SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-039

IN THE MATTER OF :
ROBERT J. SHERIDAN :
AN ATTORNEY AT LAW :

Decision

Argued: March 16, 2000

Decided: December 20, 2000

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

Thaddeus P. Mikulski, Jr. appeared on behalf of respondent.

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

This matter was before us based on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE"), based on a decision by the Court of Appeals of Maryland, on December 10, 1999, to impose an indefinite suspension upon respondent,

effective January 10, 2000. That decision prohibited respondent from applying for reinstatement within one year from the effective date of the suspension.

Respondent was admitted to the New Jersey bar in 1986. Since 1993, he has been on the Supreme Court's list of ineligible attorneys, for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection. His home state is Maryland, where he was admitted to practice law in 1978. The Maryland disciplinary authorities found that respondent violated RPC 1.15(a), (b) and (c) and RPC 8.4(c), as well as Business Occupations and Professions Article §10-306 of the Annotated Maryland Code (BOP §10-306).[1]

The disciplinary hearing was held before Judge Theresa A. Nolan of the Circuit Court for Prince George's County. Judge Nolan made the following factual findings:

> 1. Robert J. Sheridan, (hereinafter 'Respondent') was admitted to practice law in the State of Maryland on November 16, 1978.
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> 2. In January 1991, Respondent entered into negotiations with I. H. Hershner Company, Inc. (hereinafter 'Hershner') a Pennsylvania corporation. Respondent was employed by Hershner to collect upon debts, one of which was a debt owed to Hershner by RDP Enterprises (hereinafter 'Perry'), a business whose office is located in Maryland.

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[1] Maryland's RPC 1.15 and RPC 8.4(c) are similar to their New Jersey counterpart. BOP §10-306 provides that "(a) lawyer may not use trust money for any purpose other than the purpose for which the trust money is entrusted to the lawyer."

3. There is some disagreement between the Attorney Grievance Commission (hereinafter 'Petitioner') and Respondent over the fee arrangement between Hershner and Respondent. Respondent claims that there was a retainer agreement which set out the fee arrangement. Such agreement provided that Respondent would be paid $150 an hour or on a percentage basis. The Court studied this agreement and noted that although it bore the signature of Barry V. Bishop, the president of Hershner, Respondent's signature did not appear on the agreement. Further, there was no date on the contract and numerous provisions were crossed out by Mr. Bishop. Mr. Bishop has also initialed these provisions.

4. The Court also noted that the provisions were initialed by Respondent, however, his handwritten notes appeared next to the provisions. This suggests to the Court that Respondent did not agree to Mr. Bishop's alterations to the provisions.

5. On March 19, 1991, Hershner filed for bankruptcy under Chapter 11 in the United States Bankruptcy Court for the Middle District of Pennsylvania. Despite this proceeding, Respondent continued to collect on Hershner's accounts.

6. On June 12, 1991, Markian Slobodian, Hershner's counsel for the bankruptcy proceeding, sent a letter to Respondent informing him of Hershner's bankruptcy. Mr. Slobodian advised Respondent that he could become special counsel to Hershner in the bankruptcy proceeding if Respondent filled out the accompanying application. Respondent failed to do so.

7. On January 31, 1992, an Order of Settlement was entered in Fairfax County Virginia on behalf of the Hershner and Perry account. As part of the settlement, Hershner received $9,161.40, interest in the amount of $1,035.58, and attorney fees in the amount of $1,832.28. Perry was ordered to pay these amounts in twenty-one installments of $450 each. The checks

were to be payable to 'Robert J. Sheridan, attorney for I.H. Hershner, Co.'

8. Pursuant to the settlement and prior negotiations, Respondent received two checks for $450 and deposited them into his escrow account. He did not notify Hershner regarding settlement or the receipt of the funds. It was disclosed that these funds were drawn from the escrow account on a later date and used for professional and personal services.

