SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-437

IN THE MATTER OF	:
ANTHONY J. CAVUTO	:
AN ATTORNEY AT LAW	:

Decision

Argued: March 19, 1998

Decided: November 2, 1998

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

Dominic J. Aprile 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"). The complaint filed by the Office of Attorney Ethics ("OAE") charged respondent with the knowing misappropriation of client funds, in violation of *RPC* 1.15(a) and *In re Wilson*, 81 *N.J.* 451 (1979), failure to safeguard client funds, in violation of *RPC* 1.15(a), conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of *RPC* 8.4(c), failure to maintain proper records, in violation

of *RPC* 1.15(a) and *R.* 1:21-6(b) and commingling personal and trust funds, in violation of *RPC* 1.15(a).

Respondent was admitted to the New Jersey bar in 1966. He was reprimanded in 1979 for sharing legal fees with a non-attorney. As of May 21, 1998 two separate complaints pending against respondent charge him with filing a defective complaint, resulting in its dismissal in a personal injury case, and with failing to pay medical bills in another personal injury matter.

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The facts are not substantially in dispute. Respondent admitted that in 1986 he retained settlement funds for disbursement to his client's medical providers. He claimed, however, that through an oversight he failed to remit the payments until 1994. The OAE alleged that respondent knowingly misappropriated those monies. Respondent, in turn, asserted that any misappropriation was negligent, conceding that he had not maintained proper trust account records.

The issue before the Board was whether respondent's misconduct amounted to knowing misappropriation of client funds.

Respondent represented grievant Curtis Bayne in a personal injury action arising out of a motorcycle accident. On May 2, 1986 respondent settled the matter for $36,000,

depositing the settlement proceeds in his trust account on May 9, 1986. In accordance with the settlement statement that respondent prepared, Bayne was to receive $10,022.14 ($11,272.14 less $1,100 he had borrowed from respondent[1] and $150 for costs of filing suit). Respondent's fee was $12,000[2]. The settlement statement listed Bayne's medical bills, totaling $12,727.86, and required respondent to retain that sum to pay Bayne's health care providers. However, respondent did not immediately pay the medical bills. As will be seen below, respondent did not satisfy those obligations until 1994.

The OAE conducted an audit of respondent's books and records after the filing of the grievance in this matter. The audit revealed that respondent had very few trust account matters. He did not hold large sums of money in his trust account. The only records that respondent produced were his trust account checks and check stubs. He did not maintain a trust account receipts journal, a trust account disbursements journal or client ledger cards. He did not reconcile his trust account. Indeed, he acknowledged that he kept track of his trust account by maintaining a running balance on the check stubs. Respondent explained that he

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[1] During respondent's testimony, evidence was adduced that he had loaned a total of approximately $4,500 to Bayne, apparently in violation of *RPC* 1.8(a) and (e) (entering into a business transaction with a client and providing financial assistance to a client). Ordinarily the complaint would be deemed amended to conform to the proofs, pursuant to *In re Logan*, 70 *N.J.* 222, 232 (1976). However, during the hearing, the panel chair ruled that, because the issue of the loans was not the subject of the current disciplinary proceeding, no additional evidence would be admitted on that issue. Under the circumstances, the Board considered it inappropriate to deem the complaint amended to include these additional charges.

[2] Although this was not mentioned in the record, respondent's fee was not calculated in accordance with *R.* 1:21-7(d), which requires fees to be computed on the net sum recovered after deducting disbursements in connection with the institution and prosecution of the claim.

kept fees in his trust account, not as "overdraft protection," but to keep those funds from his wife, who assisted him with the office bookkeeping and had authority to sign his business account checks. According to respondent's trust account checkbook stubs, on May 17, 1986 he issued two checks totaling $10,022 to Bayne. By June 3, 1986, the balance in respondent's trust account, according to the running balance he maintained in the checkbook, was only $11,450, less than the $12,727.87 required to pay Bayne's medical bills. Thus, within approximately two weeks of distributing the settlement funds to his client, respondent had invaded the escrow funds that should have remained inviolate in his trust account. Respondent's records showed that, after depositing the *Bayne* settlement funds, he wrote numerous checks to himself, totaling $26,259, as follows:

Date	Amount	Date	Amount
5/09/86	300	6/06/86	2,000
5/09/86	250	6/10/86	1,000
5/14/86	7,450	6/12/86	500
5/21/86	1,000	6/24/86	2,000
5/27/86	1,000	6/26/86	500
5/29/86	800	7/09/86	500
6/01/86	559	7/09/86	500
6/02/86	1,000	7/11/86	1,000
6/03/86	1,200	7/15/86	600
6/03/86	1,200	7/21/86	500
6/06/86	3,000	7/24/86	400
7/31/86	200		
	Total		$26,259

By July 31, 1986 only $1,136.21 remained in respondent's trust account, when he should have been holding $12,727.87 to pay Bayne's medical bills.

