SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 90-231

IN THE MATTER OF

RONALD D. BROWN,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: November 28, 1990

Decided: January 15, 1991

Myrna Wigod appeared on behalf of the District VA Ethics Committee.

James Plaisted appeared on behalf of respondent.

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

This matter is before the Board based upon a presentment filed by the District VA Ethics Committee.

Respondent was admitted with a limited license in 1976 and a full license in 1978. After working as an Assistant United States Attorney, he entered private practice in 1982. He maintains a sole practice in Newark, New Jersey.

I-TRUST ACCOUNT VIOLATIONS

Except for eight personal injury cases in 1984 and 1985, respondent's practice consisted primarily of criminal defense work. Until he began sharing office space in 1985, he did not maintain a trust account. He testified that it was his belief that a trust

account was needed only if an attorney was handling escrow funds from a real estate practice or from a trust and estates practice (6T21-22).[1] After discovering from the attorneys in his new office that every attorney in private practice is required to have a trust account, he opened an account in July 1985. This occurred before there was any contact from the Office of Attorney Ethics (OAE) in September 1986 (4T16).

Respondent admits that, before July 19, 1985, in addition to not keeping a separate trust account, he did not keep receipt and disbursements journals, ledger books, running balances or quarterly reconciliations of his business account. He admitted that his records were sloppy and inadequate (6T21). A telling example of this is seen in respondent's testimony concerning his preparation for the auditor's visit:

> A. "They [his checks and bank records] weren't kept very meticulously. In fact, some were still in the envelope from the bank, so I opened them up and just kind of organized a little for him.
>
> Q. Put them in order?

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[1] 1T refers to the transcript of the District Ethics Committee hearing of June 7, 1988.
2T refers to the transcript of the District Ethics Committee hearing of October 11, 1988.
3T refers to the transcript of the District Ethics Committee hearing of March 15, 1989.
4T refers to the transcript of the District Ethics Committee hearing of March 16, 1989.
5T refers to the transcript of the District Ethics Committee hearing of July 19, 1989.
6T refers to the transcript of the District Ethics Committee hearing of July 20, 1989.
7T refers to the transcript of the District Ethics Commitee hearing of August 11, 1989.

A. Yes, and some of them were still in the envelope from banks. I opened up the envelope and chronologized them in numerical sequence. Sometimes numerical sequence didn't jive with how I issued them, so I compromised them . . . ."

[6T24.]

The committee found clear violations of every trust recordkeeping requirement of R. 1:21-6. The committee also considered charges of knowing misappropriation of client funds as discussed in the three following cases.

A-Atkinson Matter

On December 7, 1984, respondent deposited a settlement check for $7500 in his business account for his client, Eugenia Atkinson, who was also his cousin. A receipt for $4700 in cash, dated December 24, 1984, was signed by his client[1] (Exhibit 5 of Exhibit Q to C-2). In the intervening seventeen days, respondent withdrew $7800 from his business account, using checks payable to himself. This resulted in a negative balance in his account on December 24, 1984. None of the check stubs bore any notation indicating they were for Atkinson. In fact, most of the notations on these checks showed that they were negotiated for respondent's personal use for items including, inter alia, Christmas shopping

[1] There was some question as to whether Atkinson signed both the receipt and the settlement check, as the signatures did not appear to be the same. However, no handwriting expert testified concerning this discrepancy. Moreover, Atkinson and respondent both testified that she signed the settlement check (2T12; 6T131-134). Therefore, there is no clear and convincing evidence of a violation of the standard set out In re Conroy, 56 N.J. 279, 282 (1970).

and a house payment. At the time of the audit, respondent attempted to determine from which specific checks the money had come for the cash distribution to Atkinson, without success (3T121-122). Nevertheless, respondent testified that the notations on the checks stubs were just a general indication of his use of the money and did not eliminate the fact that he also gave $4700 of the cash from those checks to Atkinson. Atkinson testified, as did respondent, that she received the net settlement proceeds in cash from respondent (6T21-24; 6T44).

The committee found that, even though respondent could not explain how the net proceeds had passed from his business account to Atkinson, the only evidence available was that Atkinson did receive the money in a timely fashion. The committee thus concluded that there was no clear and convincing evidence that a misappropriation had occurred in this matter.

