SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-335

IN THE MATTER OF

LOUIS R. DiLIETO,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: November 16, 1994

Decided: January 5, 1995

John J. Janasie appeared on behalf of the Office of Attorney Ethics.

William J. Gearty 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 upon a recommendation for public discipline filed by Special Master Charles H. Mandell. The four-count complaint charged respondent with knowing misappropriation, conflict of interest and recordkeeping deficiencies. In the Siwakowski and Herrera matters, respondent was charged with knowing misappropriation by investing client funds without disclosing to the clients that he, rather than a third party, was the borrower. In the Walsh matter, respondent was charged with knowing misappropriation by borrowing against a deposit in a real estate transaction. In the Lombardi matter,

respondent was charged with knowing misappropriation by offsetting outstanding legal fees against a deposit in a real estate matter. The complaint charged that, in 1987, respondent withdrew certain monies from his account against client funds, at a time when there were no legal fees on deposit to cover those withdrawals.

Respondent was admitted to the New Jersey bar in 1965. He maintains an office for the practice of law in Asbury Park, Monmouth County, New Jersey. He has no history of prior discipline.

Prior to the DEC hearing, respondent and the Office of Attorney Ethics ("OAE") stipulated certain facts. Exhibit J-1.

I. FACTS

A. The Herrera Matter

Respondent had represented Helen Frangione, Elizabeth Herrera's sister, for many years. When she died, Mrs. Herrera, who lived in Venezuela, became the sole beneficiary of her estate. One asset of the estate was Mrs. Frangione's house in Ocean Grove, which was sold after her death. As a result of respondent's representation of Mrs. Herrera in the estate matter, he came into possession of $55,000, the net proceeds from the sale of the Ocean Grove house.

Respondent testified that Mrs. Herrera did not want the funds sent to Venezuela because of the unfavorable political climate in that country. She wanted to keep the monies in New Jersey. When respondent asked her if she would like to lend them out, Mrs.

Herrera replied affirmatively. Respondent then borrowed the $55,000 himself at a ten percent interest rate.

According to the complaint, respondent never disclosed to Mrs. Herrera that he was the borrower, a contention respondent denies. He testified that Mrs. Herrera was aware, from the beginning, that the loan was for himself. Respondent added that he had given Mrs. Herrera the original of a mortgage note, of which he did not keep a copy. At the DEC hearing, however, respondent conceded that the note was actually a promissory note, with no mortgage or other security for the loan.

It is undisputed that respondent fully repaid the loan on April 30, 1987. In addition, Exhibit P-1 shows that respondent paid $16,000 in interest on the loan. At the DEC hearing, Paula Granuzzo, Esq., a former deputy ethics counsel with the OAE, and Kenneth Tulloch, an investigative auditor with that office, testified that, during one of their several visits to respondent's office, respondent admitted that he had borrowed the monies from Mrs. Herrera without revealing to her that he was the borrower. Respondent denied having made such statements, although he conceded that he had not advised Mrs. Herrera to seek the advice of independent counsel at the time of the loan.

Mrs. Herrera did not testify.

* * *

The Special Master concluded that, without Mrs. Herrera's testimony, there was no clear and convincing evidence that respondent had not disclosed to her that the loan was for himself.

The Special Master remarked that "[t]he evidence of misappropriation is very strong and, if the standard of proof was a preponderance of the evidence, this burden would be met in this Hearing Officer's determination. However, the evidence falls just short of being clear and convincing on this issue." The Special Master found, however, that respondent violated RPC 1.8(a), when he failed to advise Mrs. Herrera to seek independent legal counsel.

B. The Walsh Matter

Martin Walsh and respondent had been good friends since their college days, when they were roommates. After respondent became an attorney in 1965, he represented Mr. Walsh in numerous legal matters.

In April 1987, Mr. Walsh contracted to sell a pub he owned in Neptune, the Marty Walsh's Irish Cottage Bar and Restaurant. The contract provided for the sale of the business as well as the real estate on which the business was located. The buyers were Eugene Day, Henry Wright, Reginald Hyde and Richard Hyde. The agreed price of that property was $600,000.

