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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket DRB Nos. 88-261 and 88-262

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| IN THE MATTER OF | : |
| | : |
| MORRIS J. STERN | : |
| and | : |
| HARVEY L. WEISS, | : |
| | : |
| ATTORNEYS AT LAW | : |

Decision and Recommendation
of the
Disciplinary Review Board

Argued: May 17, 1989

Decided: February 28, 1990

Thomas J. McCormick appeared on behalf of the Office of Attorney Ethics.

Justin P. Walder appeared on behalf of respondents.

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 V-B Ethics Committee ("Committee"). Respondents Morris J. Stern and Harvey L. Weiss were admitted to the New Jersey bar in 1937 and 1963, respectively. Both are engaged in the practice of law as equal partners in the firm of Stern and Weiss, located in Maplewood, New Jersey.

This disciplinary proceeding arose out of a 1984 audit of respondents' accounts pursuant to the Random Audit Program of the Office of Attorney Ethics. The time covered by the audit was

September 1983 to June 1984 (1T24).[1] Both respondents are charged with six counts of ethical violations, including failure to maintain required trust account records, advancement of legal fees, failure to safeguard client funds, and misappropriation of client funds.

For approximately twenty years prior to this ethics matter, respondents had retained a certified public accountant to reconcile their bank statements and to maintain cash receipt and disbursement journals for their partnership, as well as to prepare their tax forms (2T7, 2T8).[2] The accountant's normal procedure was to come to respondents' office one day a month. Upon arrival, he would receive the unopened bank statement from the preceding month and the cash journals, which he would balance (2T16). Respondents neither supervised this accountant, nor educated him about the rules concerning attorney trust accounts. Similarly, the accountant never discussed his reconciliations with respondents on a regular basis (2T13).

In January, February, and April 1984, there were negative balances in the trust account, a fact that the accountant never communicated to respondents. When asked why negative balances were never discussed, the accountant replied he did not view them as significant (2T48). In addition to negative balances, there were

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[1] 1T indicates the transcript of the District V-B Ethics Committee hearing on May 20, 1987, which is incorrectly labeled May 29, 1987.

[2] 2T indicates the transcript of the District V-B Ethics Committee hearing on September 22, 1987.

numerous recordkeeping deficiencies. The entries in the cash receipt and disbursement journals did not always indicate the source of the entry, date of deposit, or description of funds. The accountant never prepared a centralized list of amounts held in trust for specific clients, or reconciled individual trust ledger cards with the bank statements or the cash journals (1T96).

The Office of Attorney Ethics conducted two audit visits: on July 17, 1984, and October 10, 1984. It was found that three separate clients, Mae Keller, the Donvi Corporation, and the Estate of Mohr, had identifiable shortages of $39,000, $8,000, and $45,000, respectively, at particular times during the first six months of 1984 (1T39 to 43; 1T47). Furthermore, respondents' trust account showed a negative balance on nineteen separate occasions between September 1983 and June 1984, ranging from a low of minus $2,765.79 to a high of minus $24,052.97 (C-1 in evidence, auditor's affidavit, at 8).

Respondents did not receive separate notices from the bank concerning these negative balances because the bank provided automatic overdraft coverage at no charge. This overdraft privilege was not guaranteed, but rather was implemented on a day-to-day basis, as determined by a bank officer in charge of the accounts of valued customers of the bank (3T8; 3T23 to 24). This overdraft policy took effect only when there was no money in the trust account. Of necessity, this meant that all client funds had to be utilized before the overdraft privilege came into play. Thus, the bank's overdraft policy did not protect any particular

client's fund, but simply guaranteed payment of a check when the balance of funds in the account fell below zero. Respondents testified that they considered any negative balances to be loans from the bank rather than an invasion of client funds (C-2 in evidence, at 5).

At the second audit visit on October 10, 1984, the auditor discovered a $40,000 deposit into the trust account, which deposit had been made the day after the first audit visit. In their answer, respondents admit the $40,000 deposit consisted of personal funds belonging to the Stern and Weiss law firm. Respondents stated they deposited these funds in repayment of the overdraft loans from the bank and denied they were replacing client funds (C-2 in evidence, at 12).

At the committee hearing, there was testimony by the accountant and respondent Weiss concerning the account of a client, Quartier, which allegedly accounted for the source of the shortage. Respondents stated that they withdrew $48,810.20 from their trust account at some point prior to the audit as payment for legal fees owed them by Quartier. However, no funds were then on deposit in respondents' trust account on behalf of Quartier to cover that disbursement. An invasion of other client funds, therefore, resulted. Respondents were never able to produce the Quartier papers documenting their removal of excess fees (1T93; 1T109; 2T39 to 43; 2T45; 2T83 to 84).