9. Following the Perry settlement, Mr. Slobodian sent Respondent another letter concerning Hershner's bankruptcy status. This letter informed Respondent that because he did not sign the application to be appointed as Special Counsel for Hershner, Respondent was no longer authorized to represent Hershner. Hershner then requested the return of all files and ordered Respondent to cease any further legal action on behalf of Hershner. Instead, Hershner would seek to retain alternate counsel to proceed with any pending litigation. At this time, Hershner was unaware that a settlement had been reached in the Perry case.

10. Despite this letter dated May 13, 1992, Respondent received another letter on June 10, 1992 advising Respondent that he could sign a stipulation of dismissal on behalf of Hershner in the case of Hershner v. Vitellaro Case No. 91-CG-1779 937208. This letter, however, did not advise Respondent to act on any of the other accounts for Hershner.

11. Sometime later, Hershner learned about the Settlement Order in Fairfax County between Hershner and Perry. Roger Troupe, the administrative manager for Hershner, sent Respondent a letter confirming Hershner's knowledge about the existence of the Settlement Order. Mr. Troupe informed Respondent that he also had knowledge Respondent had received money from Perry. Mr. Troupe requested this money to be forwarded to him at Hershner. Despite this request, Respondent failed to forward the funds.

12. At the Court proceeding, Respondent testified that Mr. Troupe had not requested the funds. Instead, he asserted that Mr. Troupe instructed him to retain the money because Hershner owed Respondent outstanding legal fees. Following this correspondence there was no action taken by either party.

13. Approximately two years later, on March 2, 1994, Allied Products, Inc. (hereinafter 'Allied') and Hershner entered into an Asset Purchase Agreement. As part of the Agreement, Allied would buy substantially all of Hershner's assets including any receivables that were written off and had no value. There was no mention of any security interest held by Respondent. This Agreement was approved by the bankruptcy court on March14, 1994.

14. On March 7, 1995, Respondent sent a letter to Perry inquiring about the payments still owed to Hershner as part of the January 1992 Order of Settlement. Respondent ordered Perry to pay him $450 a month. Respondent further explained that he had put the Hershner file on hold when Hershner had filed bankruptcy. Because the bankruptcy case was dismissed on November 4, 1994, Respondent then threatened to file an initial Request for Foreign Judgment in Charles County Maryland if Perry did not comply with his demands.

15. Following the March 7, 1995 letter, Perry received a subsequent letter from Respondent. This letter dated [sic] that Respondent wanted 'in his hand' no later than October 25, 1995, $16,733.74 due to Hershner. Respondent ordered that this check be payable to 'Robert J. Sheridan, Attorney for I. H. Hershner Co.' Checks were then issued to Respondent. A check was dated for March 20, 1995, May 11, 1995 and July 6, 1995; all in the amount of $450. A subsequent check in the amount of $900 was received on August 9, 1995. None of these checks were put in an escrow account for Hershner or a separate account for client's funds. Moreover, Respondent admitted that the funds were used on professional and personal expenditures.

16. Hershner or Allied was [sic] not notified about the fund. Respondent testified that he did not inform Hershner because he was not aware of Hershner's existence and as a result, believed that there was no client to inform him [sic].

17. On October 27, 1995, Perry faxed a copy of Respondent's letter and attachments to Allied in order to inform Allied of Respondent's conduct. Perry had become concerned that Allied was not receiving the funds. True to Perry's belief, Allied had been unaware of any receipt funds for the Perry receivable.

18. Respondent's conduct then intensified. On October 29, 1995, Respondent sent a final letter to Perry suggesting a modification of the original financial arrangement. Specifically, Respondent stated that Hershner and he would be willing to accept $12,000 payable in three equal installments 'in [Respondent's] hands.'

19. Interaction between Allied and Respondent occurred [in] early November 1995, when Respondent sent a letter to Allied informing the company of how he felt he was treated unfairly by Hershner. Respondent justified his retainer of the funds on the grounds that Hershner had abandoned all legal claims to the money. Because Hershner owed Respondent attorney's fees and because Respondent had been awarded attorneys fees, Respondent had a lien on the proceeds. He did not inform Hershner of the money because he was unaware of their existence and because he felt that no [sic] money was owed to him. Moreover, he argued that the retainer agreement clarified his ownership interest in the money.

