entire deposit monies in escrow; improperly witnessed and notarized a false signature on a mortgage, in violation of RPC 8.4(c); and through his silence, misrepresented to the credit union's general manager that the woman signing the loan documents was Miller, in violation of RPC 8.4(c).

In mitigation, the Board considered the absence of harm to Miller; the fact that the recordkeeping violations were of a minor nature; respondent's explanation that the certification on the

mortgagee's form letter was not intended as a misrepresentation that he was holding $15,650 in escrow but, rather, as a representation as to the amount of the deposit tendered by the Gambinos; and the lack of evil intent on respondent's part with regard to the signing of the loan documents and the improper execution of a jurat.

As to the latter, the record leaves no doubt that Miller was aware of the credit union loan and of the mortgage securing it and that respondent's conduct was motivated solely by his desire to help her avoid the foreclosure. Nevertheless, respondent's conduct in this regard transcended that found in certain prior cases reviewed by the Board where a private or public reprimand was imposed for the improper execution of a jurat. In the majority of those cases, the attorneys witnessed signatures and took the acknowledgements on documents signed outside their presence, believing that the signatures were genuine. See, e.g., In re Coughlin, 91 N.J. 374 (1982) (where an attorney was publicly reprimanded for completing an acknowledgment on a deed and executing the jurat on an affidavit of consideration, where the grantor had signed the documents outside the attorney's presence). Here, although respondent's sole design was to help a close friend in a difficult situation, he knew that Miller had not signed the mortgage and, notwithstanding this knowledge, witnessed the false signature and affixed his jurat thereon. His conduct was more analogous to that exhibited by the attorney in In re Conti, 75 N.J. 114 (1977), who received a severe public reprimand for directing

his secretary to sign the names of elderly clients on a deed. The clients had told the secretary that it was impossible for them to come to respondent's office and had instructed her to do "whatever had to be done" to accomplish the recording of the deed. The attorney then witnessed the signatures and took the acknowledgment.

In addition to the above impropriety, respondent failed to comply with the relevant recordkeeping rules -- see, e.g., In re Fucetola, 101 N.J. 5 (1985) (where the attorney was publicly reprimanded for failure to maintain his trust account records in accordance with R. 1:21-6, resulting in various overdrafts; the attorney had been previously privately reprimanded) -- and misrepresented certain facts on two occasions. See In re Kasdan, 115 N.J. 472 (1989) (where the Court ruled that intentionally misrepresenting the status of lawsuits warrants a public reprimand). Based on the totality of respondent's conduct and after balancing his ethical improprieties and the mitigating circumstances present in this matter, the Board unanimously recommends that respondent be suspended for a period of three months.

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

Dated: 5/23/1991 By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board