SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-252

IN THE MATTER OF	:
HENRY J. WILEWSKI	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: October 19, 1994

Decided: May 23, 1995

John J. Janasie appeared on behalf of the Office of Attorney Ethics.

Frank J. Nostrame appeared on behalf of respondent.

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

This disciplinary matter arose from a recommendation for discipline filed by Special Master Douglas S. Brierley.

The Office of Attorney Ethics ("OAE") filed a two-count complaint against respondent and his then law partner. The matter against respondent's partner was administratively dismissed following his demise after the ethics hearing below.

Count one charged respondent with a violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation). The charge stemmed from respondent's knowing misuse of funds, which were erroneously credited by National Community Bank to his trust account. Count two charged respondent with failure to maintain required records, a violation of R. 1:21-6

and RPC 1.15(d). The complaint charged respondent with failing to keep a running cash balance in the trust account checkbook (R. 1:21-6(c)); permitting inactive trust ledger balances to remain in the trust account for an extended period of time (R. 1:21-6(c)); improperly using the trust account for state and federal payroll taxes (a violation of Opinion No. 598 of the Advisory Committee on Professional Ethics); commingling personal and trust funds (RPC 1.15(a)); and failing to prepare or reconcile client ledger cards to bank statements for the period from January 1, 1990 through January 1, 1991.

* * *

Respondent was admitted to the New Jersey bar in 1963 and formerly a member of the District VI Ethics Committee.

Respondent and his now deceased partner met while both were employed at the law firm of Kreiger and Cotash. It was there that they became good friends and decided to start a law practice. From 1976 to the date of the partner's death, they maintained a general practice of law in Jersey City, New Jersey. The firm maintained both a trust account and a business account at the National Community Bank (NCB), in Jersey City.

On April 6, 1990, respondent deposited a check into the firm's trust account for $15,000. The check represented proceeds from a settlement in a personal injury matter arising out of an automobile accident in which respondent and his wife were involved. However, instead of crediting the trust account with $15,000, NCB

erroneously credited it with $1,500,000. The trust account, therefore, contained $1,485,000 in excess of the amount actually deposited. Respondent learned of the bank's encoding error in May 1990, while reviewing the firm's trust account statement of April 30, 1990. Exhibit P-1.

Respondent did not notify NCB of the error. He permitted the bank funds to remain in the trust account, untouched, until July 1990. At that time, respondent began disbursing the NCB funds from the firm trust account into the firm's business account.

Respondent admitted to the OAE staff his role in disbursing the bank funds. He made that admission during a demand audit and in his answer to the complaint. He did not testify at the ethics hearing because of a criminal matter pending in Hudson County, arising from the same circumstances. However, in a certification in opposition to a petition for his temporary suspension from the practice of law, respondent stated as follows:

> Never during my 27 years of practice of law have I ever even considered improperly withdrawing or transferring funds entrusted to me, much less done so. During the two months subsequent to the erroneous deposit I agonized between notifying the bank in order to correct the error and covering my law firm expenses. To my deepest regret, I succumbed to the temptation. It was never my intention to permanently deprive any one of the funds, but merely to use them until the business income increased.
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> During the course of the time that the monies were in my account, clients' funds were also deposited and those monies that were properly due and owing to clients were always promptly paid. However, fees generated were retained in the account with the intent to

cover withdrawals from the erroneous bank deposit.
[Answer, Exhibit P-10, attachment A at 3]

Subsequent to NCB's discovery that there had been an encoding error in respondent's trust account, in early February 1991 the bank's attorney, Maria Tsitsiragos, notified the OAE of the error and of the fact that respondent had used some of the bank's money. The bank froze the firm's trust account on or about February 6, 1991. At that time, only $1,288,763.19 remained in the trust account ($196,236.81 less than the amount improperly credited to respondents' account, $1,485,000.)

On or about February 6, 1991, the branch manager of NCB, Steven Muscat, contacted respondent's firm. Muscat advised respondent's partner that there was a problem with the firm's account. Muscat wanted to meet with both attorneys at the bank to discuss the problem. Muscat would not elaborate on the substance of the problem. 2T234.[1] The meeting was scheduled for the next day, February 7, 1991. Respondent was not in the office at the time the bank called nor did he return later that day. His partner was, therefore, unable to discuss the situation with him until the following day. On their way to the meeting at the bank, the partner inquired of respondent whether he was aware of the cause of the problem with NCB. Respondent's partner testified that respondent confirmed that there was a problem with their account, but would not give further details. 2T235.

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[1] 2T denotes the transcript of the hearing on April 26, 1994.

