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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-458

IN THE MATTER OF

RAMON A. IRIZARRY,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: March 9, 1994

Decided: September 27, 1994

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

Theodore W. Dauno appeared on behalf of respondent as his assigned counsel.

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 Special Master Roger J. Desiderio. The one-count formal complaint charged respondent with knowing misappropriation of client funds (RPC 1.15 and RPC 8.4(c)), gross neglect (RPC 1.1(a)) and lack of diligence (RPC 1.3). The review of the alleged knowing misappropriation of client funds must be focused on two separate timeframes: the period before and the period after an audit of respondent's attorney records by the Office of Attorney Ethics ("OAE") on January 27, 1989.

Respondent was admitted to the New Jersey bar in 1980. On July 17, 1990, the Court temporarily suspended him from the practice of law, pending resolution of the instant matter. That suspension was continued on November 26, 1990, with respondent's consent and upon the advice of his physician. He remains suspended to date.

Respondent did not appear at the Board hearing, despite notification by mail and by telephone from his assigned counsel.

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Respondent became the subject of a select audit in response to a notice that his business account check, payable to the New Jersey Fund for Client Protection, then the Clients' Security Fund, had been returned for insufficient funds. The initial audit was conducted on January 27, 1989 by Chris McKay, an auditor with the OAE. Subsequent audits were conducted on March 9, 1989, May 16, 1990 and May 18, 1990. The audit originally covered the period from December 31, 1986 through December 31, 1988. That audit period was subsequently expanded to cover records through at least March 1990.

McKay testified that the January 27, 1989 initial audit took place, as scheduled, at respondent's Newark office. This was so in spite of respondent's request that the audit be postponed because his records were not yet completed. Present at various times during the audit were respondent, respondent's wife (the record did not explain the nature and extent of Mrs. Irizarry's involvement with respondent's office), respondent's accountant (Matthew

Azares), respondent's cousin and bookkeeper (Kelly Ann Irizarry) and respondent's computer expert/office administrator (Angel Hernandez). McKay was provided with bank statements for both the business and trust accounts,"one-write" journal sheets and only a limited number of client ledger cards. Both Mrs. Irizarry and Azares were still in the process of posting past transactions onto other client ledger cards during McKay's visit.

During the course of his audit on that day, McKay found several deficiencies and irregularities in respondent's records. For example, while respondent appeared to be using the "one-write" system, which McKay described as basically a carbon system, it appeared that, for the most part, the trust account receipts journal was not fully utilized. Specifically, the receipts journal either inaccurately reflected the nature of the deposit or did not reflect the deposit at all. In addition, McKay found several instances where, although checks were written and paid out of the trust account, they were never recorded in the disbursements journal. Furthermore, he found several instances of disbursements from the trust account, on behalf of a particular client, where no corresponding ledger card existed. Most significantly, in terms of recordkeeping, McKay found that no reconciliations of respondent's records had been performed, presumably during the original two-year audit period. McKay characterized respondent's records as being in a state of "chaos." T1 132.[1]

As part of his examination, McKay prepared a schedule of

[1] "T1" refers to the hearing transcript of October 26, 1993.

client ledger balances as of November 30, 1988. Attachment C to Exhibit M-1. He then compared the client balances to the balance shown on the bank statement for that period and, after making the appropriate adjustments for outstanding checks and overdisbursements to clients, determined that the trust account was short by the amount of $37,465.31. It should be mentioned that one of the client balances listed on Attachment C, in the amount of $30,346.70, belonged to respondent himself. McKay was informed by either Mrs. Irizarry or respondent that those funds were indeed respondent's, as explained below, and that they should have remained on deposit as of the time of audit. T1 49-51. McKay testified that, if the $30,346.70 should have been kept in the trust account, then the total amount of the shortage would have been $37,465.31. If, however, it was determined that the $30,346.70 allegedly belonging to respondent did not have to remain in the trust account, then, obviously, the shortage would have been $7,000 only.

Upon discovery of the apparent shortage, McKay met with both respondent and Mrs. Irizarry. He informed them that respondent's records disclosed a shortage. He was careful to point out to them, as was his general practice, that he could not certify, at that particular time, that a deficit actually existed and was otherwise accurate. Rather, he advised them that, according to the records respondent provided to him, the trust account was short by over $37,000.00 Respondent expressed immediate surprise that there was any discrepancy in the trust account. McKay pointed out to

both respondent and his wife that the deficiency could represent a problem with the posting of transactions and instructed them to review their records carefully. McKay asked them to examine closely the schedule of client balances that he had prepared and to advise him whether any of the client matters or balances on the schedule shown should not appear thereon for any reason. Respondent made no changes to that schedule. Nor was he able to offer any explanation for the several instances of debit balances (overpayments) on the schedule that McKay had prepared, using respondent's records.

