

NEW JERSEY DISCIPLINARY REVIEW BOARD

Comments, Explanations and Annotations
by Kenneth F. Irek

“Apparently you’ve done your work well
because everyone seems to be fully satisfied
with the record... .”

Transcript of Board Hearing,
Wednesday, November 18, 1992,
page 3, lines 3 through 5.

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Comments, Explanations and Annotations

Quote from the record: “All right. Are there questions of Mr. Gaughran by members of the Board? Apparently you’ve done your work well because everyone seems to be fully satisfied with the record and there are no questions. I’m sorry that -- ...”

Legal Question:

Does Rule 1:20-15(f) of the Rules Governing the Courts of the State of New Jersey, require the Disciplinary Review Board to hold a de novo hearing where all the existing evidence is considered and a formal decision is rendered, including findings of fact and conclusions of law, based upon the evidence, not the conclusions of the underlying Ethics Committee hearing?

Rule 1:20-15(f):

(f) Recommendations for Discipline.

(1) Generally. All recommendations for discipline received by the Board, except for admonitions and those consent matters that are reviewable only as to the recommended sanction, shall be promptly heard de novo on the record on notice to all parties. Recommendations for discipline filed by the Committee on Attorney Advertising shall be reviewed in accordance with Rule 1:19A-4(f). The Board's review shall include any portion of the charges dismissed by the trier of fact.

(2) Procedure; Waiver of Hearing. The notice of Board hearing shall contain a briefing schedule for the parties. Within ten days after receipt of that notice, the respondent and the presenter shall enter an appearance with the Office of Disciplinary Review Board Counsel. At that time, respondent may agree in writing to proceed on the record and waive oral argument. The waiver shall specify whether or not respondent agrees with the conclusions and recommendation of the trier of fact. Neither the presenter nor assigned ethics counsel may elect to waive oral argument but if respondent has filed a complete waiver, the Board may elect to review the matter without argument.

(3) Disposition. The Board shall render a formal decision including findings of fact and conclusions of law as to each issue presented, and shall make a specific determination as to the appropriate disciplinary sanction, if any, to be imposed, except in those matters in which a reprimand has been recommended and the Board determines to impose an admonition. When the Board determines to impose an admonition rather than a reprimand, it shall promptly issue a letter in accordance with paragraph (4) of this Rule. The letter shall include a statement of reasons for the Board's conclusion that a lesser sanction is warranted. The Board's disposition shall require respondent to make reimbursement of disciplinary costs in accordance with R. 1:20-17. The Board's decision shall be promptly filed with the Clerk of the Supreme Court and served on the Director and the parties by regular mail.

(4)

Discussion:

What made all nine of the Review Board members “fully satisfied with the record”?

The transcript of the November 18, 1992, Review Board hearing consists of about 377 words, less than two pages, with the majority of Board's inquiry being about Mr. Irek not appearing and how he could not be found or contacted and the mail to him being returned.

Although the board members had the material submitted and the record below, the transcript contains no mention of whether Irek was acting as an attorney subject to the Disciplinary Rules and no discussion of the specific evidence from the Ethics Committee hearing panel or whether its conclusions were supported by clear and convincing evidence:

Rule 1:20-6 Hearings

(c)(2)(B) Standard of Proof. Formal charges of unethical conduct, medical defenses, and reinstatement proceedings shall be established by clear and convincing evidence.

De novo means "anew." Black's Law Dictionary, 8th Ed. (Bryan A. Garner, ed. 2004). We have explained that "the word 'anew' means anew, de novo, from start to finish, --from beginning to end." White Sulphur Springs v. Voise, 136 Mont. 1, 5, 343 P.2d 855, 857 (1959). For instance, a trial de novo means "trying the matter anew, the same as if it had not been heard before and as if no decision had previously been rendered." McDunn v. Arnold, 2013 MT 138, ¶ 22, 370 Mont. 270, 303 P.3d 1279.

Conclusion:

The plain meaning of "promptly heard de novo on the record", is a review of the complete record, to ensure the conclusions were based upon clear and convincing evidence, which necessarily requires the DRB to issue a detailed "findings of fact and conclusions of law".

Suggested Revisions to Existing Procedure(s):

Adjust the Court Rules to require a detailed "findings of fact and conclusions of law", to accompany any recommendation for Disbarment sent to the Supreme Court.

