SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
DRB Docket No. 24-154
District Docket No. XIV-2018-0626E

In the Matter of Warren Barry Kahn
An Attorney at Law

Argued
September 19, 2024

Decided
January 8, 2025

Dissent

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

We respectfully dissent from the Majority's de novo finding, contrary to the conclusion of the Special Ethics Adjudicator, that there was clear and convincing evidence that respondent willfully misappropriated the escrow funds at issue. In our view, the Majority analysis represents both (1) a departure from factual findings made by an experienced Special Ethics Adjudicator who heard and considered live testimony over multiple days of hearings, and (2) constitutes an unwarranted and imprudent expansion of the Wilson and Hollander doctrines to disbar an attorney who even the Majority agrees had no actual knowledge of the underlying fraudulent transaction and who did not benefit from the transaction.

A brief summary of the underlying transaction is helpful for context in analyzing the issue on which we disagree with the Majority. The record discloses the following facts. The grievant, LaTour, entered into a brokerage arrangement with Providence Capital Holdings LLC (Providence Capital) to assist in securing a loan in excess of $6 million to purchase a business. Providence Capital introduced LaTour to a prospective lender, Jose Antonio Lending (Antonio Lending) and a Loan Agreement was prepared and signed by Antonio Lending and LaTour. Under the arrangement, Antonio Lending was going to loan

$6,720,000 to LaTour to purchase a business in Oklahoma. The Loan Agreement provided for a loan fee of $400,000, which respondent was told would be used to fund an insurance policy to insure repayment of the loan. Respondent had no involvement in the negotiation of the underlying transaction.

After the loan and brokerage agreement had been negotiated and executed, respondent was asked to serve as the escrow agent for payment of the insurance premium. A written "Escrow Agreement" was prepared authorizing the disbursement of the escrow funds upon the written direction of either Jeff Kahn or Addys Walker of Providence Capital. In addition, respondent, at the direction of Providence Capital, sent a letter to LaTour confirming that the escrow funds would be released only to fund the issuance of an insurance policy.

It turned out the transaction was a fraudulent scam that resulted in the funds deposited being lost. In hindsight, there were many red flags which should perhaps have been picked up by all parties. The "lender" was a private lender about which minimal information is set forth in the documents. The contemplated insurance was to "insure" repayment of the loan, presumably something akin to a surety bond but not called that, and there was no indication that the insurance company required any due diligence and or financial statement from the borrower before agreeing to guarantee repayment of the loan in excess

of $6 million.[1] The insurance company was alleged to be a Canadian company and no one was given information as to the identity of the company.

Respondent was not involved in any way in the negotiation of the underlying transaction, and the Majority opinion agrees with the Special Ethics Adjudicator's conclusion that respondent did not, in fact, represent LaTour.

The crux of the matter is respondent's disbursement of $400,000 of escrow funds, by wire transfer, to a bank account of an individual named Hope, at the direction of Providence Capital. When the loan amount was increased, LaTour sent an additional $50,000 directly to Providence Capital, which then sent it directly to Hope. Without respondent's knowledge, Hope converted the funds for his own use instead of using them to pay the premium for insurance. Subsequent efforts to obtain a return of the amounts sent were unsuccessful and the loan transaction was not consummated.

Both the Special Ethics Adjudicator and the Majority concluded that respondent had no knowledge of the fraud and no advance knowledge that the funds would be improperly dissipated. Nevertheless, the Majority finds a knowing misappropriation based upon two predicates, both of which, we believe, are not supported by clear and convincing evidence. The first is the

[1] The record reveals that the loan amount and proposed insurance guarantee was subsequently increased.

assertion that the expressed consent of LaTour should have been obtained before disbursing the funds. While there is no question that the prudent course of action would have been to secure LaTour's consent, the failure to do so under these circumstances cannot support a finding of knowing misappropriation. The "Escrow Agreement," to which LaTour was not a party, did not require it, nor did the letter which the Majority finds amended the escrow agreement by informing LaTour that the monies would not be disbursed until an insurance policy had been issued.

Secondly, the Majority asserts that the funds should not have been released until receipt of proof that an insurance policy had been issued. Respondent asserted that the policy could not be issued until the premium was paid and that, as a result, he relied upon the direction of Providence Capital, LaTour's broker and agent, to disburse the funds for what he believed was the payment of the insurance premium. It is, we submit, not illogical or unreasonable to assume that an insurance company would not issue a policy insuring against the default in a loan in excess of $6 million before the premium is paid.