The attendants at the bank meeting included respondent, his partner, Tsitsirogos, Muscat and two other individuals. At the partner's request, Tsitsirogas explained the encoding problem. She informed respondent and his partner that the matter was being turned over to the OAE and that the Internal Revenue Service, the United States Attorney's Office and the Federal Bureau of Investigation would be notified of the situation. 2T237. The partner claimed that, until that time, he was unaware of the existence of a problem with the bank. 2T237-238.

During February 1991, respondent and his partner refunded the $196,236.81 shortfall. $55,618.19 was immediately repaid, using fees left in their trust account. The remainder was paid within two weeks, out of other assets belonging to respondent and hi partner, such as stocks and other properties. 2T257.

After the OAE received notice from NCB, it scheduled a demand audit of respondent's books and records. The audit occurred on February 11, 1991 at the offices of the OAE. This matter was initially assigned to OAE Investigator Jeanine Verdel and later transferred to OAE Investigative Auditor G. Nicholas Hall. Verdel, who was present at the February 11 audit, testified that respondent and his partner brought all of their trust account and business account check stubs, bank statements, cancelled checks and record cancellations. They also brought their reconciliations, which had only been prepared over the weekend prior to the audit.

At the audit, respondent admitted his involvement in the matter and accepted responsibility for diverting funds from the

trust account. 1T40.[2] When questioned as to whether he had told his partner about the mistake in depositing the settlement check and the bank encoding error, he replied that he did not recall whether his partner knew about the mistake. However, at the ethics hearing, a stipulation was signed by the parties, stating that, subsequently, respondent told the OAE that he did not tell his partner of the bank error until February 6 or 7, 1991. Respondent also stated that, sometime in July 1990, he stopped withdrawing his fees from the trust account in an attempt to restore the amount of bank funds being used.

In or about April 1992, respondent's case was reassigned to Hall. Hall testified that he traced the disbursement of the NCB funds and discovered that approximately $251,000 had been transferred from the trust account to the business account. Of the 100 checks written during the period from July 1990 to February 1991, all but one of the checks were deposited into the firm's business account. As the result of Hall's review of the attorney records, he determined that $250,726 disbursed from the business account could be traced to respondent's and his partner's "draws," down payments for the purchase of new automobiles for each attorney, and other payments to them and to third parties for business and personal expenses.

Respondent admitted to Hall that he started using the NCB funds in July because the revenues from the law firm had decreased

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[2] 1T denotes the transcript of the hearing on April 25, 1994.

and business and personal expenses had to be paid. 1T100. Respondent further informed Hall that he and his partner generally received a "draw" of $2,000 per month each; if they were to receive any additional "draws" during the course of the month, he was the individual who made that determination. 1T104.

Hall prepared a schedule of respondent's and his partner's "draws" from the period spanning January 1990 to January 1991. Exhibit P-3. The schedule revealed the following information:

SUMMARY OF DRAWS BY MONTH
FOR PERIOD JANUARY 1990 TO JANUARY 1991

		Wilewski	Partner	Total	Number of Checks Partner Received	Number of Checks Respondent Received
Jan.	90	$ 2,000	$ 2,000	$ 4,000	2	1
Feb.	90	2,000	2,000	4,000	2	1
Mar.	90	2,100	2,100	4,200	2	2
April	90	2,300	3,400	5,700	4	3
May	90	0	0	0	0	0
June	90	2,000	2,000	4,000	2	1
July	90	4,000	4,000	8,000	4	4
Aug.	90	4,600	4,600	9,200	17	16
Sept.	90	1,800	1,800	3,600	8	8
Oct.	90	15,900	15,900	31,800	9	7
Nov.	90	4,600	4,600	9,200	10	9
Dec.	90	8,400	5,300	13,700	12	15
Jan.	91	6,800	5,800	12,600	5	5
Total:		$56,500	$53,500	$110,000		

The schedule shows that, until April 1990, each attorney received approximately $2,000 per month, as stated by respondent. In May 1990, they did not receive any "draw," which corroborates respondent's statement that the firm's revenues had decreased.

With the exception of September 1990, the amounts of the "draws" increased significantly from July 1990 until the bank discovered its error. In fact, the "draws" for the year shown indicate that each attorney received more than double the amount that they normally received ($2,000 per month). Exhibit P-3 shows only the amounts of the draws. It does not break down the proportions of the "draws" based on fees earned or on the bank funds used. Therefore, there is no evidence in the record precisely tracing the amounts of the bank funds spent on "draws," perquisites or other firm or personal expenses.

In 1990, respondent and his partner purchased new cars. This was a departure from prior practice. Generally, each partner would purchase a new vehicle every three or four years and the purchases occurred in staggered years. Respondent purchased a vehicle in September 1990 and his partner in December 1990.