Once McKay was assured that his schedule of client balances was accurate, he began to attempt to identify the source of the problem. He encouraged respondent and his staff to advise him of anything that could possibly correct the deficit, such as, for example, an unrecorded deposit. Having been unsuccessful in that attempt and knowing that respondent's records were unreliable, McKay instructed respondent, on the date of his first audit, January 27, 1989, in the presence of Azares, Hernandez and Mrs. Irizarry, to open a new trust account immediately, out of which all new client transactions should be conducted. In addition, McKay instructed respondent to cease using the then existing trust account until respondent was able to positively isolate client balances, at which point those balances should be transferred to the new trust account. McKay testified that he specifically directed respondent not to remove any funds from the old trust account, unless the funds were being paid to or on behalf of a

client and only after respondent became absolutely certain that those funds belonged to and/or were owed to that client. T1 70-73, 126-27, 134. McKay further instructed Azares, respondent's accountant, to reconstruct respondent's trust account for at least a two-year period. Inasmuch as Hernandez, the computer expert/office administrator, intended to utilize the Libra Legal System to properly control respondent's accounts, McKay felt confident that, if respondent complied with his instructions, the source of the deficit/problem in the old trust account could be readily identified and corrected.

According to McKay, respondent, Azares and Hernandez all agreed that McKay's instructions represented the best solution for isolating and correcting the problem. At this point, McKay was maintaining a non-accusatory approach to respondent's apparent problem. Nevertheless, before he left respondent's office that day, McKay conducted a private exit interview with respondent and his wife, during which he reiterated all of his previous instructions and advised them of "the possible ramifications of having that type of difference in his trust account." T1 70.

After his initial audit visitation, McKay remained in frequent contact with both respondent and Azares, either to obtain information or to encourage them to expedite the reconstruction he previously requested. Apparently, Azares never fully completed the two-year reconstruction, ostensibly because of the extent of the work involved and because respondent was not current in his payments to him. However, as of the last time McKay spoke with

Azares, which appears to be May 1990 (more than fifteen months after the initial audit), Azares had completed the reconstruction through approximately August 1989. T1 82. Any documentation dealing with Azares' reconstruction of respondent's 1989 records, however, was not made part of the record. In addition, it is not clear exactly when McKay received Azares' reconstruction of respondent's 1990 records, although a review of the records entered into evidence appears to indicate that they were generated by Azares on or about April 20, 1990. See, e.g., Exhibits G-2, H-3 and P-2.

McKay testified that, upon receipt and review of the reconciliations, it became clear that the actual trust balances, at least for the months reconciled and submitted, could not possibly support the schedule of client obligations Azares had submitted for those same periods. For example, as of February 28, 1989, the reconciliations prepared by Azares and reviewed by respondent showed respondent's client obligations to amount to $44,681.36. Exhibit G-2. However, the trust account statement for that same period showed an ending balance of only $6,582.18. Exhibit E. In addition, according to Azares' reconciliation, outstanding checks for that period amounted to $5,284.85. McKay subtracted that amount from the amount actually remaining on deposit in the trust account as of February 28, 1989 and concluded that there remained a balance of approximately $1,200 against client obligations in excess of $44,000. As of February 28, 1989, therefore, respondent's trust account was short by over $42,000. This was so,

testified McKay, in spite of the fact that respondent had deposited into his trust account $23,836.55, which he had borrowed from his cousin, Kelly Ann Irizarry. It should be noted that this deposit was made on February 27, 1989 — only three days after respondent's trust account became overdrawn by $16,254.37. That particular overdraft, noted McKay, was the last in a series of three for that month. Exhibit E. Finally, McKay's review disclosed that, during the month of February, respondent had drawn six trust account checks for fees in amounts varying from $500 to $2,500, payable to himself. McKay considered these withdrawals to be clearly contradictory to his instructions to respondent, given days before, on January 27, 1989, to refrain from drawing any checks out of the old trust account, with the exception of clearly identified client obligations. McKay did not consider respondent's withdrawal of fees to constitute a client obligation, regardless of whether he was legitimately entitled to them. McKay characterized respondent's withdrawal of fees from the trust account as a disregard for its sanctity, under the circumstances. T1 135. Indeed, in spite of McKay's instructions on January 27, 1989, respondent withdrew fees from the trust account on twenty-seven occasions, between February 3, 1989 and July 28, 1989. These fees totalled more than $32,000. Exhibit D.