On April 29, 1987, respondent deposited a $25,000 down payment in his trust account, to be held in escrow until the closing of title, pursuant to the contract. It was Mr. Walsh's understanding that, ultimately, the $25,000 sum would be used to settle a dispute with a casino involving some outstanding markers in the amount of $24,000. Prior to the resolution of that dispute, however, respondent approached Mr. Walsh about borrowing the $25,000 for his

personal use. According to respondent, he indicated to Mr. Walsh that the beginning of 1987 had been "lean" for him and that he would like to have the use of the $25,000 deposit, if it could be released. When Mr. Walsh retorted that the monies were earmarked for the casino dispute, respondent assured him that the monies would be available whenever the dispute were resolved either by judgment or by settlement. Mr. Walsh agreed to lend respondent the $25,000, on the condition that the money be ultimately available to pay the casino markers. According to Mr. Walsh, he owed respondent fees from numerous other legal matters: "he was my right hand man. Whenever something came up, I said, Lou -- usually I didn't get a bill. I said I owe you * * * * I knew I owed him a substantial amount of money." T5/26/1994 48. Mr. Walsh knew that respondent would have to obtain the buyers' consent to the release of the deposit. Mr. Walsh, however, anticipated no objections from the buyers because they were anxious for the deal to go through.

Thereafter, respondent contacted John S. Power, Esq., the attorney for the buyers, to ask for the release of the deposit. According to respondent, he pointed out to Mr. Power that there were no contingencies on the sale of the real estate and that the contingencies on the sale of the business had been almost resolved. He asked Mr. Power to obtain the buyers' authorization to the release of the deposit for the use of his client, Mr. Walsh. Respondent did not disclose to Mr. Power that the money was for himself.

After consultation with Mr. Day, the buyers' representative,

Mr. Power informed respondent that the deposit could be released. There was no writing memorializing this understanding.

Respondent then, on several occasions between May 1, 1987 and the Fall of 1987, withdrew funds for himself against the $25,000 deposit.

As to the contingencies listed on the contract, Mr. Power asserted that they were actually of no great significance to the buyers. Mr. Power alluded to Mr. Walsh's agreement to take back a $400,000 mortgage, to the buyers' willingness to purchase the property even without a liquor license and to the fact that there was no need for a perpetual easement. Mr. Power conceded, nevertheless, that, if some of the contingencies were not eventually met, his clients would be entitled to a refund of the deposit, to which respondent had agreed. The transaction was ultimately consummated.

* * *

The Special Master found that respondent knowingly misappropriated client funds, in violation of the principle established in In re Hollendonner, 102 N.J. 21 (1985). The Special Master noted that

> the question to be resolved is whether or not Mr. DiLieto had the authority to utilize trust funds, in which persons other than his client had an interest, for his own purposes. Mr. DiLieto states that he had such authority, to use the funds, but admits that he did not advise Mr. Power, the Buyer's attorney, the [sic] he was the borrower -- he stated that his client was the borrower. Furthermore, the documentation does not support that the arrangement was specifically consented to by the appropriate parties with full knowledge of

> the nature and extent of the transaction. Indeed, all involved acknowledge that there was nothing in writing documenting this 'loan'. Accordingly, there is clear and convincing evidence of a knowing misappropriation of client trust funds with regard to the Walsh-Day/Wright/Hyde matter, involving violation of RPC 1.15 and 8.4(c) as well as the principals [sic] established in the Matter of Hollendonner, supra. [original emphasis].
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> [Special Master's Report at 10.]

It seems, thus, that the Special Master based his finding of knowing misappropriation not on the lack of the parties' authorization to use the deposit but, instead, on respondent's failure to disclose to Mr. Power that he, not his client, would be using the money, albeit with his client's consent.

C. The Lombardi Matter

Respondent and Kenneth Lombardi have known each other for forty years. Over the years, respondent has represented Mr. Lombardi in many transactions concerning his plumbing supply business and real estate, as well as some civil suits.

On September 25, 1987, Mr. Lombardi and Timothy Cassidy, the sole shareholder of M.C. Inv., Inc., a real estate company, signed a contract for the sale of a lot in Asbury Park owned by Mr. Lombardi. Mr. Cassidy intended to build multiple dwellings on the land. The contract called for a $15,000 deposit, to be paid in three equal installments. Respondent was to hold the deposit in escrow "until closing of title and deed transfer." Exhibit P-14A.

