

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 97-428

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IN THE MATTER OF :  
HERBERT M. KORN :  
AN ATTORNEY AT LAW :

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Decision

Argued: February 5, 1998

Decided: November 2, 1998

Brian D. Gillet appeared on behalf of the Office of Attorney Ethics

Donald R. Belsole 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 on a recommendation for discipline issued by the District X Ethics Committee ("DEC"). The formal complaint charged respondent with violations of *RPC* 1.15(a) and (b) (negligent misappropriation of client funds) (count I), *RPC* 1.3 (lack of diligence), *RPC* 1.15(a), *RPC* 1.15(d) (failure to comply with recordkeeping

rules), *RPC* 5.3 (failure to supervise staff) and *R.* 1:21-6 (recordkeeping) (count II), *RPC* 1.1(a) (gross neglect), *RPC* 1.3 and *RPC* 1.15(a) and (b) (count III), *RPC* 1.15(d) and *R.* 1:21-6 (count IV), and *R.* 1:20-20 and *R.* 1:21-8 (employment of disbarred attorney) (count V).

Respondent was admitted to the New Jersey bar in 1972. He maintains an office for the practice of law in Morristown. Respondent has no prior disciplinary history.

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***Negligent Misappropriation of Client Trust Funds - Count I***

During a July 26, 1990 random audit of respondent's attorney records, an auditor from the Office of Attorney Ethics ("OAE") identified twenty-one inactive client matters with trust account balances. The auditor recommended that respondent transfer those funds out of his trust account and attempt to determine to whom the monies belonged. The next day, respondent's staff prepared and respondent signed fifteen trust account checks totaling \$2,964.22, payable to respondent. The checks were deposited into respondent's business account. Neither respondent nor his staff reviewed his records to determine the ownership of the funds. With the exception of \$1,500 that was paid to the State of New Jersey in the *Fornaro* matter discussed below, respondent retained the funds for himself.

On June 1, 1992 respondent terminated the employment of one of his secretaries, who then filed the within ethics grievance. Based on the grievance, on November 17, 1992 the

OAE conducted a demand audit of respondent's records. At a July 14, 1990 OAE interview, respondent explained that he assumed that his office manager and bookkeeper had reviewed the client ledger cards and other records to determine to whom the former trust account funds belonged and that they had made the appropriate disbursements.

### *The Fornaro Matter - Count II*

On June 2, 1988, after respondent settled a personal injury matter on behalf of Jack Fornaro, he sent a \$1,500 check payable to the State of New Jersey to satisfy a workers' compensation lien. However, for reasons not contained in the record, the State of New Jersey did not cash the check. Almost eleven months later, on April 30, 1989, respondent's staff voided the check. The funds remained in respondent's trust account until July 27, 1990, when they were transferred to his business account as one of the fifteen client balances closed following the random audit discussed above.

Respondent remitted another \$1,500 check to the state on December 2, 1992. Thus, the funds were paid four and one-half years after they were due.

### *The Sylvester Matter - Count III*

On June 11, 1991 respondent received settlement proceeds in the approximate amount of \$25,000 on behalf of Thomas Sylvester, a personal injury client. He disbursed \$8,190.72 to his client and \$8,494.28 to himself for his fees and expenses. Respondent should have disbursed the balance of \$8,325 to New Jersey Manufacturers Insurance Company ("NJM")

to satisfy a workers' compensation lien. Instead, according to the client ledger sheet, respondent mistakenly sent \$8,325 to Francis Sylvester, his client's brother. Although respondent also had represented Francis Sylvester and other family members in other matters, Francis Sylvester had no connection with the case and was not entitled to receive the funds. The check, naming Francis Sylvester as payee, was stamped on the back "for deposit only" and deposited into respondent's business account. Francis Sylvester, thus, never received the check.

At the 1994 OAE interview as well as at the DEC hearing, respondent appeared genuinely perplexed and could not explain why the check had been drafted with Francis Sylvester's name as payee or how it had come to be deposited into his business account.