McKay testified that, according to the reconciliations submitted by Azares for the month of March 1989, as of March 31, 1989 respondent should have been holding $54,588.43 in his trust account, in order to satisfy client obligations. In fact, however,

the ending trust account balance for that period amounted to only $4,357.75, which was barely enough to cover outstanding checks in excess of $4,200. Respondent's trust account, therefore, was short by over $54,000. During that period, respondent drew to himself four trust account checks for legal fees varying between $525 and $2,500.

During the month of April 1989, respondent's trust account was overdrawn, on one occasion, by $4,300. Apparently, a check for $5,000 was drawn against an available balance of only $700. Again, respondent drew seven trust account checks for his legal fees, in amounts varying between $750 and $1,800.

Also during the month of April, according to McKay, respondent received and deposited into his old trust account the sum of $55,430.10 received from his clients, the Maldonados, whom respondent represented in the purchase of a residence. Exhibits K-1 (deposit slip) and K-2 (Maldonado ledger card). The closing on that property took place at respondent's Newark office on April 14, 1989. A review of the HUD-1 Uniform Settlement Statement (hereinafter "RESPA") discloses, on line 504, that the amount of $45,987.51 was allocated to the payoff of a first mortgage loan. Exhibit L. Thereafter, on April 27, 1989, a trust account check in that amount was drawn to the order of Citicorp Mortgage. Exhibit N. The record does not disclose, and respondent was unable to identify, the date on which that check was actually forwarded to Citicorp. It was presented for payment, however, both on July 12, 1989 and July 19, 1989. It was returned each time for insufficient

funds, despite the fact that respondent's trust account should have had equivalent funds on deposit for that purpose. Thereafter, according to the client ledger card, the full amount was credited back to the account.

Still, according to McKay's review of Azares' analysis, on July 31, 1989 respondent's client obligations amounted to $10,658.51. Exhibit P-2. Outstanding checks as of that date amounted to $51,086. His trust account balance as of July 31, 1989, however, amounted to only $18,047.11. Respondent's trust account, therefore, was short by almost $43,000. It is not clear from the record whether the check to Citicorp (to pay off the mortgage in Maldonado) was factored into the calculation of outstanding checks for that period. In any event, during July 1989, respondent wrote five trust account checks to himself for fees varying in amounts between $300 and $2,500.

McKay testified that, although respondent finally opened a new trust account in May 1989, he continued to use the old account through August 24, 1989, when it was finally closed out. Exhibit Q-2. At that time, there remained a balance of $17,486.11, which was transferred to the new trust account. Exhibit Q-1. That amount was completely credited to the Maldonado ledger card on August 24, 1989. In addition, respondent credited to that matter the amount of $28,551.14, which represented funds loaned to him by another client, Jose Rosario. Exhibits T-2 (unsigned affidavit of Jose Rosario) and U. Thereafter, on or about October 16 or 19, 1989, respondent forwarded to Citicorp his trust account check in

the amount of $46,037.51, to be applied toward the satisfaction of the Maldonado outstanding mortgage. In his transmittal to Citicorp, respondent acknowledged that additional monies were owing by way of interest and would be forwarded within two weeks. Exhibit V-1. Citicorp, however, returned that check to respondent because it did not represent full payment of the principal plus accumulated interest. Exhibit W. According to McKay, when Citicorp returned the check, the funds borrowed from Rosario were re-credited to the Rosario ledger card. Exhibit U. The $17,486.11, however, was apparently re-credited to the Maldonado ledger card. T1 111. Although respondent seemingly made subsequent disbursements in the amount of approximately $8,971.83 on behalf of the Maldonados, he never fully paid off the outstanding mortgage (Exhibit Y-1), which was ultimately satisfied by TRW Title Insurance Company, on August 28, 1991. Exhibit Z-1. The payoff figure, by that point, had risen to $54,130.31, inasmuch as the loan had been the subject of foreclosure proceedings. (See respondent's explanation of the Maldonado deficiency below).

Respondent was the only witness appearing in his behalf. He testified that, at the time he received the initial audit letter from the OAE, he had been spending approximately forty to fifty percent of his time in his Puerto Rico office. He did, however, maintain a full staff in his Newark office, consisting of two full-time attorneys, one or two law clerks, a legal secretary, three to five clerical workers, a bookkeeper and a computer expert/office administrator. In addition, from December 1987 until April or May

1988, respondent maintained an accountant on staff. When that accountant resigned, respondent retained the services of an outside accountant, Matthew Azares, to oversee his accounting system.