An addendum to the contract provided that the deal was

contingent upon Mr. Cassidy's obtaining construction financing within six months. It also provided for Mr. Cassidy to file within sixty days the necessary applications for approvals, permits and/or variances and to obtain within six months the necessary approvals to build forty-eight condominium units. The addendum stated that "[i]n the event that the buyer is unable to obtain the necessary permits within six months of the contract, then this contract, at the option of the sellers, may be cancelled or extended." Exhibit P-14A.

On August 21, 1987 (before the execution of the contract on September 25, 1987), respondent deposited the first $5,000 installment in his trust account. The second installment was deposited on October 28, 1987 and the third on December 21, 1987.

According to Mr. Lombardi, following the signing of the contract, he had many discussions with Mr. Cassidy about the latter's compliance with the contingency clauses for the necessary applications and approvals. At one point, Mr. Lombardi discovered that Mr. Cassidy had not filed the applications within sixty days. As time went on, Mr. Lombardi received other offers to purchase the property and allegedly informed Mr. Cassidy that he would be forfeiting the deposit if he did not comply with the terms of the contract concerning the application and approval process. Mr. Lombardi also testified that, although the contract was silent in this regard, from the beginning of the transaction he and Mr. Cassidy had agreed that the deposit would be nonrefundable. This was so, according to Mr. Lombardi, because he was unwilling to tie

up the property in a deal if Mr. Cassidy did not act expeditiously to obtain the required approvals. Mr. Lombardi added that he had been in that situation with other buyers in the past, of which Mr. Cassidy was aware. Mr. Lombardi further added that Mr. Cassidy had allowed him to use the deposit monies for the carrying charges on the property, such as real estate taxes, insurance and maintenance. Lastly, Mr. Lombardi testified that, even prior to the expiration of the time limitations contained in the contract, he had informed Mr. Cassidy that he would be making use of the deposit monies, to which Mr. Cassidy had not objected because he knew he was in default.

When respondent indicated to Mr. Lombardi that he was in need of monies, Mr. Lombardi replied that he could not afford to advance respondent any monies out of his business, but that respondent could borrow against the deposit. Both respondent and Mr. Lombardi testified that the latter owed a considerable amount of legal fees to respondent from prior matters, amounting to $30,000 to $40,000. Mr. Lombardi's testimony was that he had relayed to respondent his conversation with Mr. Cassidy about the use of the deposit. Mr. Cassidy, in turn, denied having any knowledge that the deposit was being used. He contended that he had never authorized the release of the deposit to respondent or anyone else prior to the closing of title.

Conceding that he had not asked Mr. Cassidy's permission to release the deposit and that the contract did not state that the deposit was nonrefundable, respondent claimed that he availed

himself of its use because he relied on Mr. Lombardi's statement that Mr. Cassidy agreed that the carrying charges on the property be paid out of the deposit.

Eventually, the deal fell through. Mr. Cassidy elected not to pursue legal action to recover the deposit.

* * *

The Special Master found that respondent knowingly misappropriated trust funds, in violation of Hollendonner, when he failed to obtain Mr. Cassidy's approval to the release of the deposit prior to the closing of title.

D. The Siwakowski Matter

Edward Siwakowski is respondent's distant relative by marriage. According to respondent's testimony, respondent frequently assisted Mr. Siwakowski with problems concerning Mr. Siwakowski's adult mentally disabled son and Mrs. Siwakowski's failing health. Still according to respondent, Mr. Siwakowski always turned to him because he did not want his other son and daughter to get involved in his affairs.

In 1986, respondent had represented Mr. Siwakowski in the sale of property to Sherry Sciarappa, at which time Mr. Siwakowski took back a mortgage. On November 20, 1987, Ms. Sciarappa sold the property and paid the $38,000 balance on the mortgage. This pay-off check was deposited in respondent's trust account on November 30, 1987.

At some point, either shortly before or after the mortgage was

paid off, respondent and Mr. Siwakowski discussed investing Mr. Siwakowski's money. According to respondent, Mr. Siwakowski was concerned that his son and daughter not find out about the existence of those funds. He also did not want to deposit them in the bank or to invest them in certificates of deposit because the monies would be tied up. Respondent then asked Mr. Siwakowski if he wanted to lend the money out. Respondent explained to Mr. Siwakowski that he would be getting a twelve percent rate of interest and that he would not have to report the interest as income, which, according to respondent, was one of Mr. Siwakowski's concerns. Respondent told Mr. Siwakowski that he knew individuals who were interested in borrowing the money and that he, respondent, would personally guarantee the loan. Respondent testified that, at that particular point, he had "a couple of clients" in mind as borrowers. When that, however, did not pan out, he decided to borrow the money himself, without at first disclosing to Mr. Siwakowski his involvement in the transaction.

