SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-067

IN THE MATTER OF

HARRISON R. BUTLER

AN ATTORNEY AT LAW

Decision

Argued: May 15, 1997

Decided: September 30, 1997

John McGill, III, Esq. appeared on behalf of the Office of Attorney Ethics.

Harrison R. Butler appeared pro se.

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 I Ethics Committee ("DEC"). The complaint charged respondent with a violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1988. During the time relevant to this matter he was engaged in the practice of law in Atlantic City. Respondent has no history of discipline.

In September 1988 respondent was hired as an associate with the law firm of Cole and Cole, P.C. ("The Cole Firm"). In or about June 1990, respondent convinced his employer, Maurice Cole, Esq., that the acquisition of computers would be beneficial to the firm. Respondent testified that he

negotiated with the vendor, Computer House, but never dealt personally with anyone from the financing company, Citi-Lease, Inc., later known as Canon Financial Services, Inc. ("Citi-Lease" or "Canon"). In July 1990 the Cole firm acquired two computers and related equipment, pursuant to the terms set forth in exhibits C-1, C-2 and C-3, the documents executed between Citi-Lease and the Cole firm.[1] Under the controlling agreement, exhibit C-3, the Cole firm was to make sixty monthly payments of $331.28. Exhibit C-2 is a guaranteed purchase option agreement for the consideration of one dollar at the completion of the lease period. Maurice Cole signed as a guarantor on the agreement. Respondent signed as a witness.

The issue of title to the computers was examined at length during the proceedings in this matter.[2] In that regard, the hearing panel report stated as follows:

> All parties agree, and the Panel finds, that title to the equipment in question vested in Cole and Cole, P.C. as of the date of delivery. The Respondent, however, and Mr. Cole believed, at the time that the lease was negotiated, that title would not vest until the purchase option was exercised at the conclusion of the lease period.
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> [Hearing panel report at 2-3]

One computer acquired by the Cole firm in July 1990 was undisputedly for respondent's use at the office. The other was turned over to respondent on delivery and taken to his house. It is respondent's eventual sale of the second computer that forms the basis for these ethics proceedings.

The testimony of Cole and of respondent differed on the issue of ownership of the computer. Their respective versions of the facts are as follows:

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1 The record contains two lease agreements for the computers, exhibit C-1 dated June 20, 1990 and exhibit C-3 dated July 10, 1990. Exhibit C-3 reflects a higher monthly rental payment.

2 The issue of whether the transaction between the Cole firm and Citi-Lease was a sale or a lease was also closely examined. In the Board's view, the resolution of that issue is not central to this matter.

According to Cole, the second computer was purchased by the Cole firm for respondent's use at home to enable him to perform law firm work. With regard to his specific agreement with respondent about the computer, Cole testified as follows:

> The agreement was that the firm was to make the rental payments on the agreement until we acquired - by we, I mean Cole and Cole, PC, title to the computers, and once we did that, then Harrison Butler was to reimburse the firm for the computer that he had at home.
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> [T26][3]

It was Cole's understanding that title to the computers would vest "into Cole and Cole at the conclusion of the lease. . . ." "[Respondent] was to reimburse the firm once we obtained title under the option to purchase for his computer. . . ." According to Cole, the amount of respondent's reimbursement to the firm would have been negotiable. Cole insisted that the computer had not been given to respondent in lieu of additional salary. Cole did not recall having a writing memorializing his agreement with respondent about the computers.

For reasons not relevant to these proceedings, respondent's employment at the Cole firm was terminated on April 12, 1991. In May 1991, Cole's secretary called respondent and asked him to return the computer to the Cole firm. Respondent informed the secretary that he had sold the computer. Indeed, in March 1991, two months before, respondent had sold the computer to a third party for $3,000.[4] At that time, respondent was still employed by the Cole firm. Respondent neither notified Cole of his intention to sell the computer nor remitted the sale proceeds to the Cole firm.

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3 T represents the transcript of the hearing before the DEC on November 11, 1996.

4 Raymond Kaminski, an investigative auditor with the Office of Attorney Ethics, testified that the buyer of the computer, who had been unaware that the computer was leased, thought that respondent owned the computer and thought that title would pass to him upon his purchase of the equipment.