Respondent testified that he relied on Azares to make sure that the office was prepared for the OAE audit. This was so because he never considered himself to possess good bookkeeping and accounting skills. According to respondent, Azares involved respondent's entire staff in the preparation for the audit, which created "chaos" in the office because it was in the process of converting from a manual to a computerized accounting system. T2 17.[2] Azares apparently believed that the involvement of the entire staff was the only way to bring respondent's records up to date, in order to properly reconcile them for the audit. Azares made that decision after his request for an adjournment of the audit was denied. 2T 17; Azares' July 10, 1990 letter to respondent, attached to Exhibit C-1. Respondent testified that, in preparation for the audit, Azares instructed respondent's staff to "go all the way back and redo everything" because respondent did not "feel comfortable" with the work that had been previously performed by his clerical staff. T2 18.

Apparently, for the two years prior to the initial audit, respondent had relied completely on his accountant to properly maintain his records. The evidence, however, and particularly respondent's answers, did not clearly define respondent's role, if any, in the maintenance of his own records. For example, it cannot

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[2] "T2" refers to the hearing transcript of October 27, 1993.

be determined whether respondent even reviewed his accountant's work at any point. T2 22-24. Nevertheless, respondent insisted that, up to the end of 1987, when he hired a full-time staff accountant, his records were "up to date." Id. It should be noted that, prior to that time, an accountant in Puerto Rico handled the accounting systems for both the Puerto Rico and the Newark offices. When the decision was made to segregate the accounting responsibilities for each office, respondent borrowed $45,000 as a second mortgage against his home "to strengthen the administrative and accounting system" of both offices and hired both the staff accountant and the bookkeeper. T2 23-24.

Respondent described McKay's initial audit visit as chaotic. He did, however, recall speaking with McKay around mid-day. At that time, McKay showed respondent the schedule of client balances (as of November 30, 1988) that he had prepared (attachment C to M-1) and asked respondent the reason for the several instances of disbursements against insufficient funds in certain matters and for the overall shortage in the account. Respondent testified that, after expressing shock that there was any shortage in the trust account, he indicated to McKay that there could not be any shortages because he always kept a certain amount of his own money in the trust account to cover advancement of costs in behalf of clients "or even inadvertent payments that could have taken place." T2 26. (While respondent initially and thereafter referred to these personal funds as "cost account" funds, it later became clear that he was referring to a cost ledger reflecting personal funds in

the trust account to cover client expenses and/or overpayments. T2 101.) At some undefined point prior to the audit, respondent continued, he had deposited $30,346.70 of his own money into the trust account. T2 62-63. That amount apparently comprised the "Irizarry" funds showing on line 33 of McKay's schedule of client balances. Respondent maintained that he would supplement the trust account with his own funds whenever his staff indicated that additional funds were required. T2 63. Respondent added that, normally, he did not maintain a large amount of his own money in the trust account to cover client expenses. However, that amount had "dramatically increased" during the period that Azares was reorganizing the accounting system, for two reasons. First, while respondent's explanation is somewhat unclear, it appears that, prior to retaining Azares in April 1988, respondent was disbursing costs advanced by his clients through his business account and was disbursing costs advanced in behalf of clients through his trust account. Apparently, when a cost disbursement was made through the trust account, a deduction was made, for some reason, both in respondent's business account ledger ("white ledger") and in the trust account ledger ("yellow ledger"). This, according to respondent, "created confusion" when trying to track expenditures on behalf of clients. Azares, therefore, allegedly advised respondent to maintain all monies relating to the advancement of costs in his trust account and to maintain a ledger card to track those monies. Exhibits C-3 and C-3A. Therefore, monies that respondent received from clients representing advancement of costs,

previously deposited to and disbursed from the business account, were subsequently deposited to and disbursed from the trust account, in addition to the previously smaller pool of his own money that respondent kept in his trust account to cover costs not advanced by clients. The second reason why that amount increased so drastically, according to respondent, was that the office doubled its clientele and income in 1988 — apparently due to an increase of volume in real estate and negligence cases. T2 26-27.