Under the Majority's logic, disbursement of the funds directly, to even a well-known and reputable insurance company before the policy was issued, would have been a knowing violation of the escrow and would, accordingly, mandate disbarment. Such a result would, we submit, be patently absurd and

manifestly unjust. The only difference between that outcome and the Majority's recommended disposition in this case is that respondent, in this case, relied upon a third party (his son, who was acting as the broker/agent for LaTour) to confirm the purpose of the wire transfer. Acting upon written direction from LaTour's broker that the funds were being wired to pay the premium may have been negligent, but it is not enough, in our view, to warrant a finding of knowing misappropriation.

The Majority states, at page 67, that "[b]ecause respondent did not know who Hope was or how Hope would use the funds, reciprocally he knew he was not disbursing the funds for an insurance policy." We respectfully submit that this assertion is contradicted by the evidence of record.

In the Hearing Report, the Special Ethics Adjudicator referred to respondent's interview with the OAE (the transcript of which is in evidence) in which respondent stated he was "told that [Hope] was the representative of the lender who is then going to pay the premium, and the money had to go to him." A review of the record reveals that this testimony is corroborated, in part, by a facsimile wire transfer instruction from the broker identifying the bank account to which the funds should be sent. The e-mail coming from the broker, who was the agent for LaTour, indicated that the funds were for "Insurance premium." (Ex.26). Respondent's belief is further corroborated by the fact that the Loan

Agreement contemplated loan fees of $450,000 to be paid to the lender, an amount he was told would be used by the lender to fund the insurance policy.[2] When respondent testified at the hearing, neither the presenter nor respondent's counsel questioned him about his understanding of the purpose of the wire transfer and the role of Hope in the transaction. The Majority posits that respondent's failure to come forward with additional evidence to support a "good faith defense" to the charges means that respondent failed to meet his burden of proving, by clear and convincing evidence, that there was a good faith basis for respondent's belief that he was authorized to disburse the funds. We respectfully submit that the Majority's analysis improperly shifts the burden of proof to the respondent when, in fact, the burden is on the presenter to prove a knowing misappropriation by clear and convincing evidence. Because the consequence of a finding of knowing misappropriation is disbarment, careful analysis of the burden and the evidence is warranted.

The Majority opinion states, at page 78, that respondent "refused to testify on his own behalf," but the record reveals (as the Majority acknowledges later in its opinion) that respondent did testify. Even if he had not testified, there was nothing preventing the presenter from calling respondent as a witness and

[2] When respondent was directed to wire $400,000 for the insurance premium, he was also told to return $50,000 to LaTour, because the insurance premium was only $400,000, not the $450,000 originally contemplated. It is not disputed that respondent returned the $50,000 to LaTour.

questioning him about his understanding of Hope's role in the transaction and why he believed the funds were going to pay the insurance premium. When respondent did testify, the presenter made the decision not to question him about the wire transfer to Hope. Both the presenter and respondent apparently made the decision to rely upon what respondent had said in the OAE interview about that transfer (the transcript of which was in the record). The OAE's response, and the position set forth by the Majority, seems to be that his testimony was not credible, yet the OAE, which has the burden of proof by clear and convincing evidence, offered no evidence to rebut this testimony and sustain its burden on this point.

The Special Ethics Adjudicator, an experienced and respected former jurist, had the opportunity to observe the witnesses at the hearing and to the consider the evidence in light of his conclusions about their credibility and demeanor based upon direct personal observation, as distinguished from the de novo review conducted by the Majority based upon a review of the cold record. The Special Ethics Adjudicator concluded that:

> Under the totality of the evidence, and in the absence of any additional testimony or evidence regarding communications between Respondent and his son (as Jeffrey [the son] asserted the Fifth Amendment, through counsel, given the pending Federal criminal complaint against Jeffrey), and negligent as it may have been both to release the fund without actual approval by LaTour and not checking more with respect to the role of Hope,

> I cannot concluded that Respondent released and delivered the funds for reason other than he stated or with knowledge of his son's criminal intent. In fact, during the oral argument portion of the summation, the presenter candidly acknowledged (although asserting lack of relevance) that Respondent was unaware of any "criminal activity" by his son.
>
> [SEAR at 10.]