* * *

Respondent, in turn, testified that, during the course of his employment at the Cole firm, he was supposed to receive salary increases; because, however, the firm had cash flow problems, he had been receiving "perks," rather than additional salary. For example, respondent claimed, when the Cole firm was still financially able, it had leased a car for respondent's use. According to respondent, the computer had been given to him "in lieu of salary as additional compensation." T220.[5] Respondent contended that he and Cole never discussed any reimbursement to the firm.

According to respondent, Cole had told him to find a way to acquire the computers without spending a lump sum of cash. Respondent testified that, although the agreement between the Cole firm and Citi-Lease appears to be a lease, he understood the agreement to be a sale. Respondent added that, based on his belief that the computer was his, he sold it. Respondent did not report the sale or transfer any part of the proceeds to the Cole firm. Respondent confirmed Cole's understanding that the computer would be used for at least some of the firm's work. Despite Cole's expectation concerning the use of the computer, respondent did not feel he had to notify Cole of the sale. According to respondent, the value of the computer was less than the value of the benefits and the other "perks" he had lost. Respondent denied any dishonest "mindset" when he sold the computer.

In or about February 1991, the Cole firm fell behind in its payments to Citi-Lease. Since

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Respondent was asked if the computer was reflected on his personal income tax form. He replied that it was not "because it was never resolved exactly what the distribution should have been for the Social Security disability" and because he never received a 1099 form from the firm's accountant. Respondent was not charged with misconduct in this regard.

July 1990, respondent had assumed additional responsibilities at the Cole firm, including bookkeeping. Therefore, respondent would have known when he sold the computer, in March 1991, that the Cole firm had not made all payments due up to that date.

* * *

In evidence are notes Cole made at some point prior to June 30, 1990, ten days after the June 20, 1990, Citi-Lease agreement was signed, and in preparation for an office meeting. Exhibit R-2. These notes memorialized Cole's "understanding of what [he] wanted" and were, according to Cole, communicated to respondent, albeit not in writing. Cole's notes state, in relevant part:

> OK new computers (2) on lease purchase (check warranties)
>
> (a) Cole & Cole to be owner/lessee
> (b) Cole & Cole will make lease payments
> (c) HB [respondent] will reimburse Cole & Cole (impart [sic] for his social security and disability)[6]
> (d) When HB makes all payments Cole & Cole will give title to HB
> (e) HB will see that computer at his home is properly maintained at his expense

* * *

This matter gave rise to two civil proceedings. In one, the Cole firm obtained a $25,075.09 default judgment against respondent in a civil action stemming from the computer dispute and other issues. The judge in that proceeding referred this matter to the Office of Attorney Ethics. In the

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[6] Cole testified that he placed the language about social security and disability in his notes because respondent told him to do so. Cole denied any understanding of the significance of that language. T64. Respondent, too, did not understand why that language was in Cole's memo. He argued, however, that the language corroborated his claim that the computer had been given to him in lieu of salary. T343-344.

second proceeding, Cole sued respondent as a third party-defendant in an action instituted by the leasing company against the Cole firm and Cole personally. For reasons not disclosed in the record, the complaint against respondent was dismissed without prejudice. Cole reached an agreement with the leasing company to pay $15,000.

* * *

The central controversy in this case was the ownership of the computer in respondent's possession. The DEC concluded that ownership of the computer "was not transferred at any time to the Respondent." The DEC determined that "[r]espondent and Mr. Cole understood that ownership would not be transferred until the conclusion of the lease and certain other conditions were fulfilled." According to the DEC, not only was Cole the more credible witness on this issue, but his testimony was supported by the statement in his notes that "[w]hen H.B. makes all payments Cole & Cole will give title to H.B." Exhibit R-2. The DEC found that, regardless of who owned the computer, respondent and Cole understood that the computer was to be used, at least in part, for respondent's work for the Cole firm. Despite this understanding, the DEC noted, respondent sold the computer and failed to report the sale to the Cole firm. The DEC concluded that, even assuming that respondent believed that he was the owner of the computer, his conduct had violated RPC 8.4(c). In summary, the DEC stated as follows:

> The Panel finds that both Mr. Cole and the Respondent were incorrect in their initial conclusion that title to the computer and equipment remained in Citi-Lease until the conclusion of the lease. Rather, title was transferred from Citi-Lease to Cole and Cole, P.C. at the time of delivery. However, title to the computer and equipment remained in Cole and Cole, P.C. Accordingly, the Panel finds that Respondent had

no authority to sell the computer and equipment. The sale of those items without notice to Cole and Cole was dishonest and deceitful in violation of R.P.C. 8.4(c).
[Hearing panel report at 4]

In mitigation, the DEC considered respondent's youth, his civic activities, and achievements, and the misunderstanding as to his compensation by the Cole firm, which was derived, at least in part, by Cole's failure to document their understanding. The DEC recommended that the Board impose a reprimand.