Respondent contended that, when McKay showed him what appeared to be, according to McKay's schedule of client balances, a $5,000 overdisbursement on the Melendez matter, he immediately disputed the accuracy of that schedule. He maintained that he told McKay that $5,000 was advanced from the cost ledger. Exhibits C-3 and C-3A. The first entry on the Melendez ledger card (Exhibit M-3), therefore, should have been reflected as a $5,000 advancement from the cost ledger and not as a $5,000 negative balance. In other words, the clerical employee who made the entry did so incorrectly and presumably provided that incorrect and inaccurate information directly to McKay at the initial audit, without having first provided the card to Azares for his review. Respondent speculated that the clerk who made the entry did so in that manner to reflect that the client owed that money back to the office. He attributed the error to inexperience on the part of the clerk making the entry. Azares had directed one of respondent's clerks to prepare the records for McKay's audit. Respondent further explained, upon inquiry from the Special Master, that the reason why the

advancement was not reflected on the original cost ledger card (Exhibit C-3), but was reflected on the finalized version (Exhibit C-3A) in a manner that suggested that it was entered at some point after the fact, was that Azares apparently did not "reconcile" the final version prior to submitting it to McKay. McKay was, therefore, provided with inaccurate information. The record is silent as to who made the corrected entry on Exhibit C-3A, as well as to when that document was provided to McKay. T2 29-38.

Conversely, when McKay showed respondent what appeared to be, according to his schedule of client balances, an improper payment in the Azcuizdiaz matter in the amount of $5,943.82, respondent did not dispute the accuracy of that information. Instead, he testified, there was, in fact, a double payment made to Mr. Azcuizdiaz. At the hearing, respondent offered an explanation for this double payment (the record is somewhat confusing as to whom exactly respondent represented in this real estate transaction). Respondent explained that, in January 1988, a disbursement was made to Mr. Azcuizdiaz in the amount of $25,000, which represented the balance due him from a closing. Respondent's staff at that time had retained what it believed to be a sufficient amount to cover outstanding liens on the property, the exact amount of which was to be provided by Azcuizdiaz. At the time the original $25,000 disbursement was made, the person writing the check (using the one-write system) apparently did not place the client ledger card under the check. Therefore, while the disbursement appeared on the general ledger, it did not appear on the Azcuizdiaz ledger card.

Shortly thereafter, in February 1988, there was a "disruption" in respondent's office, which caused respondent's accountant and bookkeeper to leave. Respondent, therefore, had to rely on other staff members to follow through on that matter as well as on all others. Toward the end of February 1988, "the clients" (probably Mr. Azcuizdiaz) came back to his office and demanded final payment from the closing proceeds. At that time, respondent attempted to refer to the actual client file, but was unable to locate it. Respondent claimed that the file had been removed by Mr. Azcuizdiaz, at some prior point, without respondent's consent or knowledge. Respondent, therefore, had only the client ledger card as reference. When he looked at that ledger card, of course, the prior $25,000 disbursement was not reflected thereon. In addition, after he checked with his clerical staff, he believed that sufficient funds would remain to cover outstanding liens and so assumed that final payment was, indeed, owing to Mr. Azcuizdiaz. Therefore, another disbursement was made to him, this time in the amount of $30,000. The client ledger card (Exhibit M-4), which is difficult to read due to poor photocopy quality, appears to reflect such a payment to Mr. Azcuizdiaz on February 16, 1988. Thereafter, on or about March 17, 1988, after reviewing a bank statement, respondent realized that a payment had already been made to Mr. Azcuizdiaz in January. Someone subsequently made an adjustment to the client ledger card to reflect that payment. Exhibit M-4. Thereafter, between April 19, 1988 and June 2, 1988, respondent made several attempts to recover the overpayments from Mr.

Azcuizdiaz so that the outstanding liens could be satisfied and a title policy issued. Exhibits R-6 through R-8. However, respondent never received the funds back. The ledger card for Azcuizdiaz, as noted by the Special Master, appears to reflect several disbursements made subsequent to respondent's discovery of the double payment to Mr. Azcuizdiaz, further placing the matter in a negative status. Respondent again explained that these disbursements should have been shown as advances from the cost ledger and that the computation of a negative balance on the card was probably a clerical error. From a review of Exhibit C-3 and C-3A (cost ledger cards), it appears, however, that they do not reflect any such advances. T2 39-52.

Respondent initially maintained that, despite what McKay's schedule of client balances showed, respondent believed, at the end of the initial January 27, 1989 audit, that his trust account was short by only approximately $7,000. (The record is not clear as to why respondent believed that the shortage was only $7,000. See T2 60-62). Respondent, thereafter, instructed his staff to make sure that at least $7,000 remained in his trust account until the actual amount of the shortage could be definitively determined. T2 61, 108. On cross-examination, respondent admitted that, after McKay's initial audit visit, he had no doubt that there were serious problems with and questions about his trust account. No one, including respondent himself, knew the exact amount of the trust account shortage. Even Azares, his own accountant since April 1988, could not define the deficit at that point. T2 157-161.