In addition to the Quartier matter, respondents' answer referred to three other, allegedly inadvertent, invasions of client

funds, that totalled $17,500 (C-2 in evidence, at 13-14). Due to the lack of Quartier papers, no adequately documented explanation for the entire trust account shortage was ever presented. However, the record clearly shows that, during the audit, respondents had to reimburse the trust account in the amount of approximately $40,000.00 in order to make up for the shortage in their trust account.

The District V-B Ethics Committee returned a presentment charging both respondents with failure to maintain proper trust account records, failure to safeguard client funds and with invasion of client funds. The committee found no clear and convincing evidence to support the charge of advancement of legal fees. The committee recommended a public reprimand. According to the committee,

> The facts of this case indicate that (1) no client suffered any actual loss; (2) no client ever filed a complaint regarding the Respondents; and (3) that the Respondents [sic] violation of the Court Rules was not the result of any intentional conduct, but rather was a product of poor record keeping, a lack of comprehension regarding proper accounting procedures, and a misplaced reliance on the depository banks [sic] "overdraft" policy which they perceived would safeguard clients' funds; and (4) a misplaced reliance upon an accountant who was maintaining the trust account records in an improper fashion [HP4][3].

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[3]HP indicates the Hearing Panel Report dated April 6, 1988.

## CONCLUSION AND RECOMMENDATION

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

The Board finds the facts of this case to be disturbing in a number of aspects. In the Quartier matter, for example, respondents appear to have taken a substantial advance fee. However, given the inconclusive nature of the evidence, due in part to the absence of appropriate records[4], the Board cannot find clear and convincing evidence of knowing misappropriation in this instance. In re Warhaftig, 106 N.J. 529 (1987).

In Warhaftig, the attorney was disbarred for knowingly taking what he termed "advance fees" for work performed for one client from trust funds on deposit in the trust account that belonged to another client. Contrary to the case at hand, the evidence against Warhaftig was unimpeachable, consisting of complete attorney books and records establishing that fees were taken in advance, as well as of a handwritten list, maintained by respondent, of advance fees owed by him in particular cases.

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[4]The Office of Attorney Ethics noted that respondents' own ledger cards did not show the admitted advance in Quartier fees. The Office of Attorney Ethics, therefore, suggested that the "troublesome" ledger cards were suppressed. Although the Board is troubled by the state of records provided, it cannot conclude on the evidence presented that the cards were suppressed.

This case also presents strong evidence that respondents may have been aware of their invasions of client trust fund. The facts suggest that they were using their trust account, and the client funds therein, to extend themselves a line of credit. Respondents were well versed in business matters, as owners of both a first and second mortgage company. It is difficult to comprehend how two attorneys so experienced could treat their trust account in such a slipshod fashion. Similarly, it is difficult to fathom that the benefits that accrued to the partnership, through the use of what amounted to interest-free loans, were unknown to them. The Board is further concerned with the substantial admissions against interest contained in respondents' answer to the complaint, which suggest that respondents may have been aware they had misappropriated their clients' funds. The Board's concerns extend to the disparity between these written admissions and respondent Weiss's subsequent, and somewhat contradictory, testimony before the ethics committee. Clearly, his testimony, although not necessarily more reliable than the filed answer, was crafted to avoid confirmation of these prior admissions.

These suspicions aside, the Board does not find, by clear and convincing evidence, that any of the four noted invasions of client trust funds were undertaken with the requisite knowledge. Suspicions alone, no matter how grave, simply do not meet the necessary standard of proof. Given the "dire consequences which may follow" a finding of unethical conduct by an attorney, that finding must be sustained by clear and convincing evidence. <u>In re</u>

Pennica, 36 N.J. 401, 419 (1962). See In re Perez, 104 N.J. 316, 324 (1986).

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, 159-160 (1986).

The focus of all of these misappropriation 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, 521 (1987). Additionally, inattentiveness, laziness, or lack of

due diligence should not be regarded as conduct sufficiently egregious to warrant disbarment. Matter of Noonan, supra, 102 N.J. at 161.

The Board does conclude, however, that respondents were guilty of unethical conduct in this matter. Respondents abdicated their responsibilities to their clients, and to their clients' trust funds, in several respects. First, respondents' use of "overdraft protection" on their attorney trust account was highly improper. The claim that client funds were protected by this banking privilege is a red herring: the overdraft protection comes into play only where the trust account is in a negative posture. It should not be necessary to explain to any attorney the blatantly obvious fact that all available client funds have been paid out of the trust account when the balance reaches zero. Thus, if it is necessary to utilize "overdraft protection", thereby creating a negative balance in the account, in order to disburse client funds, a misappropriation of funds has occurred.

