SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-281

IN THE MATTER OF	:
HARVEY GILBERT	:
AN ATTORNEY AT LAW	:

Decision

Argued: September 17, 1998

Decided: December 11, 1998

Thomas A. Zelante appeared on behalf of the District X Ethics Committee.

Noel E. Schablik 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 X Ethics Committee ("DEC"). The formal complaint charged respondent with violations of *RPC* 1.15(b) (failure to promptly deliver funds to a third person) and *RPC* 4.4 (failure to respect the rights of a third person).

Respondent was admitted to the New Jersey bar in 1971. In 1996 he received a public reprimand for negligently misappropriating $10,303.23 in client funds; failing to comply with

the recordkeeping rules, including commingling personal and trust funds and depositing earned fees in his trust account; and failing to properly supervise his firm's employees.

* * *

The facts are not substantially in dispute. In November 1996 Barbara Mancuso retained respondent to represent her in the purchase of a cooperative apartment ("co-op") in Manhattan. Although Barbara failed to sign and return the fee agreement that respondent had sent to her, it was agreed that respondent's fee was $200 per hour, with a "cap" of $1,500, unless extraordinary services were required. In that case, the amount of the fee would be renegotiated.

At the time of the representation, Barbara continued to reside with her ex-husband, grievant Edward Mancuso, in the former marital home. The home was listed for sale with a real estate agency. The contract for the purchase of the co-op required Barbara to pay a $6,400 deposit. Because Edward was interested in physically separating from Barbara, he was willing to lend the deposit to Barbara. Accordingly, after consulting with his matrimonial attorney, Edward agreed to lend Barbara $6,400 on the following conditions: if the former marital home was sold before Barbara's purchase of the co-op, Edward would receive $6,400 from Barbara's share of the sales proceeds; if the co-op purchase did not occur, Edward would receive the return of the $6,400. Edward testified that he asked respondent for a letter

representing that, if the co-op purchase were not consummated, the deposit would be returned to him. On November 1, 1996 respondent "faxed" Edward the following letter:

> To Whom It May Concern:
>
> Please be advised that, should the contract on 505 E. 79th Street, Unit 3H be declared null and void, deposit monies being held for Barbara Mancuso shall be returned to Edward Mancuso.
>
> [Exhibit P-2]

According to Edward, he would not have extended the loan to his former wife without having received the above assurance from respondent. In addition, Edward asserted that his matrimonial attorney relied on respondent's November 1, 1996 letter in advising Edward to lend Barbara the funds. On November 2, 1996, after receiving the letter, Edward wrote a $6,400 check payable to the seller's attorney, Kurt Roth. The memo column of the check provided as follows: "For deposit for co-op apt. 505 E79 St. N.Y.C." On November 26, 1996 respondent forwarded the check to Roth.

In March 1997 the co-op board denied Barbara's application to buy the apartment. Consequently, on March 31, 1997 Roth sent to respondent a check for $6,400, which respondent deposited in his trust account.[1] Despite Edward's repeated demands for the return of the $6,400, respondent refused to return the money. Edward testified that he had informed respondent of his poor financial condition and of his dire need for the funds. Initially, respondent told Edward that the check had not yet cleared the banking process. Several days

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[1] The DEC hearing panel report mistakenly stated that the down payment was returned on July 22, 1997.

later, Edward contacted Roth, who informed Edward that the check had cleared. Thereafter, on April 18, 1997 respondent sent to Barbara and Edward a letter stating as follows, in part:

> Please know that my unpaid legal bill of $1,500,00 [sic] represents an amount chargeable against any property of yours in my possession. This unpaid bill constitutes a lien against the escrowed funds which I am hereby asserting.
>
> Accordingly, the $6,400.00 shall remain in my trust account until such time as my bill is paid. Thereafter, these funds shall be released to whomever you both agree these funds should be released.
>
> [Exhibit P-5]

In reply, on April 21, 1997 Edward sent respondent the following letter:

