SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 88-188

IN THE MATTER OF
VICTOR LIBRIZZI, JR.
AN ATTORNEY AT-LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: December 21, 1988

Decided: June 12, 1989

Robyn M. Hill, Esq. appeared on behalf of the District XIV Ethics Committee.

Frank P. Lucianna, Esq. 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 the Board's determination to treat as a presentment a recommendation from the District XIV Ethics Committee that respondent be privately reprimanded.

Respondent was admitted as a member of the New Jersey bar in 1967. He has been a sole practitioner for the past 16 years, with offices in Cedar Grove, New Jersey. The bulk of his practice consists of real estate matters and related litigation. In addition, as of 1987, the date of the district ethics committee hearings, respondent had been the municipal prosecutor for Cedar Grove for nine years.

In May 1985, respondent was randomly selected for a compliance audit of his books and records. The random audit,

which encompassed records spanning the period of September 1, 1982, through August 31, 1985, revealed that respondent had not complied with the recordkeeping provisions of R. 1:21-6. He had failed to maintain receipts and disbursement journals for his attorney trust account. No records were available showing deposits to the trust account. Deposit tickets were not consistently marked with client names. No deposit notations were entered on check stubs. Client ledger cards did not consistently reflect correct deposit information, which had to be traced from the case files. Client ledger cards made available for the audit reflected inaccurate or omitted disbursements. Moreover, no reconciliation of the trust account had been made since 1973, when respondent began his sole practice. In May 1985, after the Office of Attorney Ethics (OAE) auditor reconciled the bank statements with the client ledger books, it was discovered that respondent's trust account had a shortage of $25,417.27.

As a result of the random audit, the OAE filed an eight-count complaint against respondent, charging him with failure to maintain his trust account in accordance with R. 1:21-6, failure to maintain cash receipts and disbursement journals and failure to reconcile the trust account on a regular basis (Count One); failure to safeguard clients' funds, commingling of personal and clients' funds, and misappropriation of clients' funds (Counts Two, Three, Four, Five and Six); borrowing from trust account

funds (Count Seven); and replenishment of the trust account to replace misappropriated funds (Count Eight).

At the ethics hearings below, which encompassed four days, the auditor testified that, in addition to recordkeeping violations, as of February 28, 1984, respondent's trust account showed an $11,498.77 shortage; as of March 30, 1984, the shortage totalled $16,587.89; and as of May 3, 1984, the shortage amounted to $17,094.89.

In turn, respondent testified that he maintained both a trust account and a business account. From his business account, respondent paid both office and personal expenses. As respondent explained, ". . . we live out of the office and our household lives out of the business account" (T5-8-1987 157-1 to 4). He admitted that he had not reconciled his trust account since 1973 and that he reconciled his business account only "sporadically, every three to four months" (T5-21-1987 26-3 to 11). Respondent reasoned that "there was no particular need" to reconcile the business account on a more frequent basis in light of the banking resources that were available to him, which he deemed to be "a relatively fail-safe system." More specifically, that system provided for respondent's access to three different lines of credit. The first, called Check-King, consisted of what is commonly known as "overdraft protection," up to a $2,500 limit. The second consisted of a promissory note renewable on a monthly basis (revolving credit). Simply put, this was an unsecured line

of credit renewable every 30 days. The third line of credit, Insti-Credit, consisted of an installment loan of varying amounts (T5-8-1987 162-3 to 25, 163-1 to 25, 164-1 to 25).

In light of the above described credit system and because of the close relationship respondent shared with the bank, respondent was confident that "[the bank] never would bounce a check, never did, and never will" (T5-8-1987 164-23 to 24).

Although this system applied only to respondent's business account, respondent trusted that in the event of an overdraft in the trust account, "[the bank] would call me up. We had [a] terrific, and still do, banking relationship. [The bank] never bounced any check and never would" (T5-21-1987 83-25, 84-1 to 3). Indeed, although respondent was out of trust on a number of occasions, no client suffered any financial injury or complained to the ethics committee.

After receiving the notice of the random audit dated May 19, 1985, and prior to meeting with the auditor, respondent attempted a reconciliation of whatever trust account records were available. He admitted that his records were not maintained in compliance with R. 1:21-6. In his own words, "charitably, [the records] were in somewhat [sic] disarray" (T5-8-1987 119-13 to 14). His reconciliation showed a shortfall in his trust account of $24,321.60, traceable partially to the Costanza and Maffie matters.