B-BURROUGHS MATTER

Respondent obtained a settlement of a personal injury action for Dolores Burroughs on December 21, 1984. On January 8, 1985, $1752 was paid to Burroughs and $888 was retained by respondent to pay various medical bills. In April 1985, respondent paid $188 of the medical bills, but the largest bill of $700 due to a Dr. W. remained unpaid until October 1986.

Respondent had no explanation for why he waited four months to pay the $188 bill (1T78). There was evidence that Burroughs had sent him a handwritten note on a bill saying "please pay my bills",

but there was no date on this note indicating when it was sent to respondent (C-13). Burroughs also sent another handwritten note on a bill from Dr. W., dated February 25, 1985, in which she said she would "get bad credit" if respondent didn't pay the bill soon. Respondent's bank statements at this time indicated that his balance was frequently less than the $700 that should have been held in trust for the Burroughs medical bills between December 1984 and April 1986.

Dr. W.'s bill was not paid until after Burroughs contacted the ethics committee. Respondent testified that he was busy with trial work and had somehow confused an earlier payment of $75 to Dr. W. with the $700 that was still owed (6T29-30). He also attempted to justify the long delay and his use of the $700 owed to Dr. W. by claiming that, because the doctor was a "trade creditor" of his law practice, funds held in trust were not involved (6T121-124). Respondent did have an accountant testify that, in his expert view, Dr. W. was a trade creditor. The OAE's accountant stated that respondent's settlement letter and his letter to Dr. W. clearly indicated that the funds would come from settlement funds and were, therefore, funds in which both Burroughs and Dr. W. had an interest that was protected under RPC 1.15(b) (5T38-42;4T55;4T81-82).

The committee rejected the trade creditor argument, but found that the delay in making payment to Dr. W. was due to respondent's poor recordkeeping practices and inadvertence. The committee found a negligent misappropriation, but not a knowing misappropriation.

C-NIMMO MATTER

On September 18, 1984, Respondent deposited $2500 in his business account after settling Susan Nimmo's personal injury case. The net proceeds of $1614 were paid to Nimmo on October 12, 1984. Respondent testified that Nimmo advised him that she could not pick up the check sooner because she would be out of town on business. From September 28 to October 12, 1984, the account balance was less than the $1614 which should have been held in trust on Nimmo's behalf (C-56).

Although respondent wrote check #1489, on September 25, 1984, for the amount of $1614 due Nimmo (C-58), this check was never negotiated. Check #1508 for $1614 was then written on October 12, 1984, and was negotiated by Nimmo (C-57;C-58). On the day respondent wrote the first check to Nimmo, which left a balance of $592 in the checking account, respondent wrote a check to himself for $700. The presenter argued that, in issuing these two checks on the same day, respondent must have known that there would have been insufficient funds to pay both and that he therefore knowingly invaded client funds. Moreover, he wrote additional checks totalling $1498 prior to drafting the second check to Nimmo and, as a result, on October 5, 1984, his account was overdrawn by $48. Finally, on October 9, 1984, just prior to paying Nimmo, respondent made an unrelated deposit of $5000. Three days later, respondent issued the second check to Nimmo.

Respondent testified he did not keep contemporaneous running balances, he took checks out of sequence, and he simply did not know that he had invaded Nimmo's funds (6T32-32;6T164-165).

The committee concluded that respondent's poor recordkeeping practices, rather than willful, intentional or knowing conduct, caused the misappropriation that occurred.

II-THE CLIENTS' SECURITY FUND MATTER[2]

Respondent was ineligible to practice law from October 4, 1984 until March 24, 1986, due to his failure to pay his 1984 and 1985 Clients' Security Fund assessment ("CSF"). This matter was brought to the attention of the ethics committee by Judge Kirby, before whom respondent appeared while ineligible. Respondent testified that he paid his CSF bill in 1983 but, thereafter, he moved without notifying the Clients' Security Fund of his new address. He therefore did not receive the bills for 1984 and 1985.[3] In his testimony, he elaborated that, when he initially found out about his failure to pay, he thought it was a technical violation, and not an action that prevented him from practice (6T15-17).

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[2] This matter is referred to as the Kirby matter by the committee.