> Please be advised you are wrongfully holding monies[ ]. You told me several times by phone that the check received had not cleared, therefore you could not issue a check to me. You clearly lied about that when you knew that it had already cleared by April 9.
>
> Enclosed, please find a letter you wrote dated November 1, 1996 stating that monies being held in trust would be returned to me should the contract be declared null and void.
>
> I do not have anything to do with your dealings with Barbara Mancuso; we are not married and I am not responsible for her.
>
> Because you do not have the right to hold my money, I expect you to release it immediately. If you don't I will seek payment with interest added.
>
> I have contacted the New Jersey Bar Association and I will file a complaint with the Ethics Committee if you continue to hold my money.
>
> I sincerely hope you come to your senses and release the money you are holding illegally and avoid future conflict. [Original emphasis].
>
> [Exhibit P-4]

Respondent, in turn, sent the following letter to Edward dated April 23, 1997:

> Please review the materials I forwarded to you. You will see that I did not deposit the check I received until the afternoon of April 8, 1997. I was unable to determine that the check had cleared until the afternoon of April 16, 1997.
>
> I repeat that I have the full $6,400.00 in my trust account where it will remain until Barbara pays me the outstanding bill. When I am paid, I will return $6,400.00 to you or to her as it may appear to be appropriate at that time.
>
> If you feel the need to contact the Ethics Committee or anyone else, you are free to do whatever you feel is appropriate. I repeat that I assure that the monies in escrow are being held only until such time as my bill is paid after which payment the $6,400.00 shall be released.
>
> [Exhibit P-6]

According to Edward, he finally received the return of the $6,400 loan proceeds in late July or early August, more than four months after respondent had received it from the seller's attorney. Edward complained that, although respondent had represented that the funds would be placed in an interest-bearing account, he received only the $6,400, without any interest.

For his part, respondent asserted that, after he agreed to represent Barbara, she informed him that Edward would loan her the co-op deposit if respondent assured him that the money would be returned to him if the purchase did not take place. Referring to the November 1, 1996 letter, respondent testified that he prepared a "short assurance," gave Barbara the original and sent a copy by telefax to Edward, at Barbara's request. He denied

having written the letter at Edward's request. Respondent further denied that, when he wrote the November 1, 1996 letter, he contemplated asserting a lien on the funds.

Respondent explained that subsequent circumstances caused him to doubt whether Barbara would pay his fee. He stated that, at about the time that the co-op contract was canceled, Barbara began to make commitments to pay his fee, only to break those commitments. For example, respondent claimed that, although Barbara told him that she would send him $500 and a statement for payment of the balance, she sent neither. Respondent added that, notwithstanding Barbara's subsequent promise to pay him a $1,500 fee in full, she used the money to pay the mortgage payment on the former marital home. In addition, respondent contended that Barbara suddenly became unavailable, failing to return his telephone calls. Despite respondent's testimony that Edward was frantic and anxious for the return of the funds and that Barbara had used funds earmarked for his fees to pay the mortgage payment on the former marital home, respondent denied any awareness of Edward's financial circumstances. Respondent contended that bank personnel had informed him that it would take five to eight days for the refund check to clear and that staff from Kurt Roth's office had told him that the check had not yet cleared. Respondent could not recall the date of that conversation.

Concerned that his bill would not be paid, respondent contacted Kenneth Leiby, an attorney experienced in the area of attorney's charging and retaining liens. Leiby sent to respondent a copy of a January 7, 1993 letter-brief that Leiby had submitted to the court in

a prior unrelated case. Respondent testified that, after reviewing the letter-brief and two of the cases discussed in it, he had determined that he could properly assert a lien on the $6,400 in his trust account. Respondent based this determination on his understanding that any property that came into his possession in which his client had an interest was subject to a retaining lien for unpaid fees. According to respondent, he believed that, because the $6,400 was originally loaned to Barbara for her use, the monies belonged to her and he could impose a lien on them. He, thus, sent the April 18, 1997 letter advising Edward and Barbara of the lien. Respondent also sent an April 30, 1997 letter asking Barbara to contact him about payment of his outstanding fees.