20. Allied responded to Respondent's letter and explained that Allied had purchased Hershner's assets free and clear of all liens. As a result, the collections received by Respondent were Allied's property. Respondent was ordered to give a full accounting of the collectibles since March 1994 and to cease making any further collection. Respondent failed to deliver a full accounting or return any of the collectibles.

21. In response to Respondent's lien theory, Allied attacked Respondent's arguments. First, Allied argued there is no evidence the retainer agreement was ever entered into. Further, if there was a retainer agreement, it would not confer rights to Respondent to retain any payment by Perry absent a judicial determination.

22. Second, Allied asserts that the Bankruptcy Court's approval of the sale of assets by Allied freed Allied of any liens, security interests, and encumbrances on Hershner's assets. Thus, the Bankruptcy Court would have discharged any lien Respondent had.

23. Despite the arguments advanced by Allied, Respondent refused to return the money to Allied. Such inaction prompted Allied to make an offer of settlement. Allied would be willing to accept an immediate cash payment of two-thirds the amount of the Perry account balance. Because the account was for $9,687.43, the net would be $6,458.29. In addition, Respondent would retain the $3,600 already collected and Allied would assign Respondent the receivable including the judgment Hershner obtained. Respondent did not accept this offer, nor did Respondent return any of the money. Further, Respondent did not seek judicial assistance or advice from the Maryland Bar Association. As a result, the Court believes that attorney misconduct occurred.

24. The Court observed that Respondent truly believed that the money was legally his. Further, the Court believes Respondent's actions were not motivated by the decision to intentionally defraud Allied or Hershner. Respondent's decision to retain the files, however, defrauded Allied and/or Hershner of its legal claim to the settlement money.

[Court of Appeals of Maryland Opinion, exhibit A]

The Court of Appeals found violations of RPC 1.15(a), (b) and (c), as follows:

Respondent failed to keep separate the collected funds. In 1991 and 1992, Respondent received two settlement checks of $450 each from Perry. Respondent deposited the checks in his escrow account but later withdrew them and applied the money for his own professional and personal use. In 1995, without directions from or the knowledge of his client, Respondent demanded payments in arrears from Perry and as evinced [sic] by his Dunning letter dated 7 March 1995. Respondent received payments from Perry but did not deposit the funds in escrow and instead used them for business and professional purposes. These examples provide clear and convincing evidence that Respondent violated Rule 1.15(a).

* * *

Respondent did not notify Hershner of funds received from Perry in 1991 or 1992; in fact, he did not notify his client about the settlement he reached with Perry. In 1995, Respondent received a series of payments from Perry and, again, he failed to notify Hershner or his successor, Allied, of the payments received. Also in November 1995, after discovering that Respondent collected monies from Perry without notifying it, Allied demanded a full accounting of the amounts collected by Respondent by March 1994. Respondent did not provide an accounting. His failure to notify Hershner in 1991 or 1992 and Allied in 1995 and to provide an accounting as demanded by Allied, provides clear and convincing evidence that Respondent violated Rule 1.15(b).

* * *

Disputes of the ownership of the funds collected by Respondent in the Perry case arose in 1992 and 1993. In a letter dated 23 June 1992, after discovering Perry made payments to Respondent, Hershner demanded the payments be forwarded. Respondent failed to forward the funds or keep the funds separate until the dispute was resolved. In 1995, another dispute arose, this time between Respondent and Hershner's successor, Allied. Respondent failed to keep the funds separate until the dispute was resolved. These acts provide clear and convincing evidence that Respondent violated Rule 1.15(c).

