

NEW JERSEY DISTRICT IX ETHICS COMMITTEE

Comments, Explanations and Annotations
by Kenneth F. Irek

“... He is an attorney, you know.”
(Szatmary Testimony Transcript,
P. 17, lines 10 - 11)

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Comments, Explanations and Annotations

Quote from the record: "... He is an attorney, you know."

Legal Question:

Do the New Jersey Rules of Professional Conduct, and/ or Rules Governing the Courts of the State of New Jersey Rule 1:20. Discipline of Members of the Bar, apply to an attorney authorized to practice law in the State of New Jersey, when the attorney is the seller of real property that he is the sole owner of and buyer is represented by their own New Jersey attorney?

Discussion:

The record contains a number of references to the fact that Irek is a New Jersey attorney; below are a few samples:

1) Attorney Grievance Form, undated, but sent to the District IX Ethics Committee, about February 27, 1991, from Zontan and Cathleen Szatmary, unsigned:

"We believe Mr. Irek acted as an Attorney for Kirex Development Co., as well as an Official of that Company."

2) Szatmary's Statement of Claim with the New Jersey Lawyers' Fund for Client Protection, dated April 12, 1991 and signed by Cathleen Szatmary:

"Attorney against whom claim is made: Kenneth Irek ... escrow agent"
"Is claim based upon Attorney-Client Relationship or Fiduciary Relationship (escrow agent)"

3) Disciplinary Action Complaint, undated, unsigned, Draft marked 2/16/92:

"2. Respondent is the attorney for Kirex Development Company."

4) Testimony of Cathleen Szatmary before the District IX Ethics Committee, on July 29, 1992:

Question from Robert J. Gaughran. "Is there any reason why the check was made payable to Kirex Development Co.?"

Cathleen Szatmary's answer: Well, that was the development that we were buying from. You know, that was his development.

Q. "His development," meaning Mr. Irek's?

A. Right.

Q. Okay.

A. And I had questioned Denis about that, I was like: How come we don't -- because we bought houses before and because we've sold two houses and knew we were buying this land to build and I said: How come it's not made out to, you know, a lawyer in trust, because that's usually how we

did it, and he informed me that Ken Irek was a lawyer acting on his own behalf through Kirex Development so that there would not be a problem. He wouldn't see any reason why we shouldn't fill it out that way.

Q. All right. So, your lawyer advised you that it was okay to have the check payable to the developmental company because representations were made to your lawyer by Mr. Irek?

A. That he was acting on his own behalf as a lawyer."

5) Continuing testimony of Cathleen Szatmary before the District IX Ethics Committee, on July 29, 1992:

Question from Richard M. Keil:

"I have some questions. P-1 (Contract for Sale of real estate, dated May 23, 1990), paragraph five of the contract states: Deposit monies, all deposit monies will be held in trust by Kirex Development Co. located at Colts Neck, NJ until closing. The time you gave -- at the time you handed over that check, you understood then that it was the same as being -- that it was being held by an attorney."

Answer from Cathleen Szatmary: "Correct. Because that's what I questioned, that. Because we had a misdealing with an attorney one time Justin Ann Connors. We didn't lose anything, we did not lose anything out of that but we were in the process of buying our house when we had dealings with -- or selling our house when we had dealings with him and that was like hairy in itself and that's when we had William Smith take over for us and then we just found Dennis later for our other things. So, that's why I was more cautious than I would have been normally in saying: Why isn't there an attorney, you know, dealing with this and he said, you know: He is an attorney, you know."

6) District IX Ethics Committee Hearing Panel Report, dated August 5, 1992:

"The respondent, KENNETH IREK, on behalf of Kirex Development Company an as the attorney for Irex [sic] Development Company, of which he was the president ..." Signed by Richard M. Keil, Chair

7) Supreme Court of New Jersey, Disciplinary Review Board, Decision and Recommendation, dated December 28, 1992, signed by Raymond R. Trombadore, Chair:

"Respondent absconded with grievant's deposit monies, which grievants had entrusted to him for safekeeping until closing of title not because respondent was the president of Kirex, but because he was an attorney. Although it is respondent's status as a member of the bar that required him to abide by the high standards expected of the profession, he was also acting as an attorney in the transaction, as Kirex' [sic] counsel. Disbarment is, therefore, the only appropriate sanction for his knowing misuse of escrow funds."