NJM sent letters to respondent on March 6 and June 12, 1992 requesting payment of its lien. Respondent claimed that he did not receive the March 6, 1992 letter. According to respondent, upon receipt of the June 12, 1992 letter, he reviewed the client ledger sheet, failed to detect the reference to Francis Sylvester and, upon noticing that two checks had been sent to Sylvester, mistakenly assumed that both checks had been sent to Thomas Sylvester. Respondent alleged that, when he contacted NJM staff, he represented in good faith that the funds had been mistakenly sent to his client. Respondent told NJM representatives that, rather than embarrass himself or jeopardize his relationship with the Sylvester family by asking his client to return the funds, he would pay the lien with his own funds. On that basis, NJM agreed to accept \$6,000 in full satisfaction of the \$8,325 lien.

On November 16, 1992, respondent sent a check for \$6,000 to NJM. Three days later, on November 19, 1992 respondent sent to Thomas Sylvester a check for \$2,325 (the difference between the \$8,325 lien and the \$6,000 sum accepted by NJM). Respondent testified that, when he realized that the funds had been in his own bank account all along, he immediately thought that his client should receive the difference. Although respondent conceded, at the DEC hearing, that it was "arguable" that he should have sent the \$2,325 balance to NJM, he claimed that the thought had not occurred to him at the time.

#### *The Martin/Burd Matters - Count IV*

Respondent represented Alan and Linda Martin in a malpractice action that was settled in March 1987. On March 20, 1987 respondent's staff wired \$50,000 to a bank in Boston, directly from his trust account. The \$50,000 represented part of respondent's fee in the *Martin* case. As a result of the OAE demand audit in 1992, respondent discovered that the partial fee of \$50,000 had never been deposited in his business account. He then contacted his accountant and determined that the income reported to the Internal Revenue Service in 1987 had not included that amount. Thereafter, respondent filed an amended tax return and paid an additional \$34,000 in taxes and interest.

Similarly, in 1992, after respondent settled a matter titled *Burd v. Strutin*, \$85,685, which was part of his fee from that case, was transferred directly from his trust account to personal investment accounts, bypassing his business account. When, as a result of the

demand audit, respondent became aware that the funds were never deposited into his business account, he again discussed the matter with his accountant and filed an amended tax return, paying additional taxes and interest.

Respondent explained at the DEC hearing that, when he had instructed his staff to transfer his fees to his personal accounts, he had assumed that the funds had first been deposited into his business account.

*Prohibited Association - Count V*

On October 20, 1987 Henry Gordon was disbarred by consent after pleading guilty to bankruptcy fraud and bank robbery. Thereafter, respondent retained Gordon to perform investigative services, paying him a total of \$14,100 as compensation. Respondent testified that, after Gordon's disbarment, he had assumed the responsibility of winding up Gordon's legal practice. Wanting to assist Gordon, a longtime friend, respondent hired and compensated Gordon for investigative services. Respondent added that, because he did not feel comfortable charging clients for Gordon's services, he paid Gordon with his own funds. Respondent contended that he was not familiar with R. 1:20-20, which prohibits an attorney from employing a disbarred attorney.

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The DEC found that, with respect to count I of the complaint (the transfer of client trust funds to respondent's business account), the OAE had not proven negligent

misappropriation, reasoning that there was no evidence that the funds did not belong to respondent or that respondent was not entitled to the funds. The DEC found violations of *R. 1:21-6(i)*, requiring an attorney to make a reasonable search to determine the owner of unidentifiable or unclaimed funds held in a trust account, and *RPC 5.3(a)* for his failure to ensure that his staff followed correct procedures for determining the ownership of those funds.

With respect to the *Fornaro* matter, the DEC found that respondent negligently misappropriated funds by depositing in his business account \$1,500 owed to the State of New Jersey. The DEC also found a violation of *RPC 1.3*, determining that respondent's delay in ensuring that the workers' compensation lien had been paid constituted a lack of diligence. Although count II also charged respondent with violations of *RPC 1.15(d)*, *RPC 5.3* and *R. 1:21-6*, the DEC report did not address those infractions.

In the *Sylvester* matter, the DEC found negligent misappropriation of client trust funds, in violation of *RPC 1.15*, failure to safeguard property, in violation of *RPC 1.15(a)* and (b), and lack of diligence, in violation of *RPC 1.3*. The DEC concluded that respondent's conduct did not amount to gross neglect, in violation of *RPC 1.1(a)*.