[3] Please note that respondent's answer(C-31) not only explains his lack of compliance with regard to 1984 and 1985, but also that he incorrectly exempted himself from paying in the years he was with the U.S. Attorney's office. There has never been an exception for government attorneys in New Jersey.

The committee found respondent violated RPC 5.5(a) (unauthorized practice of law), because he appeared in court when he had not paid his CSF assessment. The committee did not find evidence of deceit or misrepresentation.

III-SPANN MATTER

In January 1984, respondent agreed to represent Larry Spann, the grievant, in a civil rights action against Spann's employer. Six depositions and an administrative hearing occurred before the civil complaint was filed in this case, during which time grievant conceded that respondent performed appropriately. In the fall of 1985, the United States Attorney's office filed a motion for summary judgment. The original date for oral argument on the motion was October 15, 1985, but this was later postponed until December 9, 1985.

Respondent admits that he mistakenly calendared the wrong date for the motion. On December 13, 1985, respondent filed a forty-five page brief in opposition to the summary judgment motion. His brief was filed out of time. Several weeks later, he learned that the unopposed motion had been granted on December 9, 1985 (6T174-176).

Respondent did not advise his client that summary judgment had been entered against him. In April 1986, Spann learned on his own that the case had been dismissed. Spann testified that he did not directly contact respondent until January 1987, at which point he confronted respondent about the dismissal and was told by

respondent that the case would be reinstated. Spann denies ever telling respondent that another attorney, Mr. B., would take over the case.

Respondent testified that, after the dismissal of the suit in December, he hired a law student in early 1986 to research the issue of how to set aside the summary judgment. That student provided the committee with an affidavit corroborating respondent's testimony as well as a copy of his research notes (D-10). Respondent stated that Spann called him in the spring of 1986 (not January 1987) and that respondent told him in vague terms that they needed to get the case reinstated. Respondent further stated that he was contacted in May 1986 by an attorney, Mr. B., whom he also told he would continue to pursue the reinstatement.

However, respondent contended that, soon after he talked to the other attorney, Spann called back and told him that the other attorney would be handling the case and that respondent was to stop working on the case. Respondent took no further action and the case was never reinstated. Spann filed an ethics grievance soon after the statute of limitations ran in January 1987.

The committee concluded that respondent's testimony concerning the substitution of counsel was truthful and that he did not abandon his client. Therefore, his conduct did not constitute gross negligence. However, the committee did find that respondent violated RPC 1.4(a), by failing to communicate the entry of the summary judgment order to his client in 1985.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the entire record, the Board is satisfied that the conclusions of the committee in finding respondent guilty of unethical conduct are fully supported by clear and convincing evidence.

TRUST FUND VIOLATIONS

The Board has carefully reviewed and independently assessed the record in the Atkinson, Burroughs, and Nimmo matters to determine whether respondent knowingly misappropriated client trust funds. Because of the "dire consequences" which follow a finding of unethical conduct, such a finding must be sustained by clear and convincing evidence. In re Pennica, 36 N.J. 401, 419 (1962). To recommend the imposition of discipline, each Board member must, thus, be able to reach "a firm belief or conviction as to the truth of the allegations sought to be established" enabling him or her to find, without hesitancy, the truth of the precise facts at issue. See In re Boardwalk Regency Casino License Application, 180 N.J. Super. 324, 339 (App. Div. 1981), modified on other grounds, 90 N.J. 361 (1982).

The Board finds that "the evidence about respondent's state of mind is no more compelling in the direction of knowledge than it is in the direction of unhealthy ignorance." See, Matter of Johnson, 105 N.J. 249, 258 (1987). If the Board had found any competent evidence that respondent had intentionally set up his office

accounting system in order to remain ignorant, it would not have hesitated to find knowing misappropriation. It is no defense for lawyers to design an accounting system that prevents them from knowing whether they are using client trust funds. Matter of Fleischer, 102 N.J. 440, 447 (1986).

In this case, during the time of these three matters, respondent did not maintain a separate trust account. He only maintained a checking account and did not keep a contemporaneous running balance, or reconcile his check book with his bank statements. He did not keep client ledger sheets, or receipt and disbursement journals. It was only when he started sharing office space, in 1985, that he learned that every attorney in private practice is required to have a trust account. Nonetheless, long before the OAE had any contact with respondent, he voluntarily remedied his recordkeeping deficiencies when he learned from other attorneys that his assumption that he did not need a trust account was incorrect.

