Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-327
District Docket No. XIV-2018-0383E

In the Matter of

Donald S. MacLachlan

An Attorney at Law

Decision

Decided: March 30, 2020

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

This matter was before us on a certification of the record filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f). The formal ethics complaint charged respondent with violations of RPC 1.15(a) and the principles of In re Wilson, 81 N.J. 451 (1979), and/or In re Hollendonner, 102 N.J. 21 (1985) (knowing misappropriation of client and/or escrow funds); RPC 1.15(b)

(failure to promptly disburse funds); RPC 8.4(b) (criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation).

For the reasons set forth below, we find that respondent knowingly misappropriated funds entrusted to him and recommend his disbarment.

Respondent was admitted to the New Jersey bar in 1981. On October 30, 2017, he became ineligible to practice law due to his failure to comply with New Jersey's mandatory continuing legal education requirements. On August 28, 2019, he also became ineligible to practice law due to his failure to comply with the Interest on Lawyers Trust Accounts obligations.

On April 25, 2019, the OAE filed a motion for respondent's temporary suspension, following his numerous, unexplained cash withdrawals from bank accounts for the Irrevocable Trust of Guy A. Blehl (the Blehl Trust), for which he was the trustee. Respondent additionally failed to refund the monies to the Blehl Trust's accounts or to distribute the funds to the trust's beneficiaries, as confirmed by subpoenaed bank records. The Court entered an order temporarily suspending respondent from the practice of law, effective October 3, 2019, restraining him from disbursing any funds he maintained in any New Jersey financial institution, except on

application to the Court, and requiring that all funds he maintained in any New Jersey financial institution be transferred to the Superior Court Trust Fund. He remains suspended to date.

At the relevant times, respondent maintained an office for the practice of law in Saddle River, New Jersey.

Service of process was proper. On August 17, 2018, the OAE sent a copy of the formal ethics complaint, by certified and regular mail, to respondent's office address of record. Both envelopes sent by certified and regular mail were returned, stamped "NOT DELIVERABLE AS ADDRESSED, UNABLE TO FORWARD."

On April 25, 2019, the OAE mailed respondent a letter, pursuant to R. 1:20-4(e), by certified and regular mail, enclosing a Petition for Emergent Relief seeking his immediate temporary suspension, with a supporting affidavit, to his office address. Again, the certified and regular envelopes were returned, stamped "RETURN TO SENDER, UNABLE TO FORWARD."[1]

[1] The OAE also attempted to contact respondent multiple times via his telephone number of record, but those efforts were unsuccessful.

On July 22, 2019, the OAE filed a complaint against respondent and served it by publication, in light of the previous mailing issues. On July 29 and August 1, 2019, disciplinary notices were published in the New Jersey Law Journal and The Bergen Record, respectively, stating that a formal ethics complaint had been filed against respondent. Those notices informed respondent that, unless he filed an answer to the complaint within twenty-one days of the date of publication of the notices, his failure to answer would be deemed an admission of the allegations of the complaint.

As of September 5, 2019, respondent had not filed an answer to the complaint, and the time within which he was required to do so had expired. Accordingly, the OAE certified this matter to us as a default.

We now turn to the allegations of the complaint.

On June 15, 2018, the grievant, Robert J. Hitscherich, Esq., filed a claim with the New Jersey Lawyers' Fund for Client Protection in behalf of the Blehl Trust. Hitscherich alleged that, after he assumed representation of the Blehl Trust from respondent, he suspected that respondent had misappropriated approximately $150,000 from the trust.

Respondent had created the Blehl Trust, an irrevocable life insurance trust, in behalf of his client, Guy A. Blehl, and served as its original trustee.

Upon Blehl's death, respondent collected $1 million in proceeds from Blehl's life insurance policy, which he ultimately deposited into three separate TD Bank accounts identified as "Guy A. Blehl Irrev Trust Life Ins Trust," account numbers XXX4347, XXX5593, and XXX5618. Pursuant to the terms of the trust, Blehl's wife, Sally, was entitled to 50% of the proceeds, with the remaining 50% to be divided equally between Blehl's children, Cort and Melinda, or their heirs. Respondent was required to make disbursements to the beneficiaries in behalf of the trust.

On August 5, 2016, respondent deposited the $1 million in insurance proceeds in TD Bank account number XXX4347. Over the following three weeks, respondent disbursed $200,000 to Sally, who confirmed receipt of these funds, but noted that she was due an additional $300,000.

From October 25, 2016 to August 25, 2017, respondent disbursed to Melinda two checks totaling $7,000; to Cort seven checks totaling $23,207.57; and to Gold Seal Transmissions (a company that Blehl had owned) two checks totaling $10,000. Following his father's death, Cort had assumed control over Gold Seal Transmissions.

On February 4, 2019, Cort informed the OAE that respondent had disbursed proceeds to him, in the amount of at least $14,000, and two checks to

Gold Seal Transmissions, in the amount of $10,000 each.[2] On February 5, 2019, Melinda confirmed to the OAE that she received the two checks totaling $7,000 from respondent. Both Cort and Melinda denied having received any cash directly from respondent.

