

Drake

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-207

IN THE MATTER OF :
J. DANIEL HARRISON, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 21, 1994

Decided: January 5, 1995

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

Raymond M. Brown 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 on a recommendation for public discipline filed by the District XI Ethics Committee ("DEC").

The formal complaint charged respondent with willful recordkeeping violations (R. 1:21-6 and RPC 1.15) because of the following deficiencies: (1) the trust receipts book was not fully descriptive [R. 1:21-6(b)(1)]; (2) the trust disbursements book was not fully descriptive [R. 1:21-6(b)(1)]; (3) a running balance was not kept in the trust account checkbook [R. 1:21-6(c)]; (4) the client trust ledger sheets were not fully descriptive [R. 1:21-6(c)]; (5) the funds received for professional services were not deposited into the business account [R. 1:21-6(a)(2)]; (7) client

ledger cards were found with debit balances [R. 1:21-6(c)]; (8) inactive trust ledger balances remained in the trust account for an extended period of time [R. 1:21-6(c)]; and (9) respondent commingled personal and trust funds [RPC 1.15].

The complaint also charged respondent with negligent misappropriation of client trust funds (R. 1:21-6 and RPC 1.15) and leaving earned legal fees in the trust account for an extended period. This conduct continued from 1986 through August 1988, when the trust account became overdrawn.

Respondent was admitted to the New Jersey Bar in 1977 and is also admitted to practice in Pennsylvania. He has no prior ethics history.

On December 2, 1985, the Office of Attorney Ethics ("OAE") conducted a random compliance audit of respondent's attorney records, which revealed various deficiencies. Thereafter, by letter dated January 14, 1986, the OAE notified respondent of eight separate trust and business account deficiencies that had been discovered. Those were:

1. Deposit slips were not maintained in accordance with generally accepted accounting practices [R. 1:21-6(c)].
2. A running cash balance was not kept in the trust account checkbook [R. 1:21-6(c)].
3. The client trust ledger sheets were not fully descriptive [R. 1:21-6(b)(2)].
4. Funds received for professional services were not deposited into the business account [R. 1:21-6(a)(2)].

5. Trust account checks were signed by rubber stamp [R. 1:21-6(c)(1)].

6. Receipts and disbursements books for the trust and/or business accounts were not fully descriptive [R. 1:21-6(b)(i)].

7. The business bank account designation was improper [R. 1:21-6(a)].

8. The trust bank account designation was improper [R. 1:21-6(c)].

By letter dated March 17, 1986, respondent submitted a certification and attachments to the OAE, setting forth the corrective measures taken to remedy the above deficiencies.

In 1988, however, respondent's trust account was overdrafted on three separate occasions: August 4, 5 and 6, in the amounts of \$5,462.79, \$6,477.79 and \$1,126.12, respectively. The OAE requested an explanation for the overdrafts. In response, respondent submitted several letters attempting to explain the reasons therefor. Initially, respondent claimed that a check in the amount of \$6,666.67 had been erroneously issued and paid twice. However, the bank statements did not corroborate respondent's claim. While two checks had been drawn in that same amount, one check had been voided and, therefore, only one check had actually been paid.

Thereafter, the OAE scheduled a demand audit of respondent's books and records. The audit, which took place on April 28, May 4, June 20, and June 21, 1989 revealed that five of the deficiencies

that had been uncovered during the 1985 random audit were continuing. As a result, a formal ethics complaint was filed.

Respondent admitted most of the allegations in the complaint. With respect to the first count, he conceded that overdrafts occurred on two of three dates, but had no independent recollection of the third overdraft. Respondent also admitted the existence of the eight recordkeeping violations set forth in the complaint, but denied that they had been willful. In mitigation, respondent asserted that his problems stemmed from his alcoholism and the breakdown of his family. He claimed that, because of his alcoholism, he was forced to delegate various administrative duties to his staff and that he was unable to monitor the administrative operations of his office.