Nonetheless, the evidence does clearly show that respondent negligently misappropriated funds in the Burroughs and Nimmo matters. His reconstructed records reveal that, during the time he was holding the Burroughs and Nimmo funds, his account balance was below the amount owed to these two clients.

Like the committee, the Board rejects respondent's position that the doctor in Burroughs was a trade creditor of his law practice. Absent a clear statement in either the retainer agreement or settlement letter that the doctor's bill would not

come from the settlement funds, respondent had the duty under RPC 1.15(b) to keep the funds separate and to promptly deliver to Dr. W. the funds that he was entitled to receive.

Cognizant of the clear and convincing standard governing its de novo examination of the entire record, the Board concurs with the District VA Ethics Committee in finding respondent guilty: (1) of violating RPC 1.15(a), by failing to hold the property of clients in a separate trust account, and by failing to maintain complete records of such funds in the Atkinson, Burroughs and Nimmo matters; (2) of violating RPC 1.15(d) in all three matters, by failing to comply with the recordkeeping provisions of R. 1:21-6; and (3) of violating RPC 1.15(b), by failing to promptly deliver funds to a third party, Dr. W., in the Burroughs matter.

CSF AND SPANN MATTERS

The documentary evidence clearly establishes that, although engaged in the practice of law, respondent did not pay his CSF assessment for two years. Discipline has previously resulted for practicing while on the ineligible list. For example, the Court publicly reprimanded an attorney who inadvertently failed to pay his CSF assessment. Matter of Constanzo, 115 N.J. 428 (1989).

Respondent argued that his failure to pay was caused by his relocation, leading to the misdirection of the billing. However, R. 1:20-1(c) requires each lawyer to file with the Clients' Security Fund a supplemental statement of any change of home or office address within thirty days. It was respondent's

responsibility to contact the CSF himself to make sure the CSF billing was sent to the correct address.

In the Spann matter, the Board agrees with the committee that respondent violated RPC 1.4(a), by failing to communicate the entry of the summary judgment order to his client. The evidence is not clear and convincing that there was gross neglect, given the substantial time spent pursuing Spann's civil rights claim and the credible explanation that he believed attorney B. was taking over the case.

Having determined that respondent was grossly negligent in the operation of his attorney account, that he negligently misappropriated client funds in the Burrough and Nimmo matters, and that he failed to pay the CSF assessment for two years and failed to communicate with his client in the Spann matter, the Board must determine the quantum of discipline to be imposed. The "severity of discipline to be imposed must comport with the seriousness of the ethical infractions in light of all the relevant circumstances." In re Nigohosian, 88 N.J. 308, 315 (1982).

This case resembles Matter of James, 112 N.J. 580 (1988) and Matter of Gallo, 119 N.J. 189 (1989). Both James and Gallo were found guilty of flagrant recordkeeping violations, and were suspended from the practice of law for three months. However, in those cases, the attorneys had either inherited or adopted the improper bookkeeping practices of their former employers and successfully argued that they did not comprehend that they were maintaining their accounts incorrectly. The Board therefore finds

that respondent's conduct herein is more serious than that displayed in James and Gallo. The Board cannot conclude that respondent deliberately designed an accounting system that would enable him to misappropriate client funds. See In re Fleischer, supra. However, the Board does conclude that, contrary to Gallo and James, respondent has no one but himself to blame for his inexcusable derelictions in failing to attend to his attorney books and records. This serious unethical conduct is more analogous to that of the attorney in Matter of Librizzi, 117 N.J. 482 (1989) (where attorney received a six-month suspension for his gross negligence in maintaining his trust account records for a twelve-year period). The Board finds no significant distinction between the degree of the misconduct exhibited by Librizzi as compared to that of respondent. In fact, respondent's misconduct extended to two other matters, CSF and Spann.

As in Librizzi, respondent's misdeeds did not cause any financial injury to his clients and respondent has not been the subject of discipline prior to these matters.

The Board, therefore, unanimously recommends that respondent be suspended from the practice of law for six months. One member did not participate.

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

Date: 1/15/1991 By: Raymond R. Trombadore

Raymond R. Trombadore
Chair
Disciplinary Review Board