On August 12, 2016, one week after he had deposited the $1 million in proceeds from Blehl's life insurance policy into TD Bank account number XXX4347, respondent made a series of withdrawals, depositing funds in two additional accounts opened in the name of the trust. Initially, he deposited $900,000 into account number XXX5593. For reasons not set forth in the record, respondent then simultaneously transferred $450,000 back into account number XXX4347, and transferred that $450,000 into account number XXX5618. On August 29, 2016, respondent completed a debit withdrawal of $4,000 from account number XXX4347.

Initially, Sally had ongoing communications with respondent regarding the Blehl Trust. At one meeting, respondent detailed the billable hours he claimed to have worked for Blehl during the previous few years. According to

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[2] Although the complaint asserts that respondent disbursed two checks totaling $10,000 to Gold Seal, in Cort's phone interview with the OAE, he stated that there were two checks of $10,000 each. The OAE does not address the discrepancy, but in its final tally, attributes only $10,000 to Gold Seal.

Sally, respondent informed her that, although he did not expect payment for all the hours he had documented, he wanted her to know that the total would have been approximately $60,000.

Sally maintained that, after approximately August 2017, her attempts to contact respondent were unsuccessful. She stated that respondent "would disappear at times, and she would find out from him that he was ill and seeking treatments." She further testified that respondent told her he had the same disease that had caused Blehl's death, but did not want visitors at the hospital. He also told Sally that he had found a new doctor and was preparing for an additional surgery.

Cort recounted that, following Blehl's death, respondent visited Gold Seal Transmissions bi-weekly, but, around July 2017, the visits ceased, and respondent discontinued any contact. Melinda explained that most of her communication with respondent had been through Cort or Sally. She added that she received her two checks from respondent only after submitting to him a written request for funds.

Blehl's brother, Allen Blehl, would also inquire about the trust's funds, and respondent would reply that the process was slow, or that he was ill and could not meet to discuss the trust. Ultimately, Allen filed a complaint with the

Bergen County Surrogate's Court, through Hitscherich, his attorney, seeking to remove respondent as trustee. At the time, respondent could not be located. All information that Allen obtained was from respondent's former wife; Allen believed that they had been divorced for about twenty years. When Allen learned about respondent's unexplained cash withdrawals from the trust's funds, Hitscherich was assisting him, but, sometime in November 2018, Allen retained Brian Selzin, Esq., who specialized in trust and estates, as his counsel.

On May 4, 2018, the Bergen County Surrogate's Court ordered respondent's removal as trustee and designated Allen as the new trustee. The court further ordered respondent to provide a full accounting of the trust, and ordered TD Bank to distribute to Allen, within thirty days, all funds in account number XXX4347.

Once Allen became the trustee, he assumed that respondent had improperly disbursed the Bleh Trust's funds. Accordingly, he retained Stephan Chait, CPA, to provide forensic accounting services in behalf of the trust. Chait discovered many unexplained cash withdrawals from the account. Specifically, between September 13, 2016 and October 30, 2017, respondent executed sixty-two cash withdrawals from accounts XXX5593 and XXX5618, comprising thirty-one identical withdrawals from each account, and totaling $116,749.

During the same timeframe, respondent further obtained forty-nine certified TD Bank checks, totaling $69,681.98, drawn on the Blehl Trust's funds. The only certified check issued in behalf of the trust was dated June 17, 2017, payable to New Jersey Inheritance and Estate Tax, and memorialized as "Guy." The remaining forty-eight checks referenced respondent's name on the memo line. Seven of those forty-eight checks, totaling $24,335.32, were payable to Willow Hill Farm, Inc., in New York. The complaint alleged that respondent's daughter received horseback riding lessons, presumably at Willow Hill Farm, Inc. Respondent cashed the remaining $47,067.02 in checks.

On May 29, 2018, in order to safeguard the Blehl Trust's remaining funds, Allen closed all the TD Bank accounts and opened a new account. On that date, the accounts held a total of $644,697.27: $10,199.05 in account number XXX4347; $317,249.11 in account number XXX5593; and $317,249.11 in account number XXX5618.

After Allen became trustee, Cort received approximately $30,000 in additional disbursements, plus three months of health insurance premiums, which were paid directly to his provider. Melinda had not been in contact with respondent or Allen, claiming there had been "issues dealing with Allen." Melinda further explained that she and Cort had retained an attorney to interact

with Allen in this regard.

According to the complaint, as of May 29, 2018, respondent disbursed or maintained $1,005,653.84 from the trust as follows: $91,749 in certified checks and cash to himself; $29,000 for inheritance taxes; $200,000 to Sally; $40,207.57 to Cort and Melinda; with $644,697.27 remaining in the accounts. The $5,653.84 over the original $1 million corpus represented interest and unexplained deposits, both calculated from August 5, 2016 to May 29, 2018. Thus, the OAE concluded that respondent had misappropriated $91,749 from the trust.

Based on the above allegations, the complaint charged respondent with violating RPC 1.15(a) and the principles of Wilson and Hollendonner; RPC 1.15(b); RPC 8.4(b); and RPC 8.4(c).