Respondent also admitted, in his answer, that he was out-of-trust on July 31, 1988 (\$10,833.71); August 31, 1988 (\$25,835.36); and September 30, 1988 (\$7,770.37), but denied any malfeasance on his part. Despite this admission, respondent presented an accountant's testimony at the DEC hearing that he was only out-of-trust in July 1988 and that he, in fact, had excess funds in August and September 1988.

The OAE auditor and the investigator concluded that respondent had many debit balances in his trust account that were carried for a long period of time. Respondent kept his fees in the trust account in order to cover the debit balances. Respondent's practice was to draw his fee checks but not negotiate them for several months. 1T56. Respondent explained to the investigator

that he lost track of the money that was due to him, even though he used his accountant's workpapers. This practice was the cause of the trust account overdrafts. 1T62.

While respondent claimed that he had an idea in his mind as to how much was owed to him at any time, he admitted to the OAE auditor that he did not keep track of his fees or maintain a running balance in his checkbook. 1T62-63. Respondent conceded that his records had been maintained in this fashion since 1986, when an incident occurred in a matter entitled Ramirez. Apparently, Ramirez was a workers' compensation client for whom respondent had recovered settlement funds. One of respondent's employees had advised respondent that she had received Ramirez' settlement check and had deposited it into the trust account, but had misplaced the deposit slip. Relying on the employee's statement and because Ramirez insisted on immediate payment, respondent authorized the payment of \$7,118.96 to Ramirez. As it turned out, Ramirez, rather than respondent's office, had received a check from the workers' compensation carrier. Therefore, the payment to Ramirez from respondent's trust account had not been covered by any corresponding funds. As a result, Ramirez had been paid twice: once from the workers' compensation carrier and then again from respondent's trust account.

At some point in time not specifically identified in the record, respondent discovered that his employee had never deposited a check in the Ramirez matter. Respondent informed the OAE auditor that he, therefore, had instructed "someone" in his office to

replace the \$7,118.96 in his trust account and assumed his instructions had been followed. Respondent never verified whether a deposit had actually been made into his trust account. Because the funds were, in fact, not replaced, respondent was out-of-trust for more than two years. 1T19. This, apparently, was the eventual cause of the trust account overdraft in August 1988.

The Ramirez shortage remained on records prepared by respondent's accountant, Helen Nunziata, for more than two years. 1T23. Although respondent claimed that he believed that his secretary had deposited the funds into the trust account, the client ledger sheets prepared by his accountant showed otherwise. 1T32. Respondent admitted that he knew there was a problem with his trust account when he realized that Ramirez had been improperly paid. 3T237.

Respondent failed to provide the OAE auditor with a trust receipts book or a trust disbursement book at the audit. 1T24-25. Moreover, the trust account checkbook was inaccurate: the check stubs showed "one thing," while the actual checks showed "something different." The checkbook did not contain a running balance. 1T25. In addition, respondent did not maintain client ledger cards. Although respondent had a book containing ledger sheets, no entries had been recorded in this book prior to sometime in 1988. Therefore, there were no ledger sheets for the period encompassed by the audit. Id. According to the OAE auditor, respondent would draw a check for his fees from his trust account instead of first depositing them into his business account, as required by the

rules. Respondent did so without specifying which client fee he had taken. In addition, the amount drawn did not necessarily correspond to the amount due from a particular client. 1T26. Respondent would also hold these checks for two to four months without negotiating them, thereby leaving the fees in the trust account. Respondent continued this practice notwithstanding that, during the first random audit, he was advised to deposit his fees into his business account. 1T27.

Each month, Nunziata prepared a list of all of respondent's client balances. The list showed the amount of the original deposit for each client, the month in which it was received, the amounts taken out and the remaining balance. All of this information appeared on a single line. There were no entries identifying the reasons for the disbursements. 1T29.

According to the OAE auditor, respondent had informed her that he used to go over the client ledger sheets with his accountant on a monthly basis and that he was aware of the debit balances appearing thereon, but just did not get around to correcting that impropriety. 1T30, 3T271.

Respondent also admitted that he had drawn from his trust account two tuition checks to the Dwight Morrow School in Englewood, New Jersey. He explained that he was having difficulties in paying the tuition, which was late, and needed a "good check." He, therefore, decided to write the checks against his trust account. 1T33.