It was not until years later that Bayne questioned respondent about the payment of the bills. Although it is not clear from the record whether this conversation took place in 1991 or 1992, it is undisputed that five to six years had lapsed since the settlement. Bayne had tried to see Dr. Elisabeth Post, who refused to treat him because his medical bill remained unpaid. When respondent sought to review the *Bayne* file, he learned that his office staff had mistakenly purged it in 1988 or 1989.

There was extensive testimony at the ethics hearing about respondent's procedures for the destination of files. Every year, usually at the end of September, respondent's office staff placed files on the floor in the conference room for respondent's review. Respondent then examined the files to determine which had to be retained and which could be destroyed. However, in 1988 or 1989, after the files had been placed in the conference room, respondent was stricken with influenza and remained at home for approximately two and one-half weeks. After a while, respondent's wife, Marie Cavuto, who operated an electrolysis business in an adjacent office, directed respondent's staff to destroy the files. Mrs. Cavuto mistakenly believed that respondent had previously reviewed the files. Upon respondent's return, he discovered that the files had been destroyed before he had had the opportunity to examine them. Approximately one hundred to one hundred and fifty files, including the *Bayne* file, were inadvertently destroyed in this manner.

Because respondent did not have his file, he directed Bayne to bring his records to respondent's office. When respondent reviewed the May 2, 1986 settlement statement, he could not recall whether he had paid the medical expenses. Respondent told Bayne that, although he intended to pay the bills, he did not have sufficient funds on hand to make immediate payment. At the time, respondent was representing Bayne in a workers' compensation matter against the Occupational Training Center ("OTC"). Bayne agreed to await the payment of his medical bills until respondent received his legal fees from the OTC matter. Respondent expected an imminent settlement in that case. Consistent with his agreement with Bayne, respondent wrote the following note on the settlement statement:

> I Anthony J. Cavuto agree to be responsible to pay all of these bills and I will do so upon settlement of the workmen's comp claim against OTC.

When the settlement of the workers' compensation matter did not occur as quickly as anticipated, respondent wrote to several of Bayne's creditors and arranged to pay the medical bills in installments. On October 22, 1992 respondent paid Dr. Post $1,200 toward the $2,400 then due. Although respondent informed Dr. Post that he expected to pay the balance within three weeks, he did not pay the bill in full until March 16, 1994. Dr. Post had sent letters to respondent on July 2, 1991 and August 26, 1992, requesting payment of Bayne's medical bills. Respondent testified that he did not recall receiving the July 2, 1991 letter.

On December 10, 1992 respondent guaranteed payment of Bayne's medical bills of $2,434 to the Neurological Center. The record shows that respondent paid $300 on December

10, 1992, $1,000 on July 30, 1993 and $600 as a final installment on March 11, 1994.[3] On March 16, 1994 respondent paid the following remaining medical bills:

Dr. Conrad Brahin	$54.00
Dr. Martin Topiel	125.00
Zurbrugg Memorial Hospital	5,740.41
Rancocas Orthopedic Associates	100.00
Dr. Szathmary	360.00[4]

Respondent borrowed money from his wife to pay Bayne's creditors.

The presenter contended that respondent ultimately paid the medical bills in response to the OAE's May 7, 1994 letter notifying respondent of a demand audit.

In the interim, on August 18, 1993, Lee Dennison, Esq. filed a complaint against Bayne on behalf of Dr. Post for unpaid medical expenses of $1,200. At that point respondent had paid $1,200 toward Bayne's bill, leaving a balance of approximately $1,200. Dennison dismissed the complaint in September 1993, when he learned that in 1987 Dr. Robert Cohen and Dr. Post's associate, had already obtained a judgment against respondent for the same bill. Dennison testified that, on April 3, 1987, he had agreed on behalf of Dr. Cohen to accept $2,400 from respondent within ten days, in full settlement of the balance due of $2,722.80, including fees and costs. Although at the time of the ethics hearing Dennison's file had been destroyed, the file jacket contained the following notation: "4/3/87 I agreed to

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[3] Because those payments amount to only $1,900, it is assumed that respondent paid the $534 difference, although the record does not show that such payments were made.

[4] Because respondent had already paid this bill, Dr. Szathmary refunded the payment to Bayne at respondent's request.

settle for $2,400 to be pd 1 wk-10 days." As pointed out on cross-examination, the notation does not specifically refer to respondent.