Nevertheless, following McKay's departure that day, respondent continued to use the existing trust account in the normal course of business, that is, he continued to make deposits to and disbursements from the trust account, which included the payment of fees to himself. He could not recall whether he had even taken the time to look at his February 1989 trust account bank statement to attempt to get a better idea of its balance. He testified that it was not his practice, during 1988 and 1989, to review his trust account records. Rather, he relied upon his staff to keep him adequately advised as to the status of his accounts. T2 201-02.

Respondent contended that he was entitled to all the fees he disbursed to himself after McKay's initial visit. He disputed that McKay had ever instructed him to "pay himself last" out of the trust account (T2 171) or told him, at the initial audit visit, to immediately cease use of his existing account and to open a new one from which to transact all future trust business. Respondent maintained, instead, that it was not until their May 1989 meeting that McKay had given him that particular instruction. (All other evidence indicates that it was not until May 1990, instead of May 1989, as respondent contended, that McKay met with respondent again. Azares' July 10, 1990 "report" might be read to support McKay's testimony that he instructed respondent to cease operation out of the old trust account at their initial meeting. Unfortunately, Azares was not called to testify by either party).

When asked why he had never satisfied the first mortgage in the Maldonado matter, respondent offered the following explanation.

After the January 1989 audit, respondent and his key employees became ill. Respondent was under so much pressure that, in March 1989, he reassigned all real estate matters to the litigation attorney in his office, who apparently had little or no experience in the real estate area. There were approximately five or six other closings during the month of April, in addition to the Maldonado closing. Respondent was not able to recall whether he handled the Maldonado closing himself. However, he would routinely depend upon his professional and support staff to make appropriate disbursements and would sometimes leave blank signed trust account checks so that any necessary disbursements could be made. This was his procedure when he had to travel to Puerto Rico before a closing or before an expected distribution in a negligence matter. All disbursements would then be made by his staff under Azares' direction. In any event, respondent continued, his review of the file showed no evidence that he participated in the follow-up procedures, such as paying off various mortgages or liens. He first learned that the Citicorp first mortgage had not been satisfied when he received notification from the bank, in July or August 1989, that his trust account check had bounced. As previously noted, the check was presented for payment on two occasions during July 1989. Respondent did not recall receiving, prior thereto, any notification from the sellers' attorney that there was a problem with the satisfaction of the mortgage.

Upon learning that his check had been returned for insufficient funds, respondent instructed Decene (an accountant he

hired in April 1989 because he believed Azares to be too slow in the reconciliation process) to complete a reconciliation on an expedited basis. T2 74-76. As a result of that reconciliation, he learned that the account was short by approximately $31,500. He, therefore, borrowed $35,000 from another client (Rosario), with his permission, to attempt to rectify the problem. Thereafter, he closed out the old trust account and transferred the remaining funds to the new trust account. As previously noted, respondent again attempted to pay off the Citicorp mortgage in October 1989. Exhibit V-1. When Citicorp returned his check because it did not represent the full payment of the mortgage plus accrued interest and costs, respondent attempted to contact Citicorp on several occasions, but did not receive any return calls. This disturbed respondent because he did not want interest on the mortgage to continue accruing. That notwithstanding, respondent testified that he "forgot" about this problem until March 1990, when his client called him and advised him that Citicorp had initiated foreclosure proceedings. T2 129. By that point, respondent testified, the accrued interest had risen to $9,000. The <u>Rosario</u> (a/k/a "<u>Ledesa</u>") funds were no longer available for respondent's use because, when Citicorp refused and returned respondent's check, the amount attributable to the <u>Rosario</u> loan was credited back to his client ledger card and was, thereafter, used for Rosario's purposes.

Respondent testified that he lost track of the <u>Maldonado</u> mortgage problem in November 1989, when he was allegedly accused by the OAE of stealing $10,000 in client funds (<u>Chepa Bros.</u>). He

contended that he, through his staff, received constant telephone calls from McKay and Sam Gerard (then Auditor-in-Chief of the Random Audit Program), as a result of which tension in the office rose to a point that ultimately caused Decene to resign in January 1990. Apparently, in December 1989, respondent was called in to the OAE on an audit relative to the Chepa allegations, which Azares also attended. At the time of that hearing, respondent alleged, he was under medical treatment for anxiety, depression and suicidal thoughts. This is supported by the July 11, 1990 report of respondent's treating physician, Majid Ali, M.D. (entered into evidence as part of Exhibit C-1). Apparently, no additional charges were brought against respondent relating to the Chepa Bros. allegations. However, respondent testified, at the end of that particular audit at the OAE, Azares was instructed to redo any trust account reconciliations by computer by the end of January 1990. If the reconciliations were not submitted by then, the OAE would move for his temporary suspension. Azares apparently objected to this timetable and advised respondent that it would take virtually all of his time to complete the reconciliations and that they would also be very expensive. From that point on, respondent testified, Azares halted his work, if respondent did not pay him $650 every Friday. At that juncture, respondent was already behind on his own mortgage payments and owed money to many friends and family members from whom he had borrowed. T2 132-136.