In Costanza, respondent received a check in the amount of $4,768.36 to satisfy a tax lien on certain property previously owned by Costanza and on which he held a mortgage. Inadvertently, however, on February 22, 1984, this check was deposited in respondent's business account. Five days later, on February 27, 1984, respondent issued a trust account check in the amount of $4,700.60 payable to the Township of Montclair.

Similarly, in Maffie, respondent received a check payable to Maffie in the amount of $6,500, representing a real estate deposit. On January 13, 1984, the check was deposited into respondent's business account. On February 14, 1984, an additional $1,500 deposit on the property was tendered to respondent, who deposited it into his trust account. Thereafter, on March 28, 1984, respondent issued a trust account check to the seller in the amount of $8,000.

Respondent was unable to identify the other sources of the $24,321.60 shortage. In order to replenish the trust account fund, he borrowed $25,000 from his parents. On his first visit with the auditor, respondent apprised her of the approximate $25,000 shortage and of the mistakes which had occurred in the Costanza and Maffie transactions. He also showed her a copy of the $25,000 check which he had used to cover the trust account shortage.

It was only after the random audit was concluded that the auditor was able to identify the remaining sources of the

shortage. More specifically, the audit revealed that on March 5, 1984, respondent misdeposited $9,500 into his business account in the Moshier transaction. On May 3, 1984, respondent issued a trust account check to Moshier in the aforementioned amount. Additionally, respondent had erroneously relied on the existence, in his trust account, of excess recording and cancellation fees related to real estate transactions which, he contended, had accumulated since his law practice began in 1973. Although respondent had not calculated the amount of those excess fees, he estimated that they totalled "thousands of dollars" (T5-8-87 140-23 to 25, 141-1 to 2). Also, in several instances respondent had made interest payments to clients from trust funds, even though he had failed to open interest-bearing accounts on behalf of those clients.

In yet another matter, Tabatchnick, respondent withdrew from the trust account approximately $1,800, representing his counsel fee in connection with a real estate transaction that took place in May 1983. After that check was cashed, the bank notified respondent that one of Tabatchnick's checks, in the amount of $1,800, which had been deposited into respondent's trust account, had been dishonored.[1] Respondent did not return the $1,800 fee to his trust account. Although he demanded another check from Tabatchnick, that second check was also returned for insufficient

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[1]Although the record is silent in this regard, it is clear that, at the closing of title, respondent failed to collect from Tabatchnick a bank, cashier's, or certified check.

funds. Eventually, when respondent sued the client, Tabatchnick's father agreed to pay respondent in "dribs and drabs." Respondent did not deposit those payments in the trust account. From the time that the first Tabatchnick check was dishonored until the time that respondent cured the aforementioned $25,000 shortage in May 1985, a period of two years had elapsed.

At the ethics hearings, respondent denied that he was aware of the trust account shortage prior to undertaking the reconciliation in anticipation of the audit. Again, this was the first trust account reconciliation performed since 1973. He denied also that the misdeposits in the Costanza, Maffie, and Moshier matters had been intended to replenish a business account shortage or to otherwise utilize the funds for personal purposes. The OAE alleged that the Maffie misdeposit of $6,500 on January 13, 1984, was intended to pay off one of respondent's bank loans of $5,799.99, due on January 24, 1984. Because respondent's records showed that, on January 25, 1984, one day after the due date of the loan, respondent deposited $7,500 in his business account, the OAE logically concluded that respondent knowingly used client funds for personal use.

To refute the above charge, respondent produced the testimony of an accountant, who reviewed respondent's records after the completion of the random audit to show that on the due date of the loan, January 24, 1984, one of the credit lines

available to respondent had a zero balance, thus respondent would have been eligible for another loan to pay off the prior $5,799.99 loan (T5-21-1987 174-13 to 25, 175-1 to 25, 176-1 to 25, 177-1 to 25, 178-1 to 3 and Exhibit C-7, page 995, attached to Exhibit C-1 admitted into evidence at the ethics hearing on May 5, 1987).