According to respondent, he simply forgot to pay Bayne's medical bills. He offered several reasons for his failure to act. Before respondent represented Bayne, in every other personal injury action he had handled, the client's personal injury protection (PIP) carrier had paid the medical bills directly. Hence, respondent explained, after he disbursed the settlement funds to his client, in his own mind his work on the case was over; he, therefore, forgot to pay Bayne's medical expenses. Moreover, he presented evidence that, when the *Bayne* matter settled in 1986, he suffered from diabetes, hypertension, depression, fatigue, forgetfulness, memory loss and an inability to concentrate for longer than an hour or two. Respondent related that, after the death of his physician in 1984, he did not seek treatment from another doctor, allowing his diabetes to remain uncontrolled.

Respondent denied that he paid Bayne's medical bills in response to the OAE audit letter dated March 7, 1994. He pointed out that the letter did not even mention Bayne. Respondent explained that he had paid the bills because Bayne had recently begun to telephone him at his office every day and at home at inconvenient times, such as 1:00 a.m. According to respondent, Bayne was taking anti-depressant medications and his behavior had become erratic. Mrs. Cavuto confirmed that Bayne frequently telephoned their home and that, during one conversation, he had been abusive toward her. As a result, respondent borrowed the necessary funds from his wife to pay Bayne's bills. About one month later, respondent

arranged for another attorney to assume responsibility for Bayne's workers' compensation matter.

Mrs. Cavuto corroborated respondent's testimony about his health problems. She testified that, although respondent needed insulin as early as 1986, he refused to take it until 1990. Mrs. Cavuto stated that after 1986 respondent's health had deteriorated; he was sleeping excessively, did not work as hard as in the past, was depressed and suffered some memory loss.

Charles Lawson, a certified public accountant, was called as an accounting expert on respondent's behalf. He testified that he had reviewed the reconstruction of respondent's trust account prepared by the OAE from respondent's trust account checkbook. According to Lawson, no conclusion could be drawn as to the accuracy of the reconstruction because there was no independent documentation or verification to support the entries made on respondent's trust account checkbook. For example, there were no bank statements or canceled checks to compare to the entries in the checkbook to establish their accuracy.

Two physicians testified on respondent's behalf. Peter A. Lodewick, M.D., a diabetes specialist, declared that he had examined respondent in 1990 and concluded that respondent's diabetes was not adequately controlled. Dr. Lodewick remarked that respondent was overweight and that, as a result of consuming excessive carbohydrates, he was sluggish, sleepy and irritable. According to Dr. Lodewick, high blood sugar, high blood cholesterol and high blood triglycerides result from overconsumption of carbohydrates, which can affect

the patient's mood and thinking processes. Dr. Lodewick opined that inadequately controlled diabetes may cause depression, irritability, fatigue, sleepiness and forgetfulness.

Herbert E. Cohen, M.D., a specialist in cardiology and internal medicine, testified, not as an expert, but as a fact witness. He related that he saw respondent in his medical office on nine instances from December 20, 1984 through December 18, 1987. Dr. Cohen observed that respondent had a poor memory, noting that his forgetfulness often resulted in missed appointments. He recalled that respondent telephoned his office to ask about blood test results and about prescribed medications shortly after the doctor's office had given him that information.

* * *

The DEC found that respondent knowingly misappropriated client funds, concluding that respondent knew from a 1987 conversation with Lee Dennison that he did not have adequate funds in his trust account to pay Bayne's medical bills. According to the DEC, respondent's partial payments to the medical providers proved his awareness that he owed money to them; similarly, his acknowledgment to Bayne of responsibility for those bills in 1991 or 1992 demonstrated that he knew that he had used his client's money without authorization. The DEC concluded that respondent treated Bayne's money as his own in 1987, when he knowingly permitted at least one judgment to be entered against Bayne as a

result of his misappropriation and again in 1991, when he agreed to pay the bills. The DEC found that respondent had finally paid the bills only because the OAE's audit notice forced him into action.

The DEC did not find clear and convincing evidence of a knowing misappropriation in 1986, when respondent failed to disburse funds to Bayne's medical providers or to retain the funds intact in his trust account. According to the DEC, the OAE failed to rebut respondent's testimony concerning his state of mind in 1986, that is, that he could not recall why he had not paid the bills and that the oversight had resulted from the passage of time, sloppy bookkeeping and poor health.

The DEC rejected Lawson's opinion that the lack of independent verification of respondent's trust account checkbook entries precluded a finding of knowing misappropriation. The DEC noted that circumstantial evidence, not accounting theory, is sufficient to find knowing misappropriation.

Finally, the DEC found that the evidence of respondent's physical and mental condition did not meet the standard set forth in *In re Jacob*, 95 *N.J.* 132 (1984), which requires a showing of a loss of competency, comprehension or will of a magnitude that could excuse knowing misconduct.

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Following a *de novo* review of the record, the Board is satisfied that the DEC's finding of unethical conduct is clearly and convincingly supported by the evidence. More specifically respondent's conduct constituted knowing misappropriation and requires his disbarment.