The DEC found that respondent's failure to deposit all of his attorney's fees in the *Martin* and *Burd* matters violated *RPC 1.15(d)* and *R. 1:21-6*. Finally, the DEC determined that respondent's employment of Henry Gordon, a disbarred attorney, violated *R. 1:20-20*.

The DEC recommended that respondent be reprimanded and that he be required to make restitution in the amount of \$2,325 to NJM for its workers' compensation lien.

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Following a *de novo* review of the record, the Board is satisfied that the DEC's findings of unethical conduct are clearly and convincingly supported by the evidence. The DEC correctly found in count I that, because there was no evidence that the funds transferred from respondent's trust account to his business account did not belong to him, no negligent misappropriation of those funds had been demonstrated. Although trust accounts should hold client funds only, attorneys often violate the recordkeeping rules by commingling client and personal funds in their trust accounts. Hence, without a showing that respondent was not entitled to retain those funds, there can be no finding of misappropriation.

In count I, respondent violated *RPC 5.3 (a)*, which requires an attorney to supervise his or her staff, and *R. 1:21-6(i)*, which requires an attorney to perform a search to determine the beneficial owner of unclaimed or unidentified funds. Respondent testified that he did not review his records to determine the identity of the owners of the funds previously held in his trust account and did not inquire whether his staff had done so. Attorneys are responsible for maintaining trust accounts and assuring that their accounting practices do not result in



misappropriation of trust funds. *In re Fleischer*, 102 N.J. 440 (1986). While attorneys may delegate recordkeeping tasks to staff, attorneys remain ultimately responsible for such duties. "An attorney cannot avoid his or her responsibility by claiming reliance on his or her staff." *In re Barker*, 115 N.J. 30, 36 (1989).

In the *Fornaro* matter, two recordkeeping violations occurred: the voiding of the check to the State of New Jersey and the transfer of the funds from respondent's trust account to his business account. With regard to the first issue, respondent had no reason to expect that the check sent to the State would not be cashed. The voiding of the check approximately eleven months later was not foreseeable and was probably not brought to respondent's attention. Unlike routine recordkeeping procedures for which attorneys ordinarily are held responsible in this case, the voiding of the check and the retention of the funds in respondent's trust account are not cause for discipline. However, when the funds were transferred to respondent's business account, he signed the check, thus, negligently misappropriating those funds. At that point, respondent had a duty to ask his staff about the reason for the transfer of funds. He also should have followed up to ensure that his staff had tried to determine the ownership of the funds.

Moreover, once respondent's staff became aware that the State of New Jersey had not negotiated the \$1,500 check sent in June 1988 to satisfy a workers' compensation lien, it should have been clear that respondent was not entitled to retain those funds. Respondent should have immediately issued a replacement check. Instead, he kept the funds in his trust

account until July 1990, when he transferred them to his business account. Respondent did not issue another check until December 2, 1992, four and one-half years after he had sent the initial check and, as argued by the OAE, only after respondent received the November 10, 1992 letter from the OAE scheduling the demand audit. Respondent conceded that his receipt of that letter, which specifically referred to the *Fornaro* matter, triggered his review of that file. Respondent's conduct, thus, constituted a violation of *RPC* 1.15(a) and *RPC* 1.3.

Although the DEC did not address the charge of *RPC* 5.3 in *Fornaro*, the Board found that respondent's failure to supervise his staff constituted a violation of that rule. Respondent admitted that he just "assumed" that his employee had disbursed funds to the appropriate parties, without ascertaining that they had done so.

Similarly, the DEC did not address the charges of violations of *RPC* 1.15(d) and *R.* 1:21-6. In this instance, respondent's misconduct did not arise from his recordkeeping violations, but from his failure to review those records and disburse funds accordingly. Respondent did not fail to keep adequate records in the *Fornaro* matter, he simply failed to examine them. Thus, the Board dismissed the charges of *R.* 1.15(d) and *R.* 1:21-6 as inapplicable.

In the *Sylvester* matter, too, respondent negligently misappropriated trust funds when he failed to satisfy the purpose for which the funds had been set aside, that is, the payment of the NJM lien, and instead mistakenly deposited them in his business account. The circumstances surrounding the issuance of a check to Francis Sylvester, the brother of

respondent's client, and the deposit of that check into respondent's business account without an endorsement were baffling. Respondent candidly admitted that he could not explain those occurrences. Clearly, however, respondent retained funds to which he was not entitled and failed to segregate and safeguard funds of a third party, in violation of *RPC* 1.15 (a) and (b). He also exhibited a lack of diligence in satisfying NJM's workers' compensation lien, in violation of *RPC* 1.3.

