

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 92-108

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IN THE MATTER OF :  
:   
KENNETH C. LUKE, :  
:   
AN ATTORNEY AT LAW :  
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Decision and Recommendation  
of the  
Disciplinary Review Board

Argued: May 20, 1992

Decided: June 26, 1992

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

Bernard F. Conway 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 the Office of Attorney Ethics (OAE). On February 2, 1990, respondent was temporarily suspended as a result of serious improprieties uncovered by a random audit. A Special Ethics Master was assigned to hear the matter and a stipulation was reached by counsel concerning the facts. The stipulation contained an admission of knowing misappropriation.

The facts, as found by the Special Ethics Master, are as follows:

Respondent represented Mary Abate in a personal injury action. On September 18, 1989, respondent deposited into his trust account

\$10,000.00 of settlement proceeds in the Abate case. Coincidentally, also in September 1989, Abate began working for respondent as a receptionist in his law practice. However, throughout the balance of the 1989 calendar year, respondent never advised Abate that her case had been settled and that he had received the settlement proceeds. Instead, he constantly misled her into believing that her case was still pending.

Both immediately prior to and after depositing the \$10,000.00 Abate settlement check into his trust account, respondent drew several checks payable to himself, designating each check "Abate." As a result of drawing these checks, respondent's trust account on September 29, 1989 had a \$4,439.52 balance, which was insufficient to pay Abate her settlement proceeds. Paragraph 13 of the stipulation specifically states that "there were insufficient funds to pay Ms. Abate her settlement proceeds, caused by the respondent's knowing invasion of client trust funds."

At the time of respondent's suspension from the practice of law, on February 2, 1990, he still had not paid Abate her settlement proceeds.

Respondent also misappropriated funds from James and Elizabeth Danella, who retained respondent to represent them in connection with their purchase of a house. On October 18, 1989, respondent deposited a check from the Danellas, in the amount of \$16,400.00, into his attorney trust account. This check represented the Danellas' deposit on the purchase of the house and, as set forth in

the stipulation, "had to remain inviolate and in the escrow until the closing which ultimately took place on December 7, 1989." Stipulation, paragraph 18.

When the Danella funds were credited to respondent's trust account on October 18, 1989, a \$16,664.42 balance resulted. However, from the date of deposit until the date of closing on December 7, 1989, respondent's trust account balance was never again sufficient to cover the Danella deposit. The balance ranged from a high of \$12,947.09 to a low of (\$142.62). Stipulation, paragraph 20. Following the real estate closing, respondent deposited closing proceeds of \$66,465.93 into his trust account, which amount was credited on December 11, 1989. From these closing proceeds, respondent had to pay off a prior mortgage. As of the end of December 1989, the prior mortgage had not been satisfied and respondent's trust account had insufficient funds for that pay-off. When respondent finally attempted to pay off the prior mortgage in January 1990, his trust account check was twice returned for insufficient funds.

Respondent's trust account was frozen on February 2, 1990, following his temporary suspension. At that time, a balance of only \$40,020.92 remained. Thus, with regard to the Danella closing alone, a significant shortage existed.

Paragraph 29 of the stipulation provides that "[t]he client funds respondent misappropriated from his trust account during this time period were utilized for personal purposes unrelated to the interests of his clients."

In addition to the stipulation, the record contains a certification filed by respondent, wherein he sets forth in detail his personal history and the circumstances surrounding the present ethics charges. Although respondent established his sole practice in 1986 and initially had economic success, he encountered financial problems in 1988. Respondent explained that, during that same time period, he was

using drugs [cocaine] on what I then thought was a recreational basis but on reflection over the past several months, I now realize that such activity was at a far greater intensity than what could be characterized as 'recreational' and obviously its use interfered with my ability to seek responsible solutions to my financial problems rather than involving myself in the use of client's funds.

[Exhibit D at 6]

Respondent did not provide any details regarding either the alleged impact of his drug abuse on his professional judgment or the alleged causal relationship of that drug abuse to his ethics offenses. Further, he provided no medical documentation of his addiction. He did not claim to have proof that he is rehabilitated at this time, but requested that, given his relative youth<sup>1</sup>, he be allowed, at some unspecified future date, to demonstrate rehabilitation.

