SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-261

IN THE MATTER OF :
:
BARBARA K. LEWINSON, :
:
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: October 23, 1991

Decided: December 9, 1991

William R. Wood appeared on behalf of the Office of Attorney Ethics.

Carl J. Palmisano appeared on behalf of respondent.

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

This matter was before the Board based upon a recommendation for public discipline filed by the District VIII Ethics Committee (DEC). The formal complaint charged respondent with knowing misappropriation of clients' funds.

The facts are as follows:

Respondent was admitted to the New Jersey bar in 1981. After her graduation from law school and following a judicial clerkship, she worked as an associate in two separate law firms until April 1984, when she started her own practice of law.

Pursuant to the Random Audit Program of the Office of Attorney Ethics (OAE), respondent's books and records were examined by an OAE auditor on July 8, 1986 and August 22, 1986. The audit, which

encompassed the period from June 1984 through July 1986, disclosed that respondent's trust and business accounts were overdrawn on numerous occasions.[1] The auditor relied on reconstructed records, including client ledger cards, prepared by William M. Dambach, an accountant retained by respondent in December 1985, after she received a bank notice that her trust account was overdrawn.

More specifically, the audit revealed that respondent was out of trust on numerous occasions between April 1984 and December 1985, as shown below:

PERIOD ENDING	**CLIENT LIABILITY**	**RECONCILED BANK BALANCE**	**SHORTAGE**
4/5/84	3,464.25	2,589.05	875.20
7/9/84	16,289.17	14,453.34	1,835.83
10/3/84	5,954.41	1,909.67	4,044.74
1/3/85	16,659.16	11,833.42	4,825.74
4/8/85	9,972.71	4,049.59	5,923.12
6/28/85	5,847.23	49.15	5,798.08
10/2/85	32,296.18	26,600.00	5,696.18

By way of example of a trust account shortage, the ledger card for Davis vs. Hamilton Hospital showed that, from May 14 to October 30, 1984, there should have been $2,888.93 on deposit in the trust account on behalf of respondent's client. Yet, the bank statements dated October 4 and November 7, 1984 showed a shortage from September 25 through October 18, 1984, as follows:

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[1] By agreement between the presenter and respondent's counsel after the DEC hearing, the presenter withdrew the charge that respondent misappropriated clients' funds after December 1985.

Date	Required Funds for Davis v. Hamilton Hospital	Balance Per Bank Statement	Resulting Shortage
9/25/84	2,888.93	2,184.67	704.26
9/27/84	2,888.93	1,984.67	904.26
10/3/84	2,888.93	1,909.67	979.26
10/12/84	2,888.93	1,609.67	1,279.26
10/18/84	2,888.93	2,109.67	779.26

[Exhibit OAE 20 at 7]

In addition, from October 30, 1984 through July 9, 1986, respondent should have been holding $2,813.93 in trust on behalf of her client. Notwithstanding, from January 11, 1985 through March 26, 1986, the trust account showed numerous shortages ranging from $39.54 to $2,892.82. On seven occasions during that period, respondent's trust account was overdrawn (Exhibit OAE 20 at 8-9).

As found by the auditor,

> [t]he trust account shortages were the result of a conglomerate of debit balances for individual clients. A debit balance occurs when the amount disbursed on behalf of an individual client is greater than the amount received. Mrs. Lewinson's accountant prepared listings of client balances showing total debits and credits for each period, reconciled to the bank statement. The following schedule shows the total debit balances for each period a client listing was prepared:

DATE	TOTAL DEBITS	DATE	TOTAL DEBITS
4/5/84	$ 875.20	10/2/85	$5,696.18
7/9/84	1,835.83	1/8/86	6,028.53
10/3/84	4,044.74	4/8/86	4,389.76
1/3/85	4,825.74	5/2/86	4,570.96
4/8/85	5,923.12	6/9/86	4,847.96
6/28/85	5,798.08	7/9/86	4,553.73

[Exhibit OAE 20 at 12]

An example of what caused these debit balances is found in the Bartkowicz v. Daniello matter. As can be seen from the ledger card (Attachment F1 to Exhibit OAE 20), two checks for $40 each were disbursed in May 1984. Inasmuch as there were no funds standing to the credit of the client as of that time, a debit balance of $80 was created. Thereafter, on July 12, 1984, respondent issued another trust account check (#325) on July 12, 1984, payable to "cash," in the amount of $1,333.33. The debit balance for this client, thus, increased to $1,413.33. It also remained in that amount until July 29, 1986, a period of two years. On that date, respondent made a deposit of $3,713.08 to correct all existing shortages.