Fact Summary:

In May of 1990, Plaintiff, Kenneth Frank Irek (Irek) advertised the sale of a vacant construction lot in Jackson, New Jersey, owned by his solely owned New Jersey corporation, Kirex Development Company, Inc. Zontan Szatmary and his wife, Cathleen Szatmary, decided to purchase the lot and retained a licensed New Jersey attorney, Dennis D. Poane to represent them. A "Contract for Sale of Real Estate" was signed by both parties and Cathleen Szatmary made a \$5,000 check payable to "Kirex Dev. Co", dated May 29, 1990, as the initial deposit of the purchase price of \$35,000. Irek, acting in his official capacity as the President of Kirex

Development Company, Inc., endorsed the check as “Kirex Development Co”, and deposited it into the Kirex business bank account. Dennis D. Poane, Esq, proceeded to prepare for closing with a series of correspondences back and forth with Fran Donahue, a Realtor friend of Irek, at the end of June and early July, 1990. The liens and judgments that Poane knew of would not have exceeded the total purchase price of the lot. On or about August, 1990, Irek became unavailable and the closing never took place and the \$5,000 deposit was not returned. On February 27, 1991, the Szatmarys (“Claimants”) filed an Attorney Grievance with the District IX Ethics Committee. On April 12, 1991, Claimants filed a written “Statement of Claim” with the NJLFCP, stating that they lost Five Thousand dollars from Kenneth Irek, based on a Fiduciary Relationship (escrow agent). On July 29, 1992, Cathleen Szatmary testified before the District IX Ethics Committee. On May 11, 1993, Chief Justice Robert N. Wilentz signed an Order that permanently disbarred Kenneth F. Irek and restrained and enjoined him from practicing law in New Jersey. On November 26, 1993, the Trustees of the NJLFCP paid to Zontan and Cathleen D. Szatmary the sum of \$5,000, ‘arising from the dishonest conduct of their attorney, Kenneth Irek ...’, and received a signed ‘Release, Assignment and Subrogation Agreement from the Szatmarys. On December 29, 1994, the New Jersey Lawyers’ Fund for Client Protection, filed a Civil Complaint in the Superior Court of New Jersey, Law Division, Mercer County, demanding Kenneth Irek reimburse the NJLFCP for the Five Thousand Dollars (\$5,000), paid on his behalf to the Szatmarys, plus interests and costs of suit. Paragraph 4 of the NJLFCP Complaint states:

“4. In or about August 1990, while representing Zontan and Cathleen Szatmary, defendant embezzled, misapplied and converted to his own use the sum of \$5,000.00 received by him on behalf of Mr. and Mrs. Szatmary as funds to be held, in a fiduciary capacity, in escrow in connection with a real estate transaction.”

On March 22, 1995, the Superior Court of Mercer County, Law Division, entered a Five Thousand dollar (\$5,000) Default Judgment against Kenneth Frank Irek and in favor of the NJLFCP. Twenty-five years later, on November 9, 2020, Plaintiff filed a six-count Verified Complaint in the Superior Court of New Jersey, Mercer County, Law Division, claiming, inter alia, that Defendant, the New Jersey Lawyers’ Fund for Client Protection, fraudulently obtained the above-described Default Judgment and to declare it void *ab initio*. On November 27, 2020, Plaintiff filed a Motion for Injunctive Relief Temporary Restraints, preliminarily enjoining and restraining Defendants from, inter alia, continuing to engage in conduct related to compelling Plaintiff to reimburse the NJLFCP for the \$5,000 claim they had paid to the claimants. On December 9, 2020, Defendants filed a Cross-Motion to Dismiss Plaintiff’s Verified Complaint and deny injunctive relief, claiming, inter alia, lack of subject matter jurisdiction; failure to state a

claim upon which relief can be granted; absolute immunity in law and equity; and no showing of irreparable harm or substantial hardship if injunction denied. On December 14, 2020, Plaintiff filed a Reply to Defendants' Cross-Motion, opposing dismissal of his Verified Complaint and Injunctive Relief. On December 15, 2020, Defendants filed a request for leave of court to file a sur-reply. On December 15, 2020, Plaintiff filed a response to Defendants' request to file a sur-reply. On December 18, 2020, a telephonic oral argument was held for 34 minutes, before Judge Douglas H. Hurd, P. J. Cv. On December 21, 2020, Judge Hurd signed an Order granting Defendants' Cross-Claim to dismiss Plaintiff's Verified Complaint, with prejudice, for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, and granting Defendants' objection to Plaintiff's Motion for Injunctive Relief. It is from this Order that Plaintiff appealed to the Superior Court, Appellate Division. On December 21, 2020, Judge Douglas H. Hurd put his motion decision on the record. On January 7, 2021, Plaintiff filed a Notice of Appeal of Judge Hurd's Order. On March 3, 2022, in-person oral argument was heard. On May 18, 2022, the Appellate Division's Per Curiam decision affirmed the Superior Court's dismissal of Irek's Verified Complaint and denial of injunctive relief. On May 18, 2022, Plaintiff filed a Notice of Petition for Certification with the Supreme Court of New Jersey. On June 15, 2022, Plaintiff filed a Petition for Certification with the Supreme Court of New Jersey.