* * *

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

The central issue in this matter was whether Cole bought the computer for respondent and, if so, whether the sale of the computer in March, 1991 was proper.

Respondent vigorously argued that Cole agreed to purchase the computer for respondent in lieu of monetary compensation. Cole claimed, to the contrary, that the computer was the firm's and that respondent could use it at home for the firm's work and ostensibly for his own purposes as well. Since the parties' testimony is at variance, the Board found it necessary to examine other evidence to determine the facts.

Lending credence to Cole's contention is exhibit R-2, Cole's handwritten notes created contemporaneously with the structuring of the deal. Those notes state that the transaction was a lease-purchase; that the firm would be the owner/lessee; that respondent would reimburse the firm, in part, for social security and disability payments; that the firm would transfer title to respondent when respondent made all payments to the firm; and that respondent would properly maintain the computer at his own expense. The contents of the notes are consistent with Cole's testimony that title

was to remain in the firm until the occurrence of certain events, namely, respondent's reimbursement to the firm for the price of the computer, to be determined at a later date. Cole answered as follows, when queried by respondent:

> Q: Mr. Cole, could you tell us, please, to the best of your recollection what your understanding of our agreement was regarding my responsibility to make any payments towards my computer?
>
> A: As I indicated before, the title to the computers, once it came in to Cole and Cole at the conclusion of the lease, that you were to reimburse Cole and Cole 50 percent, which would be the cost of the computer that you had at home. And I indicated before that I would have been willing to renegotiate your reimbursement depending upon what the firm did and what you did to earn that.
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> [T61-62]

To bolster his claim that the computer was his, respondent pointed to his obligation to maintain it. Otherwise put, respondent appeared to be arguing that, if he was to be responsible for the maintenance of the computer, it should logically follow that the computer was his, not the firm's. It is possible, however, – even probable – that, because respondent was allowed to use the computer for his personal benefit as well as the firm's, he agreed to bear the costs of maintenance. It would have been appropriate to require respondent to "see that computer at his home is properly maintained" (exhibit R-2), if it was to be used for work related to the firm. In addition, if the computer had been given to respondent as partial compensation, he would have been obligated to declare such value on his income tax returns. Yet, in answering the panel's question in this regard, respondent replied that he had merely relied on the firm's accountant to supply the proper 1099 form.

The totality of the evidence supports Cole's position that the Cole law firm obtained the computer for the firm, that it intended to be the owner of the computer until respondent reimbursed

the firm of an amount to be determined at a later time, and that respondent had possession of the computer at home in order to work for the firm as well as to use the computer for his own purposes. Hence, respondent could not have sold the computer because it was not his to sell. Although the Board recognizes that there was a long-standing dispute between respondent and Cole, it is not clear that the computer belonged to the Cole firm and not to Citi-Lease. What is clear is that respondent was not authorized to sell the computer.

The Board is reminded of In re Siegel, 133 N.J. 162 (1993), where an attorney was disbarred for knowing misappropriation of $25,000 of law firm funds from the firm's attorney business account by submitting thirty-four false requests for disbursements over a three-year period. The Board is of the opinion that the discipline imposed in Siegel is not mandated here because (a) it is not clear that Siegel established a bright-line rule for disbarment if there is theft of firm property, (b) both the amount and the nature of the misconduct involved here are far less significant than that in Siegel, and (c) if the transaction between the Cole firm and Citi-Lease was a lease, the computer belonged to Citi-Lease, not to the firm. Hence, this is not a Siegel situation.

In light of the foregoing, a five-member majority of the Board determined that respondent should be reprimanded. See In re Birchall,126 N.J. 344 (1991) (where an attorney was publicly reprimanded after he pled guilty to two counts of theft and one count of burglary resulting from two

break-ins at his former marital residence). Three members dissented, voting for a three-month suspension. One member did not participate.

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

Dated: 9/30/97

By: _____
Lee M. Hymerling
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Harrison R. Butler
Docket No. DRB 97-067

Argued: May 15, 1997

Decided: September 30, 1997

Disposition: Reprimand

Members	Disbar	Three-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:		3	5				1

Robyn M. Hill 10/1/97
Robyn M. Hill
Chief Counsel