When asked what caused the initial Maldonado check to Citicorp to bounce, respondent explained that he only learned from Azares,

in July 1990, that a shortage in the trust account had been caused by an error in bookkeeping. Specifically, respondent represented a client by the name of Torres, who had approximately thirty trust ledger cards attributable to his transactions during 1988. Torres had a closing on August 8, 1988, which involved his purchase of property in North Carolina and which required that a check in the amount of $25,731 be sent to the sellers. Torres was apparently making the purchase through his L & G Development Corporation. In order to provide the sellers with the required funds, Torres requested that $25,731 be deducted from his Sajoma Supermarket ledger card and transferred to his L & G card (basically, a paper transfer). The transfer was apparently recorded by respondent's staff on the L & G card, but was not deducted from the Sajoma card until sometime late in 1989. Exhibit R-3. Respondent's staff thereafter operated under the assumption that the funds showing on the Sajoma card remained available for disbursements. Additional disbursements were, indeed, made and deducted from that particular ledger card, ultimately causing a shortage, which was carried over into 1989. Respondent maintained that this eventually affected the Maldonado funds. He further contended that, had Azares maintained proper control over the records, that amount ($25,731) should have been deducted from his cost ledger or respondent should have been advised that he needed to deposit additional funds for the cost ledger. In the alternative, respondent claimed, the client should have been asked to replace the funds that were mistakenly disbursed in his behalf. However, respondent testified, neither Azares nor

McKay found that error. Torres eventually declared bankruptcy and, therefore, never replaced the funds.

* * *

Throughout the hearing, respondent maintained the position that he had always taken the necessary steps to ensure that his records were accurate and his clients' funds secure. Specifically, he hired what he considered competent, qualified professionals and expected them to handle his records appropriately. If there were problems, such as a shortage in the trust account, respondent expected his staff to so advise him, so that he could deposit additional personal funds to the trust account to cover that deficit. T2 100-01. In fact, between 1988 and 1989, respondent deposited over $92,000 of his own funds into the trust account to cover cost advancements and errors. During what respondent described as the "transition period," when Azares worked with respondent's staff to computerize his accounting system, Azares always assured respondent that his trust account was under control and that all expenditures that needed to be made in behalf of clients would be deducted from the cost ledger. At the time, respondent was apparently preoccupied with the practice of law in both New Jersey and Puerto Rico. In short, he delegated his recordkeeping responsibilities to the experts.

* * *

No experts testified in respondent's behalf. Instead, respondent offered into evidence the "reports" of Matthew Azares and Arceldine Decene. Azares' July 10, 1990 letter report does

make general reference to generic causes of deficits in respondent's trust account. However, the report cites no specific cases. On the other hand, Azares does acknowledge that respondent continued to make disbursements out of the old (unreconciled) trust account, although a new one had been established. He went on to say that "not having reconciled the [old] trust account, it became a 'Russian Roulette' game every time a transaction was made out of the old trust account." Exhibit R-5 at 2.

Similarly, the September 25, 1989 report of Arceldine Decene made general but not specific reference to the causes for any shortages in respondent's trust account. Among those, she noted that no reconciliations had been performed since December 1987. In addition, she attributed trust account deficits and the condition of respondent's records to a "lack of management review of the account and monitoring of the staff." Exhibit R-6 at 2. She concluded by recommending that a qualified full-time individual be hired "to actively handle and monitor the day to day transactions in the new trust account, under close management supervision, in order to prevent the same pattern of bookkeeping from developing in the new trust account." Id.

* * *

The Special Master found that, during his initial audit visit, McKay had, indeed, instructed respondent to open a new trust account and to cease use of the existing account until it was finally and definitively reconciled. The Special Master recognized

this finding to rest upon a credibility assessment, inasmuch as McKay's instructions had not been reduced to writing. However, given the agreement between all parties that respondent's trust account records were in total chaos, the Special Master found McKay's testimony in that regard to be more credible. In addition, the Special Master found that respondent continued to draw fees from the trust account during periods of time when he was borrowing money from relatives and friends to cover deficits in the account. He considered this conduct, coupled with respondent's conduct in the Maldonado matter, to amount to a knowing misappropriation of trust funds, in violation of RPC 1.15 and RPC 8.4(c). In making that determination, the Special Master noted that respondent was unable to offer any explanation for the present whereabouts of the $17,486.11 assigned in the new trust account to the credit of the Maldonados. Finally, the Special Master found respondent guilty of violations of both RPC 1.1(a) (gross neglect) and RPC 1.3 (lack of diligence) for his mishandling of both the Maldonado matter and his mismanagement or lack of management of his trust account records. The Special Master recommended public discipline for respondent's misconduct.