In fact, respondent did utilize this credit line in order to deposit $7,500 into his business account on January 25, 1984 (Exhibit C-3 to E-1 in evidence). While this deposit may have covered the amount due on the outstanding loan, respondent's business account bank statements show that the Maffie misdeposit was thereafter fully utilized by respondent to cover business and personal expenses. By February 21, 1984, respondent's business account held a negative balance of $111.73. On the following day, Costanza's $4,500 in trust funds was deposited into the business account (Exhibit B-2 to C-1 in evidence). When the $9,500 in Moshier trust funds was added to the business account on March 5, the account contained $3,623.24 (Exhibit D-3(a) to C-1 in evidence). By the end of May, the business account balance was $2,559.36 (Exhibit D-3(b) in evidence), and, by June 28, only $986.32 (Exhibit D-3(c) to C-1 in evidence). Thus, without reference to any additional deposits of earned fees, from January 12, 1984, through June 28, 1984, respondent spent at least $20,000 of the Maffie, Moshier, and Costanza trust funds.

Following the conclusion of the ethics hearings, the panel found that respondent had been guilty of recordkeeping violations, contrary to R. 1:21-6, DR 1-102(A)(6) and DR 9-102(C). The hearing panel found no clear and convincing evidence that respondent had knowingly misappropriated client funds. It recommended that respondent receive a private reprimand.

CONCLUSION AND RECOMMENDATION

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

Respondent was grossly negligent in maintaining his trust account records, in violation of DR 9-102 and superseding RPC 1.15. There were no receipts and disbursement journals. Client ledger cards were not maintained. There were no records showing deposits to the trust account. More egregiously, from 1973 to 1985, a period of 12 years, respondent did not reconcile his trust account. He testified that the bank envelopes containing the trust account statements were not even opened (T5-21-1987 123-13 to 16). According to the testimony of the accountant respondent hired after the audit, "[respondent] was a shoe box client. All his records were in shoe boxes." (T5-21-1987 166-10 to 16). With this chaotic state of affairs, it is hardly surprising that respondent found it necessary to invade clients'

funds to satisfy another client's particular needs. That no trust account check was ever dishonored was indeed fortuitous.[2]

After a careful review of the record, however, the Board is unable to conclude that respondent knowingly misappropriated client funds. The requisite standard of proof was described in In re Pennica, 36 N.J. 401 (1962):

> Because of the dire consequences which may flow from an adverse finding, however, we regard as necessary to sustain such a finding the production of a greater quantum of proof than is ordinarily required in a civil action, i.e., a preponderance of the evidence, but less than that called for to sustain a criminal conviction, i.e., proof of guilt beyond a reasonable doubt. Although the specific rule has not been articulated previously in this State, we declare it to be that discipline or disbarment is warranted only where the evidence of unethical conduct or unfitness to continue in practice against an attorney is clear and convincing. [Id. at 419, (citations omitted).]

Accord In re Gross, 67 N.J. 419, 424 (1975); In re Rockoff, 66 N.J. 394, 396-397 (1975).

In another context, the clear and convincing standard was described in State v. Hodge, 95 N.J. 369 (1984), as

> that which 'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established,' evidence 'so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' [In re Boardwalk Regency Casino License Application, 180 N.J.

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[2]The record is not clear whether respondent's trust account balance was ever in a negative position. In any event, it appears that the bank would have honored any checks as a result of a close business relationship with respondent.

> Super., 324, 339 (App. Div. 1981), mod., 90 N.J. 361 (1982) (quoting Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 162 (App. Div. 1960).] [Id. at 376.]

The Board has applied these standards in determining whether the record before it demonstrates clearly and convincingly that respondent misappropriated client funds and, if so, whether his dereliction was a knowing one, warranting the most extreme disciplinary sanction.

Misappropriation is "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." In re Wilson, 81 N.J, 451, 455 n.1 (1979). The misappropriation that will trigger automatic and almost invariable disbarment "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." Matter of Noonan, 102 N.J. 157, 159-60 (1986).

The Court in Noonan further observed, in pertinent part:

> 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 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. To the extent that the language of the DRB or the District Ethics Committee suggests that some kind of intent to defraud or something else

> is required, that is not so. To the extent that it suggests that these varied circumstances might be sufficiently mitigating to warrant a sanction less than disbarment where knowing misappropriation is involved, that is not so either. The presence of 'good character and fitness,' the absence of 'dishonesty, venality, or immorality' -- are all irrelevant. While this court indicated that disbarment for knowing misappropriation shall be 'almost invariable,' the fact is that since Wilson, it has been invariable. [Id. at 160] footnote omitted; emphasis supplied.]