[Exhibit A at 14-15]

With regard to the alleged violation of RPC 8.4(c), the Court of Appeals found respondent guilty of dishonesty, rather than fraud as found by the court below:

Judge Nolan found that Respondent did not defraud intentionally Allied or Hershner but did find that 'Respondent's decision to retain the funds, however, defrauded Allied and/or Hershner of its legal claim to settlement money.' We are unable to reconcile these two findings. Because Judge Nolan found no intentional fraud in 'any decision' made by Respondent and Bar Counsel does not dispute this finding, we do not believe that Bar Counsel has proven fraud by clear and convincing evidence. Therefore, we overrule the judge's finding that Respondent 'defrauded Allied and/or Hershner of their legal claim to the settlement money.'

In doing so, we conclude nonetheless, that Respondent violated R. 8.4(c) by engaging in dishonest conduct, rather than fraud. . . .

[Exhibit A at 21]

* * *

...we find clear and convincing evidence that Respondent exhibited a lack of probity, integrity and straightforwardness in his conduct regarding his client and, therefore, his actions were dishonest in that sense.... We add to this the reinforcing observation that Respondent's efforts to collect attorney's fees from Perry in 1995 were disingenuous....

* * *

...This letter signals that Respondent lead [sic] Perry to believe that Respondent acted at the behest and with the authority of his client.

The Court of Appeals sustained Judge Nolan's finding that Respondent violated BOP § 10-306, stating as follows:

In her conclusions of law, Judge Nolan found that Respondent violated §10-306. The statute states: 'a lawyer cannot use trust money for any purpose other than the purpose for which the trust money is entrusted to the lawyer.' We have previously held that a violation of §10-306 requires willful conduct on the part of the attorney charged. [Citation omitted.] Willful conduct, in this context, requires proof of internal intent by clear and convincing evidence. [Citations omitted.] General intent, for these purposes, 'includes those consequences where (a) represent the purpose for which an act is done (regardless of likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire).' [Citation omitted.]

> The record is replete with evidence that Respondent willfully misused trust money for his own use. Judge Nolan found by clear and convincing evidence that Respondent received his client's monies in 1991 and 1992, that he deposited those monies in his escrow account, and later removed them for his professional and personal purposes. The judge also found that, in 1995, Respondent also received monies on behalf of Hershner that were never deposited in escrow, but were used by him for professional and personal expenditures. Furthermore, Respondent's own testimony on cross-examination is particularly telling with regard to his willful conduct.
> [Exhibit A at 19-20]

The Court of Appeals found a violation of the BOP § 10-306. In fact, Respondent admitted that he eventually withdrew $900 (two $450 payments made in 1991 and 1992) and used it for his own purposes.

Next, the Court of Appeals considered respondent's state of mind at the time of the ethics infractions. Because Judge Nolan found that respondent's actions were not intentionally fraudulent, the Court of Appeals felt constrained to accept that assessment. However, the Court of Appeals found that respondent "knew or should have known" that his actions were unethical. The Court of Appeals considered mitigating circumstances

> . . . justifying a lesser sanction than disbarment, in the remoteness and time of offenses in 1991 and 1992, as well as Respondent's acknowledgment that his conduct in dealing with Hershner in those years was unethical. In particular, we note that, because Hershner was no longer in existence at the time of the hearing, Respondent may have faced certain practical difficulties proving other mitigating factors. Furthermore, it is significant that Judge Nolan found that Respondent did not act <u>intentionally</u> when he violated his ethical duties. We hold, therefore, that the appropriate sanction in this case is indefinite suspension, with the right to apply for reinstatement no earlier than one year from the beginning of the suspension. Our decision comports with our prior decisions which state that '[s]uspension is generally appropriate when a

> lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.' [Citations omitted][Emphasis added].
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> [Exhibit A at 33]

The Court of Appeals, thus, deferred to Judge Nolan's finding that respondent's conduct had not been intentional.

* * *

Upon review of the full record, we determined to grant the OAE's motion. We adopted the findings of the Maryland Court of Appeals that respondent violated RPC 1.15 and RPC 8.4(c). In re Pavalonis, 98 N.J. 36, 40 (1984); In re Tumini, 95 N.J. 18, 21 (1979); and In re Kauffman, 81 N.J. 300, 302 (1979).