Respondent claimed that, although he had written a letter assuring Edward that the funds would be returned to him if the co-op sale did not occur, he did not return the funds to Edward because he had to look to his client for authority, but was not able to reach her. According to respondent, he was concerned that, because he believed that Edward and Barbara were still working out their financial affairs, Barbara might instruct him not to return the funds to Edward. Thus, respondent added, to bring the matter to conclusion he notified Edward and Barbara of their right to request fee arbitration on May 13, 1997. Respondent hoped that a fee arbitration proceeding would quickly settle the issue of respondent's fees.[2] Because neither Barbara nor Edward requested fee arbitration, respondent filed a civil action

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[2] Although respondent had agreed to limit his fees to $1,500, he attached a bill of $2,880 to the fee arbitration notice.

against Barbara for his fee, which was later settled for $1,000. Thereafter, respondent returned the $6,400 to Edward.

The following was respondent's justification for the retention of the funds:

> Well, I was unsure as to whose money I had in my trust account. If it was Mr. Mancuso's money in my trust account, then I was not clear that a retaining lien was an appropriate assertion.
>
> If these moneys were Mrs. Mancuso's moneys, then I had a very firm belief that my assertion of a retaining lien was indeed appropriate.
>
> I was unable to ascertain from the day or two of research that I did an answer to that question, whose moneys these were that I was given.
>
> I understood that if this was Mr. Mancuso's moneys, I couldn't touch them at all because my bill to Mrs. Mancuso was none of Mr. Mancuso's business.
>
> So the prospect of invading the $6,400, taking out $1,500, holding it aside or $2,800, holding it aside was not something I felt comfortable with. They weren't my money. Under any circumstances, I couldn't justify taking my money from the $6,400 if those moneys were Mr. Mancuso's moneys. And I knew them clearly to be – if all things played out the way it should, it would go back to Mr. Mancuso.
>
> So at no time did I invade the $6,400.
>
> On the other hand, it was clear to me that Mrs. Mancuso owed me $1,500. And it was clear to me that Mr. Mancuso intended to lend her $6,400.
>
> So while I had her $6,400 used for her purposes coming through my hands, that fell squarely within the prescription of the retaining lien cases.
>
> I had a right to say, 'Hold it, your money is not going anywhere until you satisfy my request for payment. Deal with me.'
>
> And that is the difficulty that I was in. It was also because Mr. Mancuso was becoming hysterical in his – I'm talking two, three, four times a day, 'Did you find out yet? Did you find out yet?'

> I understood he was living with Mrs. Mancuso. Mrs. Mancuso is not responding to me at all. So what did he know about Mrs. Mancuso that I wasn't being told? Was he understanding that she was telling me that I was going to whistle for my fee? I understood that there was that playing out in front of me. And I couldn't find firm authority to tell me whose money I was dealing with.
>
> I also saw in one of the cases that it need not be determined that the money was, in fact, all Mrs. Mancuso's. The language of one of the two cases that I reviewed said money that she had an interest in. It didn't have to be her money. It had to be money that she had an interest it.
>
> If it was in my possession, clearly these moneys satisfied that very limited standard. She had an interest in these moneys. They were coming into my hands for her purposes. They were leaving my hands on her behalf. So she had an interest of some sort in those moneys. And therefore I felt that the retaining lien was – oh, I felt that the retaining lien was appropriate.
>
> [T85-88][3]

Although respondent claimed that he looked to Barbara for authority regarding the ownership of the $6,400 in his possession, he did not ask her for direction. Respondent conceded that, although he advised Barbara and Edward that he would release the $6,400 upon payment of his fee, he never informed them that he would release the $6,400 to Edward upon Barbara's direction.