Additionally, according to respondents' version of the facts, the overdraft protection resulted in "loans from the bank to respondents," thereby somehow protecting client funds. This argument fails on its face, because 1) client trust funds must, by rule, remain on deposit in the the account until properly

disbursed (R. 1:21-6); RPC 1.15[5]; and 2) overdraft protection covered only negative amounts up to 100,000, thereby placing in jeopardy any single transaction or group of transactions that exceeded that amount. In this instance, respondents' claimed reliance on this banking privilege was irresponsible and negligent.

In addition to their improper use of an "overdraft privilege" on their trust account, respondents further abdicated their responsibilities to their clients by their failure to supervise their accountant's review of their attorney books and records. Apparently, over a period of twenty years, and despite the numerous rule changes governing attorney accounts and recordkeeping, respondents never once insured that their accountant was acting in accordance with the rules. Respondents' errors were compounded by their failure to review the records regularly themselves, and to initiate contact with their accountant to determine the status of their accounts. Respondents characterize their failures as a "misplaced reliance" on the accountant. While the Board agrees that respondents' reliance was misplaced, this argument misperceives the role of an accountant in the review and maintenance of an attorney's books and records. The accountant is merely retained to perform certain specific tasks. The attorney remains the moving force in the review and maintenance of the

[5]The overdraft notification rule, R. 1:21-6(a)(2), which came into effect in 1984, did not alter any obligations of attorneys in the operation of the trust account, but rather created a new obligation on the part of all approved banks to notify the Office of Attorney Ethics whenever an overdraft occurs in an attorney trust account.

attorney accounts. The obligations of the attorney in this regard constitute a non-delegable duty.

By their irresponsible behavior in failing to review their accountant's work, respondents were guilty of gross negligence in safeguarding client funds. DR 9-102. Having failed in their obligations, respondents can neither hide behind, nor cede responsibility to, their accountant. Attorney trust account rules are "binding on attorneys -- not lay personnel -- and (contemplate) reasonable supervision by an attorney of his staff in matters relating to a trust account." Black v. State Bar of California, 499 P.2d 968, 977 (Cal. 1972) (where attorney blamed trust account violations on secretary, but was nonetheless suspended for six months for trust account improprieties and other unethical conduct). Similarly, in a case where an attorney's secretary/office manager, inter alia, made unauthorized client account withdrawals and failed to deposit client funds and took steps to avoid discovery, the attorney was nonetheless suspended for thirty days. Attorney Grievance Committee of Maryland v. Goldberg, 441 A.2d 338 (Md 1982). The Court there stated that "... at all times, [lawyers] have a responsibility to their clients. This responsibility necessarily includes adequate supervision of their employees." Id. at 342. The Board sees no distinction between an attorney's supervisory responsibility over an accountant vis-a-vis that of any other non-attorney employee of the attorney.

Having determined that respondents were grossly negligent in the operation and review of their attorney accounts, 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).

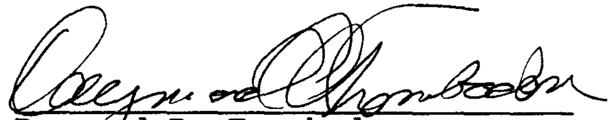
This case resembles Matter of James, 112 N.J. 580 (1988) and Matter of Gallo, ___ N.J. ___ (1989). Both respondents James and Gallo were found guilty of flagrant recordkeeping violations, and were suspended from the practice of law for three months. However, in those cases, the attorneys had either inherited 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 finds that respondents' conduct herein is more serious than that displayed in James and Gallo. The Board cannot conclude that respondents deliberately designed an accounting system that would enable them to misappropriate client funds. See In re Fleischer, supra. However, the Board does conclude that, contrary to Gallo and James, respondents have no one but themselves to blame for their inexcusable derelictions in failing to attend to the maintenance of their attorney's books and records. Their extremely serious unethical conduct is more analogous to that of the attorney in Matter of Librizzi, ___ N.J. ___ (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 in the degree of misconduct between respondent Librizzi's conduct and that of respondents herein.

Similarly, mitigating factors similar to those enumerated in Librizzi are present here: respondents have not previously been the subject of discipline, and fortunately, no client suffered financial injury as a result of their misconduct.

The Board, therefore, unanimously recommends that each respondent be suspended from the practice of law for six months.

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

Date: 2/28/1990



Raymond R. Trombadore
Chair
Disciplinary Review Board