8) Release, Assignment and Subrogation Agreement, between the New Jersey Lawyers' Fund and Zontan and Cathleen Szatmary, dated November 26, 1993:

“The Trustees of the Client Protection Fund, pursuant to R. 1:28-3, having considered the claim of Zontan Szatmary and Cathleen D. Szatmary, arising from the dishonest conduct of their attorney, Kenneth Irek, ...”

9) Civil action complaint filed December 29, 1994, captioned: New Jersey Lawyers' Fund for Client Protection, signed by Michael T. McCormick, Deputy Counsel, 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.”

10) Letter dated October 22, 2004, from the New Jersey Lawyers' Fund for Client Protection to California Department of Motor Vehicles, signed by Joanne M. Dietrich:

“Dear Sir or Madam:

Please be advised that I serve as Deputy Counsel to the New Jersey Lawyers' Fund for Client Protection (“Fund”). The Fund exists as a Committee of the Supreme Court of New Jersey pursuant to R. 1:28-1 et seq. for the purpose of compensating the clients of disciplined attorneys who misappropriated money from them. Kenneth Irek was such an attorney. His conduct, while acting as a New Jersey lawyer, has resulted in claims with the Fund in the amount of \$5,000.00.”

11) Letter dated October 6, 2006, from the New Jersey Lawyers' Fund for Client Protection to California Department of Motor Vehicles, signed by Ruby D. Cochran:

“Gentlemen:

Please be advised that I serve as Deputy Counsel to the New Jersey Lawyers' Fund for Client Protection (“Fund”). The Fund exists as a Committee of the Supreme Court of New Jersey pursuant to R. 1:28-1 et seq. for the purpose of compensating the clients of disciplined attorneys who misappropriated money from them. Kenneth Irek was such an attorney. His conduct, while acting as a New Jersey lawyer, has resulted in a claim or claims with the Fund. The Fund has a Judgment against Mr. Irek in the amount of \$5,000.00, which he has refused to pay.”

12) Decision of Judge Douglas H. Hurd, P.J. Cv., Superior Court of New Jersey, Mercer County, after oral argument in: Kenneth Frank Irek v. New Jersey Lawyers' Fund for Client Protection, Plaintiff, and The Supreme Court of New Jersey, dated December 21, 2020:

“... The disbarment was based on a real estate transaction involving the Szatmarys in which Irek acted as an escrow agent. ...

On April 12, 1991, the Szatmary's completed a statement of claim through the New Jersey Lawyers' Fund for Client Protection providing that Irek misappropriated the \$5,000 deposit as an escrow agent.”

13) Superior Court of New Jersey, Appellate Division's opinion affirming Superior Court's Dismissal of Plaintiff's Verified Complaint in: Kenneth Frank Irek v. New Jersey Lawyers' Fund for Client Protection, Plaintiff, and The Supreme Court of New Jersey, decided May 18, 2022, Per Curiam:

“The cornerstone of Irek's arguments is that since he was acting as an escrow agent for his corporation, and did not represent the buyers, he cannot be held accountable for his failure to return the deposit. The mistaken premise that neither the Court nor the Fund can sanction him because there was no attorney-client relationship colors his analysis of the law. The Court's disbarment decision identified the "knowing misappropriation of escrow funds in violation of RPC 1.15(b) and RPC 8.4(c)" as Irek's wrong. It seems a self-evident proposition, and one supported by case law, that licensed attorneys must honor their oath, even if acting only as an escrow agent, regardless of any attorney-client relationship with the owner of the funds. See, e.g., Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 217 (App. Div. 2014) ("RPC 1.15(a) requires a lawyer to appropriately safeguard the property of clients or third parties in his or her possession."). Thus, Irek's flawed premise cannot sustain his causes of action. Attorneys may be disbarred even for conduct unrelated to the practice of law. See In re Witherspoon, 203 N.J. 343, 357 (2010).”

Conclusion:

The record does not contain any evidence that Irek's was acting as an attorney for his Corporation or as an escrow agent for the real estate funds. Once the volunteer Ethics Committee presenter, Robert J. Gaughran, erroneously concluded the Committee had jurisdiction over Irek, not one of the dozens of New Jersey's employees that were affiliated with the case ever disputed whether the New Jersey Rules of Professional Conduct applied to Irek's conduct. His conclusion was accepted as fact and never discussed or reviewed in further proceedings.

Suggested Revisions to Existing Procedure(s):

Disbarment is a serious penalty depriving an attorney of important property rights protected by the US and New Jersey constitutions. A disinterested party, such as a Superior Court judge,

should handle all disbarment cases as a trial de novo, with all the due process requirements of a criminal case.

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.