We find that the facts recited in the complaint support the charges of unethical conduct. Respondent's failure to file an answer to the complaint is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

We determine that, by disbursing more than $90,000 in Blehl Trust monies to himself, without the consent or authorization of the beneficiaries, respondent

knowingly misappropriated funds entrusted to him, in violation of RPC 1.15(a) and the principles of Wilson and Hollendonner.

In Wilson, the Court described knowing misappropriation of client trust funds as follows:

> Unless the context indicates otherwise, 'misappropriation' as used in this opinion means any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.
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> [In re Wilson, 81 N.J. 455 n.1.]

Six years later, the Court elaborated:

> The misappropriation that will trigger automatic disbarment under In re Wilson, 81 N.J. 451 (1979), disbarment that is 'almost invariable' . . . 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 is 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.
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> [In re Noonan, 102 N.J. 157, 159-60 (1986).]

Thus, to establish knowing misappropriation, the presenter must produce clear and convincing evidence that the attorney used trust funds, knowing that they belonged to the client and knowing that the client had not authorized him or her to do so.

This principle also applies to other funds that the attorney is to hold inviolate, such as escrow funds. In re Hollendonner, 102 N.J. 21 (1985).

In Hollendonner, the Court extended the Wilson disbarment rule to cases involving the knowing misappropriation of escrow funds. The Court noted the "obvious parallel" between client funds and escrow funds, holding that "[s]o akin is the one to the other that henceforth an attorney found to have knowingly misused escrow funds will confront the [Wilson] disbarment rule . . . ." In re Hollendonner, 102 N.J. at 28-29.

As detailed above, the record clearly establishes that Sally, Cort, and Melinda, as the beneficiaries to the Blehl Trust, were solely entitled to all the proceeds from the trust, in their respective shares. The Court has held that an attorney-client relationship between an attorney and the beneficiaries of a trust

is not a prerequisite for a finding of knowing misappropriation. In In re McCue, 153 N.J. 365 (1998), the attorney was appointed trustee of a trust valued at over one million dollars. Throughout his term as trustee, McCue neither gave the beneficiaries an accounting of the trust assets nor filed the fiduciary income tax returns for the trust, and he breached his fiduciary duties. In the Matter of William T. McCue, DRB 97-086 (February 17, 1998) (slip op. at 3-4). The beneficiaries petitioned a court in Virginia to remove McCue as trustee. Id. at 3. The court determined that the trust suffered a loss of $655,000 because of McCue's fraud and misappropriation. Id. at 4.

McCue subverted the OAE's investigation by refusing to provide his records, but it was established that, at a minimum, McCue had misused more than $500,000 of trust funds. Ibid. McCue transferred most of those funds by issuing forty-three checks payable to a separate trust, unrelated to the first. Id. at 3. The matter was before us by way of default and McCue did not appear for the Order to Show Cause issued by the Court. In re McCue, 153 N.J. 365.

Similarly, an attorney appointed as the administrator of an estate, where the sole beneficiary was confined to a nursing home, was disbarred when he "misappropriated and wasted more than $308,000 in estate funds." In re Meenen, 156 N.J. 401 (1998). Meenen made a series of improper loans from the estate

without security or documentation, invested $205,580 in limited partnerships and speculative companies that were either defunct at the time of the investment or went out of business shortly thereafter, and improperly advanced to himself fees of $39,000. In the Matter of Robert D. Meenen, DRB 97-406 (June 29, 1998) (slip op. at 3). Meenen was unable to substantiate his entitlement to the fees taken. He also failed to file appropriate tax returns on behalf of the estate until March 1996, during a tax amnesty period established by the State of New Jersey. Id. at 4.

We determined that, even though Meenen had served as administrator, rather than attorney, the appropriate discipline, in that client matter alone, was disbarment. Id. at 5. Accordingly, for his theft from the estate, we recommended Meenen's disbarment. Id. at. 6. As in McCue, the matter was before us by way of default and Meenen did not appear for the Order to Show Cause issued by the Court. In re Meenen, 156 N.J. 401.

Here, as in McCue, respondent misappropriated more than $90,000 of the Blehl Trust's funds, while serving as the trustee and fiduciary for those funds. Moreover, even if respondent were entitled to attorney fees from the trust, he represented to Sally that his fees amounted to $60,000, less than the amount he disbursed to himself without authorization. Respondent's unauthorized use of

the trust's funds violated RPC 1.15(a) and the principles of Wilson and Hollendonner. Consequently, respondent must be disbarred for knowingly misappropriating funds entrusted to him. Therefore, we need not consider the appropriate level of discipline for his other infractions.

Member Boyer did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bruce W. Clark, Chair

For Ellen A. Brodsky

By: _____
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Donald S. MacLachlan
Docket No. DRB 19-327

Decided: March 30, 2020

Disposition: Disbar

Members	Disbar	Recused	Did Not Participate
Clark	X		
Gallipoli	X		
Boyer			X
Hoberman	X		
Joseph	X		
Petrou	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	8	0	1

For Ellen A. Brodsky

Ellen A. Brodsky
Chief Counsel