Another illustration of a debit balance may be seen in the Lewinson-Weiner matter. As the client ledger card indicates, as of March 30, 1985, the disbursements amounted to $4,352.50, of which $3,015 had been made to respondent or to "cash." Yet, the receipts totalled only $2,122, leaving a debit balance of $2,235.50. Otherwise stated, the disbursements shown on the ledger card exceeded the receipts by $2,230.50 as of March 30, 1985.

As pointed out in the audit report, in both matters, trust funds belonging to other clients were used to cover the trust account shortages generated by these excess disbursements. (Exhibits OAE 20 at 14).

* * *

At the DEC hearing, William Dambach, the public accountant retained by respondent in December 1985, testified about respondent's deficient recordkeeping practices. According to Dambach, she did not maintain client ledger cards or receipts and disbursement journals; although she had a checkbook, check register, bank statement, cancelled checks and some deposit slips, she did not keep a running balance in the trust account check register and never reconciled her trust account records. In Dambach's words, respondent had a "drawer filled with bank statements, never opened" (T23)[2]. It took Dambach 600 hours to reconstruct respondent's records.

Respondent's only attempt at recordkeeping, in some cases, consisted of registering, on sheets of yellow legal paper, the checks drawn against a particular client's funds and the deposits made on that client's behalf; she would then place that sheet of paper in the respective file. According to Dambach, those sheets were sufficiently descriptive in approximately one-half of the cases. In the remaining fifty percent, he was forced to search for the actual document in order to perform the reconstruction of respondent's records.

Respondent admitted, at the DEC hearing, that she had been derelict in her recordkeeping obligations:

> Q. At that institution you opened two accounts, is that correct?
>
> A. Right. Trust account and business account.

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[2] T denotes the transcript of the DEC hearing of April 29, 1991.

Q. Did you have a bookkeeper hired at that time to take care of these responsibilities?

A. No.

Q. Who took care of those responsibilities?

A. In truthfulness, nobody did.

. . .

Q. How did you maintain your records?

A. What I would do is when I would finish a case, when I would settle a case, if it was P.I. case or real estate case, I would write a letter to clients, etc. etc. What I would do is I would write out these yellow sheets that we have been talking about even though I should have been reconciling the accounts, etc. I know that when I was getting monies in, I was paying the clients. I was paying for the costs, and so I didn't think there was any problem and basically I would just toss the bank envelopes in my desk drawer.
[T96-97]

Asked why she had not retained Dambach before, respondent replied,

> I really don't know. We talked about it and I felt that at some point I would retain him when my practice really justified it. The practice wasn't that big. I was just starting out and I just didn't. He had been our personal accountant and I probably would have retained him around that time anyhow when I think back, but [the notice of overdraft] was what really triggered it.
> [T98]

Respondent explained that the checks made out to her or to "cash" were for legal fees and costs. She maintained, however, that she at all times believed that there were sufficient funds on deposit to cover the withdrawals. She also explained that her

withdrawals in the Lewinson v. Weiner matter had not been against trust funds; the deposits in the trust consisted of personal funds, represented by installment payments of a $50,000 loan made to Weiner, a fellow attorney, who had been ill. According to respondent, she sometimes deposited those payments in her trust account and sometimes in her business account.

Respondent advanced three separate defenses to the invasion of clients' funds and to the overdrafts. First, she argued, she mistakenly used trust account checks in some instances, instead of business account checks:

> . . .On a number of occasions when I wouldn't -- first of all, and even though it was stupid, both checkbooks, trust account checkbook and the business account checkbook [were kept] in one drawer in my desk and I never paid a lot of attention, unfortunately, and sometimes I would grab the wrong checkbook.
>
> [T102]

She also asserted that, in those instances where she represented clients in multiple matters, she might have confused the cases and withdrawn monies against the wrong matter. Finally, she contended, she had inadvertently deposited in the business account certain funds that belonged in the trust account. Respondent also blamed her inexperience as an attorney and lack of knowledge of the relevant rules for her recordkeeping deficiencies.