* * *

The DEC found that respondent violated *RPC* 1.15(b) by failing to promptly return the $6,400 to Edward Mancuso. The DEC concluded that respondent was required to return

[3] T refers to the January 29, 1998 hearing before the DEC.

the deposit monies to Edward once the co-op contract was canceled. The DEC remarked that respondent in effect held the deposit funds "hostage" to collect the fees that Barbara owed to him. The DEC determined that respondent wrongfully deprived Edward of his right to the money, that this was financially burdensome to Edward and that the misconduct violated *RPC* 4.4.

The DEC recommended a reprimand after considering the following aggravating factors: a prior reprimand; "failure to remediate despite opportunities to do so"[4]; lack of remorse; and the fact that the misconduct was committed for personal gain. The DEC considered respondent's cooperation with the disciplinary authorities as the sole mitigating factor.

* * *

Following a *de novo* review of the record, the Board is satisfied that the DEC's finding of unethical conduct is supported by clear and convincing evidence. Respondent represented to Edward that, if the co-op purchase did not occur, he would return the $6,400 to Edward. Respondent gave no notice to Edward that, if Barbara failed to pay his fee, he would impose a lien on the loan proceeds. Respondent's position that he was authorized to impose a lien is devoid of merit. He understood that Edward's loan to Barbara was for a

[4] It is unclear what this statement signifies.

limited purpose, to be used only as a deposit for the co-op. Respondent further understood or should have understood that, once the purpose of the loan was extinguished, he was duty-bound to return the funds to Edward. Instead, respondent retained those monies, holding them "hostage," as the DEC found, to induce Barbara to pay his outstanding legal fee.

Respondent's following testimony negates his alleged belief that he was authorized to impose a lien on the funds:

- "Well, I was unsure as to whose money I had in my trust account."
- "I was unable to ascertain from the day or two of research that I did an answer to that question, whose moneys these were that I was given.
- "And I couldn't find firm authority to tell me whose money I was dealing with."
- "Under any circumstances, I couldn't justify taking my money from the $6,400 if those moneys were Mr. Marcus's moneys and I knew them clearly to be —"

Despite having given a written representation that he would return Edward's funds to him if the co-op purchase did not occur, and despite his uncertainty regarding the ownership of the funds, respondent imposed a lien on them. Respondent attempted to justify his position based on his understanding from caselaw that he could impose a lien on funds in which his client had an interest. For his understanding of retaining liens, respondent relied on Kenneth Leiby's 1993 letter-brief in an unrelated matter. It should be noted that, in that letter-brief, Leiby stated that he had had fewer than twenty-four hours to reply to his adversary's motion. Respondent, thus, chose to rely on a brief that was prepared in a very short time period. Furthermore, neither *Frenkel v. Frenkel*, 252 *N.J. Super.* 214 (App. Div.

1991) nor *Brauer v. Hotel Associates, Inc.*, 40 *N.J.* 415 (1963), the two cases on which respondent allegedly relied, hold that an attorney may impose a retaining lien on property in which his client merely has an interest, not necessarily ownership. That issue is not considered in either case. Moreover, *Brauer v. Hotel Associates, Inc.* provides that a retaining lien cannot arise if possession of the property is maintained for a special purpose that is inconsistent with the attorney's claim to a lien. Under those circumstances, respondent could not have had a reasonable belief that his position was supported by caselaw. Moreover, even if respondent incorrectly interpreted caselaw to support his assertion of a lien, he waived his right to do so when he wrote the letter providing his "assurance" that he would return the funds to Edward.

Respondent's contention that he was required to obtain direction from Barbara is questionable. His November 1, 1996 letter clearly provided that the funds would be returned to Edward if the co-op contract was canceled. Moreover, respondent did not seek direction from Barbara on whether he should return the funds to Edward. Respondent's alleged concern that Barbara might direct him not to return the funds to Edward because she and Edward apparently had not fully and finally settled their financial affairs was disingenuous, particularly in light of his failure to ask Barbara if he should return the funds to Edward.