Respondent informed Hall that he handled all of the financial and administrative aspects of the law firm. 1T120. His partner had nothing to do with that aspect of the business. Respondent also indicated that he and his partner never talked about financial or administrative matters involving the firm. They never discussed how well the firm was doing or whether there were profits or losses. Respondent alone determined whether a "draw" was to be greater than $2,000 per month and how many checks would be disbursed.

Respondent's partner denied learning of the encoding error until approximately eight months after its occurrence, when NCB

froze their trust account and then contacted them, on February 6, 1991, to meet with bank officials.

Notwithstanding the increase in the "draws" during the period from July 1990 to February 1991, respondent's partner claimed that he did not discuss the firm's finances with respondent and never asked respondent why their draws had increased. The partner admitted that most of his income was from "draws" from the firm. However, he testified that, in previous years, there were occasions when his "draw" was greater than $2,000 per month, such as, for instance, when there was a recovery on a large personal injury case. 2T321-313.

Respondent's partner testified that he rarely questioned respondent about financial issues or day-to-day operations of the firm. There was no need to do so because he trusted respondent and there had never been any signs of financial difficulty prior to the telephone call from NCB.

* * *

The Special Master found that respondent's knowing conversion of the bank's money for the firm's use was a violation of RPC 8.4(c). The Special Master also found clear and convincing evidence that respondent committed recordkeeping violations, including failing to keep a running cash balance in the trust account checkbook (R. 1:21-6(c)); maintaining inactive trust ledger balances in the trust account for an extended period of time (R. 1:21-6(c)); using the trust account to pay state and federal

payroll taxes (Opinion Number 598 of the Advisory Committee on Professional Ethics); commingling attorney fees and trust funds (RPC 1.15(a)) and failing to maintain a proper schedule of client ledger accounts, to reconcile bank statements from January 1, 1990 through January 1, 1991 (R. 1:21-6, RPC 1.15(d)) and to adhere to generally accepted accounting principles.

* * *

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

Respondent did not testify at the hearing. However, based on the admissions in his answer to the complaint, the testimonies of OAE Investigator Verdel, OAE Investigative Auditor Hall and respondent's partner, it is unquestionable that respondent violated RPC 8.4(c) by improperly converting NCB funds and knowingly misusing those funds for business and personal expenses. Respondent also admitted, in his answer to the complaint, all of the recordkeeping violations charged and consequent violations of R. 1:21-6, RPC 1.15 and Opinion No. 598 of the Advisory Committee on Professional Ethics.

The only remaining issue is, hence, the appropriate form of discipline for respondent's knowing misuse of the bank funds. The recent case of In re Siegel, 133 N.J. 162 (1993) is relevant. In Siegel, the attorney, a former partner in the law firm of McCarter

and English, submitted thirty-four false requests for disbursements from September 4, 1986 to November 21, 1989 and received $21,636.32 in either goods, services or cash, to which he was not entitled. The attorney obtained an additional $4,483.95 in false disbursements. The Court determined that disbarment was appropriate, ruling that, even though the relationship between lawyers and clients differs from that between partners, misappropriation from the latter is as wrong as from the former.

Also instructive is In re Spina, 121 N.J. 378 (1990), where an attorney was also disbarred after he pled guilty to the federal misdemeanor of taking property belonging to his employer. The attorney's misappropriations occurred over a two- and one-half-year period. Among other things, the attorney submitted false reimbursement claims and deposited checks intended as contributions to his employer into his personal checking account. The Court found it immaterial that the attorney's conduct had not occurred in the context of a lawyer-client relationship. The attorney's conduct toward his employer "constituted irrefutable evidence of a profound lack of professional good character and fitness." Id. at 384-85 (quoting In re Templeton, 99 N.J. 365, 367 (1985)).

Here, the fact that respondent misused funds mistakenly credited to his account does not lessen the seriousness of his conduct. Respondent left fees in the trust account in an attempt to cover the use of the NCB funds. However, when the bank froze the funds in the trust account, in February 1991, the fees that remained in the account were insufficient to cover the amounts

spent by respondent. Had the bank's error gone undetected for a greater period of time, it is likely that the misuse would have continued and that respondent would not have been able to replenish the amounts from his personal funds.

As a former member of a district ethics committee, respondent should have known better. It is tragic that respondent "succumbed to temptation" at a time when his firm was facing financial difficulties. Because there is nothing to distinguish the importance of safeguarding an employer's funds versus clients' funds or bank funds, respondent's disbarment is unavoidable. The Board unanimously so recommends. Three members did not participate.

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

Dated: 5/23/95

By: Raymond R. Trombadore
Chair
Disciplinary Review Board