According to respondent, although Mr. Siwakowski agreed to invest the monies, he requested that he be given $2,500 out of the closing proceeds. Respondent testified that he then cashed a check for $2,500, but that Mr. Siwakowski never came to his office to pick up the money. Respondent further testified that, on December 18, 1987, he gave $3,000 to Mr. Siwakowski, at his request. Respondent added that, on that same day, he gave Mr. Siwakowski a note for $30,500, guaranteeing the loan, which Mr. Siwakowski folded and put in his wallet "where nobody could find it."

(Nevertheless, during one of his visits to respondent's office, the OAE investigative auditor found the original note in the Siwakowski file.) In January 1988, Mr. Siwakowski again asked respondent for a portion of the monies, this time for the payment of an overdue tax bill of $2,500, which respondent paid.

According to respondent, in April 1988, five months after the loan, he disclosed to Mr. Siwakowski that he had borrowed the monies. Respondent testified that he finally revealed the identity of the borrower after Mr. Siwakowski insisted on knowing to whom the monies had been lent. Respondent explained that, initially, he was embarrassed to tell Mr. Siwakowski that he needed the monies.

Respondent acknowledged that he gave no security for the loan and that he did not advise Mr. Siwakowski to consult with independent counsel.

Mr. Siwakowski claimed no knowledge that respondent had borrowed the monies, until he received a letter from the OAE, after a random audit of respondent's attorney records. Mr. Siwakowski also denied having received a promissory note. Nevertheless, when Mr. Siwakowski was first contacted by the OAE investigative auditor, he admitted that he knew that respondent had borrowed $30,500 from him, to which he had agreed. At that time, Mr. Siwakowski also praised respondent's professional ability, indicating that he trusted respondent and that respondent "would never defend a thief." He also indicated to the investigative auditor that he wanted to keep his financial affairs hidden from his son.

According to the OAE investigative auditor, however, following that conversation, Mr. Siwakowski's attitude changed. He subsequently made certain statements that were contradictory to the prior statements to the auditor, including a signed affidavit stating that respondent had borrowed the $30,000 without his knowledge or consent. Exhibit P-11.

It is undisputed that Mr. Siwakowski's monies were paid in full, with interest.

* * *

The Special Master found that respondent knowingly misappropriated trust funds from Mr. Siwakowski and that he failed to advise him to consult with independent counsel, in violation of RPC 1.8(a). The Special Master did not cite the specific grounds for his finding of knowing misappropriation.

E. Recordkeeping Deficiencies

Respondent stipulated that a random audit performed by the OAE revealed several recordkeeping deficiencies. More specifically, respondent retained earned fees in his trust account, rather than transferring them to his business account after earned; did not perform three-way reconciliations for the period from 1986 through 1990; did not maintain a running balance in the trust account checkbook; and did not keep account balances on the client ledger cards during the period covered by the audit.

Respondent's explanation for the recordkeeping improprieties was that he had been previously associated with an attorney who did

his bookkeeping without regard to the rule requirements and that he had adopted said improper bookkeeping practices since opening his own practice, in or about 1976.

CONCLUSION AND RECOMMENDATION

Following a de novo review of the record, the Board is satisfied that the Special Master's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence. The Board is unable to agree, however, with the Special Master's conclusion that respondent was guilty of knowing misappropriation.

The Special Master properly dismissed the charge of knowing misappropriation in the Herrera matter. In view of Mrs. Herrera's failure to testify, there is no evidence that respondent hid from Mrs. Herrera that he was the borrower of the funds. In addition, even if that had been the case, it is not so clear that this conduct would have amounted to knowing misappropriation, as discussed below. It is undeniable, however, that respondent entered into a business transaction with Mrs. Herrera without complying with the safeguards spelled out in RPC 1.8(a).