Respondent's claim that he was not aware of Edward's financial circumstances is similarly suspect. Apart from Edward's testimony that he directly informed respondent of his need for the funds, respondent testified that Edward was calling him frantically, two to four

times per day. Respondent was also aware that Barbara had used funds earmarked for his legal fees to pay the mortgage on the former marital home owned by Edward and her. Thus, even if Edward had not disclosed his financial straits to respondent, he should have been aware of it from other circumstances. Respondent's failure to return the funds to Edward was all the more inexcusable in the face of respondent's knowledge of Edward's desperate need for the money.

In short, respondent knowingly and intentionally breached his commitment to Edward; rationalized his misconduct with a flagrantly unreasonable interpretation of both the law and the facts, offering the untenable notion that the funds did not belong to Edward; and clearly acted in bad faith to advance his own financial interests. Respondent's actions represent a striking example of the type of misconduct that contributes to the negative image associated with the legal profession. Respondent gave his word, broke it and, rather than remorsefully admitting his mistake, tried to justify his actions. He demonstrated a serious lack of candor and disregard for the truth. As the Court stated in *Application of Jenkins*, 94 *N.J.* 458 (1983):

> We have long and firmly held that 'there is no place in the law for a man or woman who cannot or will not tell the truth, even when his or her own interests are involved. In the legal profession, there must be a reverence for the truth.' *In re Hyra*, 15 *N.J.* 252, 254 (1954).
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> [*Id.* at 470]

Respondent failed to promptly pay funds to, and to respect the rights of, a third person in violation of *RPC* 1.15 (b) and *RPC* 4.4. In a recent case, the Board addressed an attorney's improper retention of client funds. *In re Banas*, 144 *N.J.* 75 (1996). There, the attorney was

retained to represent a defendant in a homicide case. The defendant's mother gave the attorney $5,000, which she had borrowed from two banks. At that time respondent gave her a receipt with the following words: "[Received] on behalf of Carl Grant to be held for bail application. Money is to be returned to M. Grant if bail not obtained." The receipt also bore the notation that the balance due was "zero." Ultimately, bail was set at $100,000. The defendant, however, was unable to post bail. The attorney, who had placed the $5,000 in his business account, applied the money to his fees. Eventually, the defendant's mother asked respondent for the return of the $5,000 sum, as her son had not been released from jail, that is, "bail had not been obtained." The attorney replied that the $5,000 was not returnable and was to be applied to his $25,000 fee. The attorney's interpretation of their agreement was that "obtained" meant "set" and that his fee was earned once bail was set. The Board found that the attorney improperly and knowingly retained the $5,000 as his fee. The Court agreed. The Board concluded that the $5,000 had been entrusted to the attorney for the purpose of obtaining the defendant's release from prison; otherwise, the $5,000 was to be returned to the defendant's mother. The Board also determined that the attorney improperly required the defendant to sign an affidavit stating that the $5,000 was to be credited against his $25,000 fee. The Board found that the preparation of the affidavit was belatedly contrived, six months after the mother asked for the return of the $5,000. The attorney received a reprimand.

Here, respondent's conduct was worse than Banas' because respondent refused to acknowledge his wrongdoing and showed no remorse for his misconduct. Moreover, the bad

faith was more glaring since respondent's letter clearly stated that he would return the $6,400 to Edward. The Board also considered as aggravating factors respondent's public reprimand in 1996 and the fact that the misconduct was committed for respondent's pecuniary gain. Although the DEC considered respondent's cooperation as a mitigating factor, attorneys are required to cooperate with ethics authorities. Thus, although the lack of cooperation constitutes an aggravating factor, an attorney's cooperation is expected and should generally not be considered in mitigation.

Based on the foregoing, the Board unanimously determined to impose a three-month suspension.

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

Dated: 12/1/98

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board