At least one of her defenses was supported by Dambach's testimony, as seen below. Dambach was unable to recall any conversations with respondent regarding the mistaken deposit of

trust funds into her business account. When the presenter asked him, "if she would have said anything like that, you would have checked it out, wouldn't you have?," Dambach replied, "yes" (T150). Dambach corroborated respondent's explanation, however, that she had inadvertently used her trust and her business accounts interchangeably:

> Apparently what would happen because of the same coloring, the same covers on the books, the possibility existed that any book could be picked up since the attorney trust account and business account looked almost identical. There was a possibility that that could be picked up and construed there [sic] to the trust account, could be construed to be the business account by reversal.
> [T33-34]

Dambach also testified that, on a several occasions, the bank had erroneously charged respondent's trust account, instead of her business account.

* * *

At the conclusion of the DEC hearing, the panel found that respondent had not knowingly misappropriated clients' funds. The panel found, however, that "respondent's inability to maintain adequate, business-like records or to obtain the services of someone who could do so for her prior to December 1985, constitutes reckless conduct, and violation of RPC 1.15(a) and (d)." Hearing Panel Report at 3.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence.

As did the DEC below, the Board has carefully reviewed the record in order to determine independently whether respondent knowingly misappropriated clients' funds. The Board unanimously finds no evidence that respondent committed a knowing misappropriation.

The requisite standard of proof was described in In re Pennica, 36 N.J. 401 (1962) as follows:

> 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. [Citation omitted].
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> [Id. at 419]

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. 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 her dereliction was a knowing one, warranting the most extreme disciplinary sanction.

Misappropriation is "any unathorized 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 and knowing that the client has not authorized the taking." Matter of Noonan, 102 N.J. 157, 159-60 (1986).

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.

Indeed, it is unquestionable that respondent was inexcusably derelict in her recordkeeping obligations. She did not maintain client ledger cards, or receipts and disbursement journals, or even a running balance in the check register. From the start of her

sole practice of law, in April 1984, until December 1985, when she was notified by the bank of an overdraft in her trust account, she never reconciled the cash balance, the checkbook balance, the bank statement balance and the client ledger card balance. There is no doubt that respondent abdicated her responsibility to safeguard the integrity of funds held in trust for her clients. There is also no doubt that her shoddy bookkeeping practices caused the invasion of clients' trust funds. But it cannot be said that this invasion was knowing. Respondent's testimony, corroborated by Dambach's, was that she never opened her bank statements; that she withdrew funds against the wrong matter in those instances where she represented a client in multiple cases; that she mistakenly deposited trust funds in her business account; and that she inadvertently issued trust account checks, instead of business account checks. Dambach added that, on certain occasions, the bank also charged checks against her trust account, rather than her business account. In the face of this record, it cannot be clearly and convincingly found that respondent intentionally misappropriated clients' funds.

Neither may it be concluded, as the presenter argued, that respondent's conduct paralelled that of the attorney in In re Skevin, 104 N.J. 476 (1986). In that case, the attorney commingled personal funds (one million dollars' worth) and trust funds for several years. Allegedly relying on the existence of personal funds in his trust account, the attorney consistently withdrew his legal fees in advance of receiving settlement checks, a practice that ultimately caused him to be out of trust in amounts ranging from

$12,000 to $133,000. The Court concluded that the attorney had to know that the invasion of other clients' funds was a likely result of his conduct, a state of mind consistent with the statutory definition of knowledge (the party is aware of the probable existence of a material fact but does not satisfy himself or herself that it does not in fact exist). Here, the record does not clearly and convincingly support the conclusion that respondent was guilty of "willful blindness," à la Skevin. Rather, her misdeeds were caused by ignorance, improvidence or inexperience.

Nevertheless, respondent's failure to maintain proper records constituted reckless conduct. In a recent matter, the Court reviewed an attorney's recklessness toward his recordkeeping responsibilities. In re Ichel, 126 N.J. 217 (1991). In that case, the Court imposed a six-month suspension (suspended) on an attorney who, for thirteen years, consciously shirked his recordkeeping responsibilities, not because he was unaware of the rules or knew little about sound recordkeeping, but because he "didn't like to do a lot of bookkeeping." The attorney had a practice of advancing legal fees to himself prior to the settlement of the cases, relying on a "cushion" of an indeterminate amount made up of legal fees and excess recording and cancellation fees left in his trust account. The advanced legal fees ranged from $200 to $5,000, for a total of $9,000. Following settlement, the attorney would replace the amount withdrawn, thus replenishing the "cushion." Because of his shabby accounting practices, however, the attorney invaded clients' funds on numerous occasions. Finding that the attorney's conduct

had been reckless, the Court nevertheless ordered only a six-month suspension, in light of the many mitigating circumstances present in that case.