Accord Matter of Warhaftig, 106 N.J. 529, 533 (1987).

The focus of these cases as well as a plethora of other disciplinary opinions is that, for disbarment to be warranted, a finding is necessary that the misappropriation was knowingly made. In determining whether a knowing misappropriation has occurred, the Board is mindful that "[i]t is no defense for lawyers to design an accounting system that prevents them from knowing whether they are using clients' trust funds. Lawyers have a duty to assure that their accounting practices are sufficient to prevent misappropriation of trust funds." Matter of Fleischer, et al., 102 N.J. 440, 447 (1986). ". . . [P]oor accounting should not, and does not, establish a Wilson defense, ... but poor accounting is not a Wilson violation absent evidence of a knowing misappropriation." Matter of Simeone, 108 N.J. 515 (1987), citation omitted. Additionally, inattentiveness, laziness, or lack of due diligence should not be regarded as conduct sufficiently gross as to warrant disbarment. Matter of Noonan, supra, 102 N.J. at 161.

Based on this record, the Board is unable to conclude that the evidence before it is of a character so clear, direct,

weighty, and convincing to enable it, without hesitancy, to conclude that a knowing misappropriation has occurred. See State v. Hodge, supra, 95 N.J. at 376.

Here, respondent was inexcusably derelict in his obligation to attend to the accounting and bookkeeping details of his practice. It cannot be said, however, that respondent deliberately designed an accounting system that would enable him to misappropriate client funds. Respondent, a sole practitioner since 1973, had an active law practice. His staff consisted of one secretary, who was replaced on a full-time basis by respondent's wife in September 1984. Respondent did not employ the services of a bookkeeper or an accountant. Although the busy character of his practice and the absence of outside help to maintain his books and records constitute no excuse to his grossly negligent recordkeeping practices, they bear directly on the issue of whether respondent knowingly misappropriated client funds. The Board finds that respondent's "unhealthy ignorance" of the status of his trust account was unintentional and prevented him from committing a knowing misappropriation.

The Board agrees with the ethics committee's conclusion that the Costanza, Maffie, and Moshier deposits into respondent's business account were the product of inadvertence and not of evil design to utilize the funds for personal purposes. Corroborating this conclusion are the fact that the checks deposited in the Costanza and Moshier matters are stamped payable to respondent's

trust account number and the fact that respondent had conveniently set up a multiple-credit line system to provide additional funds to his business account, as needed.

Respondent's most glaring violation occurred in the Tabatchnick matter. There, respondent issued a trust account check to himself in the approximate amount of $1,800, representing counsel fees in a real estate transaction. After the check was cashed, the bank notified respondent that one of Tabatchnick's checks, which had been deposited into respondent's trust account, had been returned for insufficient funds. At that time, an obligation arose on respondent's part to make immediate restitution to the trust account of the monies withdrawn against uncollected funds.

Although respondent trusted that the bank would "never bounce a check" because of their close and long-standing business relationship and although respondent had the honest belief that there were "thousands of dollars" in excess recording fees accumulated in his trust account since 1973, his conduct in not making prompt restitution to the trust account smacked of gross negligence. While the Board finds credible respondent's testimony that the accumulated recording fees exceeded $1,800, it strains credulity to believe that respondent never attempted to determine the exact amount of those excess fees. The same holds true for respondent's payments of interest to several clients, which payments he believed to be covered by the "thousands of dollars" left in the trust account.

In this regard, respondent's conduct differed substantially from the attorney's in Matter of Brown, 102 N.J. 512 (1986). There, for a period of four years the attorney knowingly invaded client trust funds through a "lapping" process by using designated funds of one client to pay for another client's needs and for certain office expenses. The Court viewed the attorney's conduct as amounting to an intentional and continuous misappropriation of client funds warranting disbarment. Here, respondent was operating under the credible notion that the recording fees accumulated in the trust account for a period of 10 years -- from 1973 to 1983 -- exceeded the amounts withdrawn for the payment of interest to clients and the amount of the Tabatchnick check which was dishonored, $1,800. While the Board strongly condemns respondent's grossly negligent conduct, it cannot conclude that respondent knew that there were insufficient funds in his trust account to cover those deficiencies.