The auditor inquired whether respondent was concerned about causing an overdraft in his trust account because of the duplicate check that had been written in Ramirez, the amounts taken out for fees that were not properly allocated and the debit balances. Respondent replied that he was very careful to delay cashing his fee checks to make sure there was enough money in his trust account to pay his clients.

In October 1988, respondent met with Nunziata to determine the amount of the shortages in his trust account. Nunziata concluded that there was a shortage of \$9,383.08. 3T267. In order to reconcile his trust account, on October 18, 1988, respondent drew a series of twenty checks from his business account to replace each shortage. The checks, however, were not negotiated until April 13, 1989, the date of the first scheduled OAE demand audit. 3T266.

Respondent informed the auditor that he had to wait to cover the trust account shortages until he received funds from the sale of his residence in Teaneck, New Jersey. 1T381, 3T271. Respondent also told her that his accountant had made him aware of certain recordkeeping improprieties that had to be remedied, but that he "just didn't get around to it." 1T42, 3T271.

Respondent hired Samuel Fisher, a certified public accountant, to review his records as of June 1992 and, ultimately, to review respondent's records prior to 1992. Fisher — not Nunziata — testified on behalf of respondent at the DEC hearing. Fisher's review of respondent's records revealed that respondent was only out-of-trust on July 31, 1988 and that, on August 31, 1988 and

September 30, 1988, he actually had surplus funds in his trust account. Moreover, Fisher claimed that, in July 1988, respondent was out-of-trust by only \$4,333.71, rather than the \$10,833 set forth in the complaint. 3T144. Fisher stated that the reason for the discrepancy between his findings and those of the OAE was that a check originally written in November 1987 (check No. 2758 for \$9,070), never negotiated and voided, was carried on respondent's books until September 1988. Two weeks later, two separate checks were issued (Nos. 2789 and 2781) to replace check No. 2758. Fisher stated that, when reconciling respondent's books, the OAE auditor must have determined that check No. 2758 had been negotiated, leading the auditor to conclude that respondent was out-of-trust by a greater amount. 3T152-53.

With respect to August 1988, Fisher claimed that the OAE auditor overstated the client trust accounts by recording the receipt of client funds and not accounting for disbursements or expenditures from those funds. For September, Fisher claimed that respondent received two checks on September 30, 1988 totalling \$11,000, which should have been shown as a "deposit-in-transit" in the trust account reconciliation process, even though the deposits did not clear until October 2, 1988. Fisher claimed that, contrary to being out-of-trust in August and September 1988, respondent had a balance of \$3,229.64 for both months. 3T160, 164.

Notwithstanding the foregoing, Fisher admitted on cross-examination that, if respondent had withdrawn his fees from his

trust account, he would have been out-of-trust in July, August and September 1988. 3T189.

Respondent admitted his negligence in maintaining his books and records and his responsibility for the maintenance of his trust account. However, he claimed that, because of his alcoholism, he was unable to handle those matters. 3T216. Respondent also testified that, while Nunziata supplied him with monthly statements, he was not capable of understanding them at that time; he "didn't stay sober long enough." 3T318.

In his answer, respondent averred that, despite his alcoholism, he continued to maintain his law practice and to function effectively as an attorney. Yet, at the DEC hearing, respondent retracted that statement. It was, he contended, because of his staff and some of the attorneys he hired on a per diem basis that his office continued to function. 3T225. It was not until respondent came to grips with his alcoholism, in 1993, that he realized that the statement in his answer to the complaint was not accurate.

Respondent presented an expert witness on alcoholism, William Kane, Esq., to confirm that respondent was an alcoholic.

* * *

The DEC found clear and convincing evidence of willful recordkeeping violations (R. 1:21-6 and RPC 1.15). The DEC found that respondent's alcoholism did not rise to a level that would have rendered him incapable of willful conduct, particularly

because he had been advised of similar recordkeeping violations in an earlier random audit. The DEC also found clear and convincing evidence that respondent had negligently misappropriated client funds.