The DEC correctly determined that respondent's delay in sending the check to NJM, without more, did not establish gross neglect, in violation of *RPC* 1.1(a).

As noted earlier, after NJM agreed to a compromise, based on respondent's representation that he had given the funds to his client and would be paying the lien with his own money, respondent discovered that the funds had been in his own account all along. Thereafter, respondent should have sent \$2,325 (the difference between the lien and the reduced amount) to NJM, instead of to his client, since the basis for the compromise proved to be erroneous. Respondent violated *RPC* 1.15(b) when he failed to deliver to NJM funds to which it was entitled.

In the *Martin* and *Burd* matters, respondent violated *RPC* 1.15(d) and *R.* 1:21-6 by failing to deposit attorney's fees in his business account. However, after he reported the income to the Internal Revenue Service, he paid additional taxes and interest.

Finally, respondent's employment of Henry Gordon violated *R.* 1:20-20(a), which prohibits an attorney from employing a disbarred attorney or from authorizing a disbarred

attorney to perform services for the attorney. It is of no consequence that Gordon performed investigative, not legal, services (although there is a suggestion in the record that he performed minimal legal services) or that respondent did not charge his clients for Gordon's services. The rule is to be read broadly. It prohibits employment of any kind, regardless of whether the attorney or the client ultimately pays for the services.

In summary, respondent negligently misappropriated funds, exhibited a lack of diligence and failed to safeguard funds in two matters; failed to comply with the recordkeeping rules in those matters, plus in a third matter; failed to supervise staff in one of those matters, plus in another matter; and employed a disbarred attorney. The Court has imposed a reprimand for conduct similar to respondent's. *See In re Tighe*, 143 N.J. 304 (1996) (negligent misappropriation resulting from attorney's failure to supervise staff), *In re Fucetola*, 147 N.J. 255 (1997) (negligent misappropriation and failure to comply with recordkeeping rule), *In re Liotta-Neff*, 147 N.J. 283 (1997) (negligent misappropriation, failure to comply with recordkeeping rule and commingling of personal and trust funds), *In re Stephen Gilbert*, 144 N.J. 583 (1996) and *In re Harvey Gilbert*, 144 N.J. 581 (1996) (negligent misappropriation, failure to comply with recordkeeping rule, commingling personal and trust funds, failure to deposit fees in business account and failure to supervise staff in maintenance of records), *In re Marcus*, 140 N.J. 518 (1995) (negligent misappropriation), *In re Zavodnick*, 139 N.J. 608 (1995) (failure to maintain records and to correct prior recordkeeping violations), *In re Mitchell*, 139 N.J. 608 (1995) (negligent


misappropriation) and *In re Barker*, 115 N.J. 30 (1989) (grossly negligent accounting procedures, failure to supervise bookkeeper and negligent misappropriation of client funds).

Although in this matter the misconduct also included other violations – failure to deposit fees in respondent’s business account and employing a disbarred attorney – there are substantial mitigating factors. Respondent’s professional career, spanning twenty-five years, has previously been unblemished. More importantly, there has been a significant passage of time – five to ten years – since 1987 and 1992, when the misconduct occurred. Respondent presents a sympathetic figure. There was no showing of any improper intent on his part. All of his infractions resulted from inadvertence or, in the case of employing a disbarred attorney, the desire to help a friend. Respondent was not motivated by greed or venality and did not benefit from his misconduct. Given respondent’s contrition, the significant amount of time that has passed since the misconduct and his previously unblemished record, a suspension is not warranted.

In light of the foregoing, the Board determined to impose a reprimand for respondent’s ethics infractions. In addition, respondent must make full restitution of \$2,325 to New Jersey Manufacturers’ Insurance Company within six months of the date of this decision. Such payment shall be monitored by the OAE. If respondent fails to make restitution within six months, the OAE shall so notify the Board, which will then reconsider the sanction imposed. One member did not participate.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 11/2/98

By:   
LEE M. HYMERLING  
Chair  
Disciplinary Review Board