Although the DEC rejected the presenter's contention that respondent knowingly misappropriated client funds when he failed to immediately pay his client's health care providers, the Board found that respondent knowingly misappropriated funds at that time. On May 9, 1986 respondent deposited into his trust account settlement funds on behalf of his client, Bayne. After disbursing Bayne's share of the settlement and his own fee, respondent was obligated to pay Bayne's medical expenses. However, respondent failed to immediately pay the medical expenses or even to keep the funds intact in his trust account. Instead, respondent immediately began disbursing the funds to himself. Indeed, within two weeks of distributing the settlement funds to his client, respondent invaded the funds that were escrowed for payment of the medical expenses and within three months all of the money had been spent. The Board determined that, because respondent had very few trust account matters and maintained a running balance in his checkbook, he had to be aware that he was spending his client's funds. Moreover, respondent disbursed the funds to himself over a very short period of time. Within three months, he issued twenty-two checks totaling $26,259. Respondent knew that, once the trust account balance fell below $12,727.86, he would be

invading client funds. The Board, thus, rejected respondent's explanation that he simply forgot to pay the creditors.

For his knowing misappropriation of client funds, respondent must be disbarred. *In re Wilson*, 81 *N.J.* 451 (1979). In *Wilson,* the Court announced the bright-line rule that knowing misappropriation of client funds will, almost invariably, result in disbarment. The Court placed the highest priority on the maintenance of public confidence in the Court and in the bar, such that "mitigating factors will rarely override the requirement of disbarment." *Id* at 461. Although the use of such terms as "almost invariable" and "rarely override" raised the possibility of a departure from the automatic disbarment rule, since 1979 the *Wilson* rule has been applied without exception. Every attorney who has been shown to have knowingly misappropriated client funds has been disbarred.

In *In re Noonan*, 102 *N.J.* 157 (1986), the Court defined the requirements for a finding of knowing misappropriation:

> The misappropriation that will trigger automatic disbarment under *In re Wilson*, 81 *N.J.* 451 (1979), disbarment that is 'almost invariable,' *id.* at 453, 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. It makes no difference whether the money was used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of *Wilson* is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind is irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment. . . . The presence of 'good character and fitness,' the absence of 'dishonesty, venality or immorality' – all

> are irrelevant. While this Court indicated that disbarment for knowing misappropriation shall be 'almost invariable,' the fact is that since *Wilson*, it has been invariable. [Footnote omitted]
>
> [*In re Noonan, supra,* 102 *N.J.* at 159-160]

Under *Noonan*, thus, intent to steal or defraud and dishonesty are not required. So long as the lawyer knows that the funds are not his or hers and knows that the client has not consented to the taking, the absence of evil motives, the lack of intent to permanently keep the monies, the good use to which the funds may be put, the lawyer's prior unblemished character and, moreover, the circumstances or pressures impelling the lawyer are all irrelevant. All that is needed to mandate disbarment is proof that the lawyer took the funds knowing that they were not his or hers and knowing that the taking was unauthorized. No amount of mitigation is sufficient to excuse misappropriation that was knowing and volitional. See also *In re Pomerantz*, 155 *N.J. 122* (1998) and *In re Greenberg 155 N.J.138* (1998).

As the Court observed in *In re Roth*, 140 *N.J.* 430 (1995):

> The line between knowing misappropriation and negligent misappropriation is a thin one. 'Proving a state of mind – here, knowledge – poses difficulties in the absence of an outright admission.' *In re Johnson*, 105 *N.J.* 249, 258, 520 *A.*2d 3 (1987). However, this Court has noted that 'an inculpatory statement is not an indispensable ingredient of proof of knowledge, and that circumstantial evidence can add up to the conclusion that a lawyer 'knew' or 'had to know' that clients' funds were being invaded.' *Ibid.* In this case, that circumstantial evidence includes repeated invasions of client funds that were required to be held inviolate. The testimony adduced convincingly suggests that respondent 'knew' or 'had to know' that he was invading client funds.
>
> [*In re Roth, supra*, 140 *N.J.* at 445]

Here, too, respondent either knew or had to know that he was invading client funds when he immediately started to issue checks to himself and failed to hold inviolate the required amount to pay his client's medical bills.

A five-member majority of the Bard recommends that respondent be disbarred. Four members dissented, finding that, because Bayne had agreed that respondent could pay the medical bills upon the resolution of the workers' compensation matter, there could not have been a knowing misappropriation of client funds. Those members voted for a six-month suspension for respondent's negligent misappropriation of client funds and recordkeeping violations.

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

Dated: 11/2/98

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Anthony J. Cavuto
Docket No. 97-437

Decided: November 2, 1998
Disposition: Disbar

Members	Disbar	Six 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:	5	4					

By Robyn M. Hill 11/25/98
Robyn M. Hill
Chief Counsel