Neither is respondent's unethical conduct comparable to that exhibited by the attorney in Matter of James, 112 N.J. 580 (1988). There, the attorney received a three-month suspension for inattentiveness to his accounting and bookkeeping system, which he had "inherited" from his senior partners and which he perpetuated for 24 years, albeit without incident. The Court found that respondent had not known how to manage his attorney accounts appropriately for the reason that no one had ever shown him. Here, respondent does not allege that he did not know how

to manage his accounts. Instead, he conceded his negligence but argued that he was "too busy." The Board finds that his conduct evidenced flagrant bookkeeping abuses.

The instant matter is more analogous to Matter of Orlando, 104 N.J. 344 (1986), where client funds were invaded because of the attorney's failure to verify whether his secretary had deposited client funds prior to disbursing monies from his trust account. Because of the attorney's special relationship with the bank, the latter would honor his checks whether or not there was enough money in the account to cover them. Hence, there was often a delay before the attorney realized that checks had not been deposited. In Orlando, the Court concluded that there was no clear and convincing evidence of knowing misappropriation and deemed the attorney's four and one-half-year temporary suspension sufficient discipline for his recordkeeping infractions.

Similarly, in Matter of Noonan, 102 N.J. 157 (1986), the Court considered a four-year temporary suspension adequate discipline for an attorney who was guilty of a pattern of neglect and of gross neglect in keeping his records, which caused a negligent misappropriation of client funds.

The question that presents itself here is what measure of discipline is justified by respondent's misconduct. "Discipline is generally regarded as non-punitive in its essence. The primary purpose is to protect the public against members of the

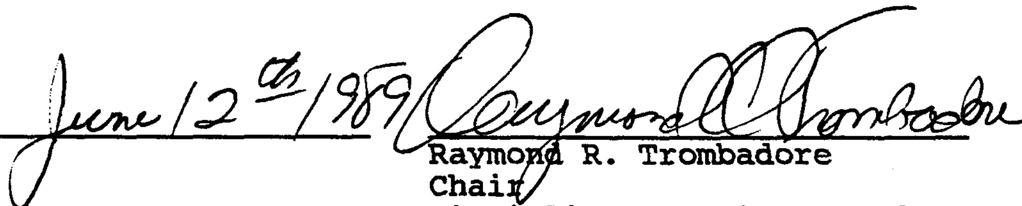
bar who are unworthy of the trust and confidence essential to the relationship of attorney and client." In re Introcaso, 26 N.J. 353, 360 (1958). In recommending discipline, the interests of the public, the bar, and the respondent must all be considered. Matter of Kishner, 101 N.J. 397, 400 (1986). "The severity of discipline to be imposed must comport with the seriousness of the ethical infractions...." In re Nighosian, 88 N.J. 308, 315 (1982). "Contrition and admission of wrongdoing are mitigating factors in respondent's favor." In re Rosenthal, 90 N.J. 12, 17 (1982); In re Horan, 78 N.J. 244, 247 (1978).

In mitigation, the Board considered that respondent has been a member of the bar for 22 years, with an unblemished record prior to the within complaint. He took instant action to replenish the trust account upon being apprised of its deficiencies. No client sustained financial harm as a result of his unethical actions. Following the completion of the random audit, respondent engaged the services of an experienced accountant and implemented a system which is in compliance with the rules.

Respondent's horrendous bookkeeping practices, however -- or better, the lack thereof -- may not be ignored. When viewed with his deplorable conduct in the Tabatchnick matter, where respondent, aware of a trust account deficiency which inured to his personal gain, failed to make prompt restitution by relying on the existence of unknown amounts accumulated in his trust

account, respondent's flagrant bookkeeping delerictions merit a one-year suspension. A five-member majority of the Board so recommends. One member would impose a six-month suspension. Two members would recommend disbarment in light of respondent's conduct in the Tabatchnick matter. Those members believe that respondent's awareness of the trust account shortage, subsequent to the cashing of his $1,800 fee, and failure to replenish the funds amounted to a knowing misappropriation. One member did not participate.

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



Dated: June 12th/1989

Raymond R. Trombadore
Chair
Disciplinary Review Board