Here, respondent's conduct, albeit reckless, does not come close to that exhibited by attorney Ichel. Her failure to comply with the recordkeeping rules was not the product of sloth, indifference or dislike for accounting details. It was the product of ignorance and inexperience.

Neither is her conduct equal to that displayed by the attorney in In re Librizzi, 117 N.J. 481 (1990). There, the attorney was suspended for a period of six-months for "extremely serious" recordkeeping deficiencies, including the failure to reconcile his trust account records for a period of twelve years. Like this respondent, attorney Librizzi did not open his bank statements and, accordingly, was unaware of any trust account shortages. The attorney's misconduct, however, spanned a twelve-year period, compared to this respondent's twenty months of poor accounting practices. In addition, unlike respondent, attorney Librizzi did not claim ignorance of the rules. His proffered excuse for his bookkeeping abuse was that he was "too busy."

Respondent's conduct is closer to that found in In re James, 112 N.J. 580 (1988), and In re Gallo, 117 N.J. 365 (1989). In James, the attorney was found guilty of several bookkeeping irregularities for a period of twenty-four years, which ultimately caused negative balances in his trust account. Like respondent, the attorney did not maintain client ledger cards or receipts and

disbursement journals, and did not reconcile the bank statements with the trust account ledger. The attorney acknowledged responsibility for his derelictions, but explained that he had inherited an inadequate system from his legal mentors, a system that he had adopted for twenty-four years, without incident. Finding that the attorney's conduct had been the result of lack of knowledge and not of intentional ignorance of the rules, and taking into consideration his twenty-eight years as a member of the bar as well as other numerous compelling circumstances, the Court suspended the attorney for a period of three months.

In Gallo, the Court suspended for three months an attorney who, for five years, was seriously inattentive to proper accounting and bookkeeping procedures. Specifically, the attorney created two accounts: a trust account, from which he paid all his business expenses, such as salaries, rent and office supplies, and a business account, from which he paid personal expenses. In addition to commingling personal and trust funds, the attorney commingled his personal funds and a client's settlement award in an investment account. Because the attorney was never aware of how much money he had in the trust account and to whom the money belonged, he occasionally deposited personal funds into the account, if he believed that the balance was too low to cover the payments of operating expenses. Ultimately, the attorney's abysmal bookkeeping practices led to the return of two checks for insufficient funds. In suspending the attorney for three months, the Court concluded that his obvious lack of knowledge about the

basic principles of recordkeeping responsibilities and the unfortunate example of egregious bookkeeping practiced by his first employer were, in great measure, responsible for the appalling condition of his attorney records. The Court also took into consideration the chaotic condition of the practice (over 200 files) that he had inherited from another attorney, which prevented him from attending to his accounting obligations.

Although the reason for attorney James', attorney Gallo's and respondent's deficient accounting procedures was the same -- lack of knowledge of the relevant rules -- it cannot be overlooked, however, that attorney James' misconduct spanned a period of twenty-four years and attorney Gallo's a period of five years, compared to a period of twenty months encompassed by respondent's infractions. Moreover, at the time of her recordkeeping derelictions, respondent had only three years of experience as an attorney, one of which had been spent in a judicial clerkship. James, on the other hand, was an experienced attorney with twenty-five years as a member of the bar.

In light of the foregoing, the Board's unanimous view is that a public reprimand constitutes sufficient discipline for respondent's unethical conduct. This recommendation is consistent with the discipline imposed by the Court in In re Hennessey, 93 N.J. 358 (1983) (attorney who caused relatively minor shortages in his trust account as a result of poor accounting procedures was publicly reprimanded. The attorney's problems were the result of an apparent lack of comprehension of the proper operation of an

attorney's accounts) and in In re Fucetola, 101 N.J. (1985) (public reprimand was warranted where attorney's trust account was overdrawn at various times as a consequence of his failure to maintain proper records on a regular basis). Furthermore, respondent's conduct was mitigated by the absence of harm to clients, her immediate deposit of funds to cover the overdraft, her implementation of an adequate bookkeeping system and, more significantly, her full compliance with the recordkeeping rules for a period of six years. Had respondent not straightened out her accounting practices and had they not been in compliance with the relevant rules for a substantial period -- six years -- the Board's recommended discipline would have been for a three-month suspension, in view of respondent's reckless approach toward her recordkeeping obligations.

The Board's recommendation for a public reprimand was unanimous. One member disqualified herself and one member did not participate.

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

Dated: 12/9/1991

By:

Raymond R. Trombadore
Chair
Disciplinary Review Board