As to Walsh, the evidence shows that both the seller, Mr. Walsh, and the buyers, through their attorney, agreed to the release of the deposit before the closing of title. Respondent, however, did not disclose to the buyers' attorney that the deposit

was for his own use, instead of his client's, albeit with his client's authorization. Based on this fact, the Special Master found that respondent knowingly misappropriated the funds because he, not his client, availed himself of the monies, notwithstanding his client's consent. This situation, however, is indistinguishable from the scenario where respondent's client, Mr. Walsh, would have first received the deposit, as authorized by the buyers, and immediately would have turned it over to respondent as a loan. Under these circumstances, it cannot be found that respondent's taking of the monies was unauthorized and in contravention of the Wilson and Hollendonner rules. Here, respondent obtained the buyers' permission for the seller to use the deposit monies and then obtained the seller's permission for him to use them. Respondent's only impropriety was to misrepresent to the buyers' attorney that the monies were for his client.

In the Lombardi matter, too, respondent obtained the seller's (Mr. Lombardi's) consent for the use of the deposit, although he failed to seek the buyer's (Mr. Cassidy's) authorization. Nevertheless, in light of Mr. Lombardi's testimony that the deposit was nonrefundable or that it had been forfeited because of the buyer's default under the agreement, and that Mr. Lombardi had communicated this fact to respondent, then respondent's honest, but mistaken, belief that the deposit could be released to Mr. Lombardi (who, in turn, would allow respondent to use it by way of outstanding legal fees) belies knowing misappropriation. See In re Rogers, 126 N.J. 345 (1991) (attorney not disbarred after he failed

to pay a mortgage following a real estate closing because of good faith belief that the individual who held the mortgage had authorized the use of the monies for the attorney's own purposes as a short-term loan).

As in Rogers, although respondent's belief could have been incorrect, the Board cannot conclude from this record that respondent's misuse of the deposit was "knowing." The Board also notes that, after the transaction fell through, the buyer elected not to file suit to recover the deposit.

As to the Siwakowski matter, there is no question that, at least for a period of five months, respondent did not disclose to Mr. Siwakowski that he was the borrower of his funds. Respondent so admitted. It cannot be said, however, that respondent's misconduct constituted knowing misappropriation. There is no evidence that the monies could not be lent out to someone, that is, that they had to be kept inviolate in respondent's trust account. The issue is not, then, that respondent touched the funds, but only that he did not tell Mr. Siwakowski, for five months, that the investment was for his benefit, instead of a third party's. Accordingly, the problem is one of a conflict of interest (business transaction with a client) and of a possible misrepresentation by silence, but not of a knowing misappropriation. In the absence of clear and convincing evidence that Mr. Siwakowski had not consented to investing the funds and in the absence of clear and convincing evidence that respondent used the funds against Mr. Siwakowski's objection to respondent as the borrower, it cannot be concluded

that respondent knowingly misappropriated the funds.

The Board is mindful of the OAE's contention that an attorney who borrows a client's money without the client's consent must be disbarred. The misappropriation that triggers automatic disbarment "consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking." In re Noonan, 102 N.J. 157, 160 (1986). The difference is that, here, Mr. Siwakowski authorized the investment of the funds, gave no specific directions as to how they should be invested (other than to rule out certificates of deposit), left up to respondent to decide how to invest them and with whom, and was satisfied with the terms of the loan. Moreover, there is no evidence that Mr. Siwakowski instructed respondent to lend the monies to anyone but respondent. Accordingly, the Board cannot find that respondent's use of the monies was "unauthorized."

There is no dispute, however, that the OAE's random audit revealed several recordkeeping deficiencies, in violation of RPC 1.15(d). Similarly, it is unquestionable that respondent entangled his business concerns with those of Mr. Herrera and Mr. Siwakowski, in violation of RPC 1.8(a). Lastly, although the Board could not find that respondent's conduct in Walsh, Lombardi and Siwakowski consisted of knowing misappropriation, it was troubled by respondent's "loose" practices in obtaining the consent to the release and use of funds that otherwise had to be safeguarded as trust funds. A four-member majority of the Board recommends a six-

month suspension. Three members voted for disbarment, based on a finding of knowing misappropriation in the Lombardi matter only. Two members did not participate.

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

Dated: 1/5/1995

By: Raymond R. Trombadore
Chair
Disciplinary Review Board