As the Court stated in In re Konopka, 126 N.J. 225 (1991), in a quotation referenced in the Majority opinion at page 71:

> [w]e insist, in every Wilson case, on clear and convincing proof that the attorney knew he or she was misappropriating . . . [I]f all we have is proof from the record or elsewhere that trust funds were invaded without proof that the lawyer intended it, knew, and did it, there will be no disbarment, no matter how strong the suspicions are that flow from that proof.
>
> [Id. at 234 (emphasis added).]

In this case, the evidence falls short of the heavy burden of establishing, by clear and convincing evidence, a knowing misappropriation. The evidence does not show that respondent knew, when he disbursed the funds to Hope, that the funds would not toward purchase of the insurance policy. The Majority's contrary conclusion is, at best, based on suspicions flowing from the proofs, precisely what our Court has said we cannot do in such a case.

The cases cited by the Majority in support of the conclusion that respondent knowingly misappropriated funds are clearly distinguishable from

this case and do not, we respectfully submit, support the result reached by the Majority.

In In re Mason, 244 N.J. 506 (2021), the attorney disbursed escrow funds to an unrelated venture not authorized by the escrow agreement knowing that the funds would be at risk and that he did not have the consent of the interested parties, thus supporting a finding, by clear and convincing evidence, of knowing misappropriation of escrow funds. Similarly, in In re Aaroe, 241 N.J. 532 (2020), the evidence showed that the attorney clearly knew the funds were going for a purpose not authorized by the escrow, namely payment of his own personal real estate taxes, among other things. In In re Frost, 156 N.J. 416 (1998), the attorney was found to have disbursed escrow funds in which a workers compensation carrier had an interest despite a clear statement from the carrier that it disputed the amount tendered as a result of which the attorney knew that the carrier did not authorize the disbursement. Nevertheless, the attorney in that case was suspended, not disbarred.

In In re Wade, 250 N.J. 581, 601 (2022), the Court emphasized the requirement of a knowing misappropriation when it stated "[w]hen clients place money in an attorney's hands, they have the right to expect the funds will not be used intentionally for an unauthorized purpose." (Emphasis added). Here,

LaTour was not the client, and the evidence shows that respondent had no knowledge of the illicit scheme that resulted in the monies being diverted.

In In re Leiner, 232 N.J. 35 (2018), a default matter, the attorney, who had an extensive disciplinary history, did not contest allegations that he took monies sent to him to settle a case and, instead of depositing them into his trust account, placed them in his business account and spent them. The attorney was disbarred. That is a far cry from the facts presented here.

We agree with the Majority's conclusion that respondent was not aware of the alleged criminal scheme to divert the money and as a result, had no duty to take affirmative steps to prevent the implementation of a criminal scheme to divert the money. We also agree with the Majority that respondent did not, in fact, represent LaTour and that, as a result, respondent did not have a conflict of interest. Where we part ways with the Majority is that we cannot find that respondent knew the funds were not going for the purpose intended, namely purchase of the insurance policy. In our view, absent that knowledge, there can be no knowing misappropriation.

Respondent's conduct was far from blameless. After the funds had been disbursed, he knowingly misrepresented to LaTour that the funds were still in his escrow account when, in fact, they were not. He also improperly insisted that LaTour withdraw his ethics grievance as a condition precedent to respondent

returning the funds. While we do not find that respondent knowingly misappropriated the funds, we agree with the Special Ethics Adjudicator that he was negligent in that he did not take additional steps to ensure the funds were used for the purpose for which they were intended. We find the amount of money involved, $400,000 to be an aggravating factor. We find as mitigating factors (1) the fact that respondent reimbursed LaTour in full for the funds lost, and (2) the fact that respondent had no prior discipline in over thirty years as a member of the New Jersey bar and almost fifty years at the bar in New York when the events giving rise to this proceeding occurred. Based upon the foregoing, and our conclusion that there was no knowing misappropriation proven by clear and convincing evidence, we would recommend the imposition of a one-year suspension for respondent's misconduct.

Disciplinary Review Board
Peter Boyer, Vice-Chair
Lisa J. Rodriguez, Esq.

By: */s/ Timothy M. Ellis*
Timothy M. Ellis
Chief Counsel