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

> . . . The Board shall recommend imposition of the identical action or discipline unless the Respondent demonstrates, or the Board finds on the face of the record upon which the discipline in another jurisdiction was predicated that it clearly appears that:
>
> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
>
> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the Respondent;

(C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

(D) the procedure followed in the foreign matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the misconduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (D). However, the OAE argued that, with regard to paragraph (E), a question arises as to whether the disbarment rule espoused in In re Wilson, 81 N.J. 451 (1979) applies. Wilson holds that an attorney who knowingly misappropriates client funds is almost invariably disbarred. The OAE interpreted the Maryland Court of Appeals' decision as finding respondent guilty of knowing misappropriation of client funds. However, the OAE argued, because Maryland's definition of knowing misappropriation is more expansive than New Jersey's – also including situations where the attorney should have known that he or she was misusing client funds – and because the Maryland disciplinary authorities found that respondent was entitled to the funds as legal fees, it cannot be said that respondent was guilty of knowing misappropriation within the New Jersey definition of this ethics offense. The OAE, therefore, recognized that, since the facts of this matter do not fall within the Wilson rule, respondent's disbarment in New Jersey is not mandated. Accordingly, the OAE recommended that New Jersey impose the same discipline as Maryland – an indefinite

suspension – with the restriction that respondent may not apply for reinstatement until he is reinstated in Maryland. We agree with the OAE's assessment of the Maryland Court of Appeals' findings and with the OAE's argument that respondent's conduct was not knowing within the definition of knowing misappropriation and, therefore, not subject to mandatory disbarment.[2]

As previously noted, the Court of Appeals found that respondent was entitled to legal fees. However, respondent went further, contending that he was entitled to withdraw his fees from the Perry funds. This case bears a strong resemblance to In re Barbour, 147 N.J. 456 (1997).

In Barbour, a one-year suspension was imposed upon an attorney who took legal fees from his client's settlement funds. The attorney knew that his client opposed the distribution and continued to deplete the funds. We found as follows:

> Lastly, and more egregiously, Respondent's unauthorized taking of fees from the settlement funds without Watkin's knowledge or consent violated RPC 1.15(b) and (c). Respondent's most serious misconduct occurred when, on notice that his client opposed his use of the settlement funds as compensation for his counsel fees, he continued to avail himself of the funds until they were depleted. Under the circumstances, respondent had an obligation to keep the funds segregated until the resolution of the fee dispute. His conduct did not amount to knowing misappropriation only because of his colorable claim of entitlement to the funds as counsel fees.

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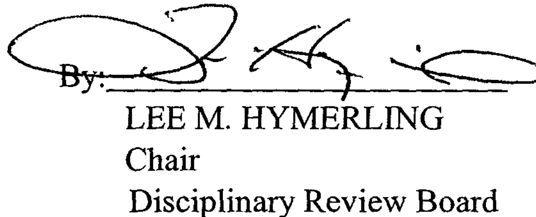
We noted also that New Jersey's definition of knowing misappropriation is equivalent to Maryland's intentional misappropriation, an offense mandating disbarment. See Attorney Grievance Commission v. Berger, 326 Md. 129, 606 A.2d 58 (1990).

Respondent's overall conduct, however, was sufficiently egregious to merit a period of suspension. Respondent came perilously close to knowing misappropriation when he continued to avail himself of the trust funds after he was put on clear notice that Watkins (the client) considered them her property.

Here, too, because respondent had a colorable interest in the funds because of owed legal fees, like the Maryland courts, we cannot find that his conduct rose to the level of knowing misappropriation, as defined in New Jersey. Under these circumstances, we unanimously determined to impose discipline similar to that imposed in Maryland, that is, to suspend respondent indefinitely and to preclude him from applying for reinstatement in New Jersey until he has been reinstated in Maryland.

We also required respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

Dated: 12/20/00



By: ______________________
LEE M. HYMERLING
Chair
Disciplinary Review Board