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<sup>1</sup>At the time of his temporary suspension on February 2, 1990, respondent was thirty-four years old.

CONCLUSION AND RECOMMENDATION

The stipulation and exhibits in this case clearly and convincingly establish knowing misappropriation of client funds in two matters. In the Abate matter, respondent did not pay his client her settlement proceeds, wrote three checks to himself totaling \$5,105, designating "Abate" on the checks, and acknowledged in his certification that "there were insufficient funds to pay Ms. Abate her settlement proceeds, caused by respondent's knowing invasion of client trust funds." Exhibit C at 3. In the Danella matter, respondent first invaded deposit funds held in escrow for the purchase of a house and then invaded closing proceeds that were to be used to satisfy a prior mortgage. At the time that respondent's account was frozen, February 2, 1990, it had a \$40,020.92 balance, substantially less than the mortgage pay-off figure of \$68,603.50.

Respondent knowingly misappropriated trust funds in the Abate matter and escrow funds in the Danella matter. Accordingly, disbarment is the only appropriate sanction under In re Wilson, 81 N.J. 451 (1979), and In re Hollendonner, 102 N.J. 21 (1985).

The only issue raised in this matter is respondent's request for a "permanent suspension," with the right to seek reinstatement upon proof that he is rehabilitated. Respondent's certification set out his personal history and the financial problems that led him to misappropriate client funds. In addition, while noting that it is no defense to his actions, respondent has admitted his

dependency on cocaine. The Board, too, notes that cocaine addiction is no defense to disciplinary charges. See In re Turner, 120 N.J. 706 (1990) (cocaine use is a violation of the law and such activity cannot be condoned by allowing it to ameliorate the penalty); In re Hein, 104 N.J. 297 (1986) (the Court will continue to disbar where drug and alcohol dependency demonstrates the loss of judgment, but the addiction has not led to the inability to comprehend the nature of the act or lack of capacity to form the requisite intent).

Since the Wilson decision in 1979, disbarment has never been reversed. Only three attorneys have been reinstated following disbarment in the last one hundred years. See In re Wendel, 3 N.J. Misc 312 (Sup. Ct. 1925); In re Isserman, 9 N.J. 269 (1952) and 35 N.J. 198 (1961); and In re Mink, 60 N.J. 609 (1973).

In the matter now before the Board, there is no suggestion of any possibility that new evidence will demonstrate respondent's innocence. Rather, he requests that he be permitted to apply for reinstatement based upon subsequent exemplary conduct and reformation, à la In re Harris, 88 N.J.L. 18 (Sup. Ct. 1915). In essence, he requests that he be indefinitely suspended, rather than disbarred. In Harris, a case decided prior to the Wilson decision, the attorney was criminally convicted of theft for misappropriation in 1895. Twenty years later, in 1915, fifty-four witnesses appeared before the bar association committee to testify as to the moral fitness of the petitioner. The bar unanimously asked the Court for Harris' reinstatement. The Court refused to reinstate

because of the petitioner's earlier misdeeds, but it did allow him to retake the bar examination.

The Board sees no reason to distinguish this matter from any other where an attorney has knowingly misappropriated client funds. The Board does not find Harris to be relevant: the legal climate has changed significantly since 1895, particularly in the field of attorney discipline. Moreover, "mitigating factors will rarely override the requirement of disbarment." Wilson, supra, 81 N.J. at 461. The fact that respondent is relatively young is not a sufficient mitigating factor to override disbarment. Nor did the Board find any proof in this matter that respondent's alleged drug use caused his misconduct. Indeed, the record is bereft of any documentation in this regard. Similarly, "[t]here has been no demonstration by competent medical proofs that respondent suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful." In re Jacob, 95 N.J. 132, 137 (1984). Accordingly, the Board unanimously recommends that respondent be disbarred. Three members did not participate.

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

Dated:

June 26<sup>th</sup>, 1992 By: Raymond R. Trombadore  
Raymond R. Trombadore  
Chair  
Disciplinary Review Board