The DEC recommended public discipline, in addition to regular monitoring and audits of respondent's trust account by the OAE, for a reasonable period of time.

CONCLUSION AND RECOMMENDATION

Following a de novo review of the record, the Board is satisfied that respondent committed serious recordkeeping violations. Most of them were ongoing, even after respondent was advised of their existence by the OAE, following a random audit in 1985. The violations spanned from at least 1985 through the filing of the formal complaint, in 1992. The real question is whether respondent's conduct was willful in nature.

Respondent claimed that his alcoholism prevented his conduct from rising to a level of willfulness. He contended that he had been "in the throes of alcoholism" since 1985 and that, because of his condition, he was unable to "conform his behavior" to the rules.

Respondent has demonstrated that his alcoholism rendered him incapable of functioning adequately in terms of his recordkeeping responsibilities. Under these circumstances, the recordkeeping violations cannot be deemed knowing.

It is undeniable, however, that respondent negligently misappropriated client funds. He was out-of-trust for more than two years, commencing with the improper payment to Ramirez, in October 1986. Nevertheless, the record does not establish, to a clear and convincing standard, that respondent knew that he was out-of-trust at that time. The Board finds that, after October 1986, respondent became aware that a problem existed, not only because of the Ramirez incident, but also because he reviewed the monthly statements prepared by Nunziata, which showed debit balances on client accounts. It is, therefore, reasonable to infer that respondent permitted sufficient fees to remain in his trust account in order to cover any problems or shortages in that account. Apparently, respondent successfully accomplished this "lapping" of fees until August 1988. In that month, his trust account became overdrawn on three consecutive dates, August 4, August 5 and August 6, thereby causing an invasion of client funds.

The record establishes, to a clear and convincing standard, that respondent was out-of-trust on July 31, 1988. The question of whether he was out-of-trust in the amount of \$4,333, as claimed by Fisher, or \$10,833, as claimed by the OAE, is not significant. The concern in this matter is the fact that respondent was out-of-trust for two years and failed to reconcile and correct the problems with his trust account within that time period.

Similarly, the question of whether respondent was out-of-trust in September 1988 is not essential to a finding of negligent misappropriation. It is unquestionable that respondent was out-of-

trust in July 1988, as respondent himself admitted. By the same token, it is clear that respondent was also out-of-trust on August 4, August 5 and August 6, 1988 — notwithstanding Fisher's testimony to the contrary — because respondent's trust account was overdrawn on those dates.

In other such cases, the discipline imposed by the Court has ranged from public discipline to a period of suspension. See In re Hennessy, 93 N.J. 611 (1983) (public reprimand after books and records showed flagrant recordkeeping errors, including minor shortages in the trust account that were not allocated to any particular client; there was no indication of knowing misappropriation); In re Fucetola, 101 N.J. 5 (1985) (public reprimand for inadequate recordkeeping, resulting in numerous minor trust account overdrafts; no clients were injured and no evidence that the attorney misappropriated client funds); In re Barker, 115 N.J. 30 (1989) (public reprimand for grossly negligent accounting procedures; the attorney's part-time bookkeeper did not regularly reconcile the accounts, resulting in an inadvertent invasion of client funds); In re Librizzi, 117 N.J. 481 (1990) (six-month suspension for negligent misappropriation of client funds due to grossly negligent recordkeeping; the attorney was out-of-trust in the amount of \$25,000 for approximately two years).

The Board has considered respondent's alcohol problem, recordkeeping problem and the actions he has taken to remedy these problems. As a result, the Board unanimously recommends the imposition of a public reprimand, quarterly audits of respondent's

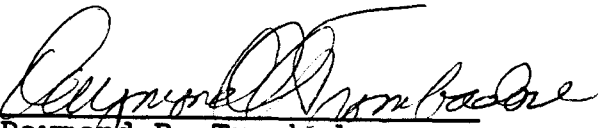
books and records, and drug and alcohol screening as deemed appropriate by the OAE.

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

Dated: _____

1/5/1995

By: _____


Raymond R. Trombadore

Chair

Disciplinary Review Board