CONCLUSION AND RECOMMENDATION

Following an independent de novo review of the record, the Board is satisfied that the Special Master's conclusion that respondent acted unethically is fully supported by clear and convincing evidence. Respondent's conduct violated RPC 1.1(a), RPC 1.3, RPC 8.4(c) and RPC 1.15.

Respondent's conduct before the initial January 27, 1989 audit and his conduct after that audit should be segregated.

PRE-AUDIT

McKay himself described respondent's trust account records for the two years preceding the initial audit to be in a state of "chaos." It was for that reason that he demanded that respondent reconstruct and reconcile the account for that period. Without that reconstruction, no one, including McKay, could know for sure how much respondent should have been holding for clients and by how much he was out of trust. In fact, when McKay confronted respondent with the result of his initial audit, he was careful to inform respondent that the shortage shown on his schedule of client balances did not absolutely reflect an actual deficit in the trust account itself. Rather, it showed a deficit based upon respondent's records. Even McKay acknowledged that the noted deficit could be explained by bookkeeping errors. Furthermore, given the chaotic state of respondent's records, McKay considered it possible, and even probable, that overdrafts and overpayments in

the account would occur. McKay further acknowledged that he found no evidence of any fraudulent practices on respondent's part. Given this state of affairs, the Board cannot find that respondent's pre-audit conduct amounted to knowing misappropriation. Respondent's conduct, which resulted in several instances of negligent misappropriation, could be analogized to that displayed in In re Barker, 115 N.J. 30 (1989) (attorney publicly remanded for negligent misappropriation occasioned by bookkeeper's failure to regularly reconcile accounts, thus making it difficult to determine client obligations), In re Gallo, 117 N.J. 365 (1989) (attorney suspended for three months for wholly inadequate recordkeeping procedures, which resulted in commingling of attorney's funds with client funds and ultimately caused the inadvertent invasion of client funds), and In re Librizzi, 117 N.J. 481 (1990) (attorney suspended for six months for gross negligence in the maintenance of his trust records resulting in the account being out of trust by $25,000 over a two-year period; attorney labelled a "shoe-box" client).

POST-AUDIT

Respondent's post-audit conduct, however, is drastically distinguishable from his pre-audit conduct. Specifically, after McKay's initial audit visit, on January 27, 1989, respondent admittedly was aware that there were serious problems, including a deficit in his trust account. His continued use of the existing trust account amounted, in Azares' words, to "a game of Russian

Roulette." This was all the more egregious in light of McKay's testimony that he instructed respondent, at the initial audit, to cease future use of the existing trust account and to disburse from that account only determined payments owed to or on behalf of clients.

Respondent's actions subsequently to McKay's direction bespeak more than mere neglect. First, after the initial audit, respondent proceeded to infuse another $30,000 of personal funds (by way of a loan from his father-in-law) into the trust account to cover any deficits therein. Then, his bank statements showed overdrafts in the account and respondent borrowed another $23,000 from his cousin to deposit into the account, obviously, but not admittedly, to cover that overdraft (that particular deposit was made only three days after his account became overdrawn for the third time that month). Finally, when respondent learned that his trust account balance would not support his obligation in the Maldonado matter, he borrowed another $35,000 from another client to satisfy that obligation. At that point, he could no longer use his own funds because he had no more -- his mortgage was in arrears, though it is not known for what period of time prior thereto. These post-audit deposits into the trust account totaled $88,000. Respondent had to know (or intentionally refused to know) that his trust account was showing shortages. Yet, through all of this, respondent regularly disbursed fees to himself out of the trust account. Finally, after all this -- the initial audit, the overdrafts, the frequent infusion of funds to cover deficits -- respondent still

failed to oversee his trust account. Instead, he totally delegated that responsibility to Azares and to his staff members, while he continued to attend to the practice of law in New Jersey and Puerto Rico. The Board finds unbelievable respondent's claim that, post-audit, he deposited $88,000 in personal funds in the trust account not because he knew the account to be suffering from continuing deficits but, rather, to cover cost advancements and possible errors. If that were so, given respondent's dire personal financial situation, he would have elected to have the clients advance their own costs. In view of the above, the only possible conclusion is that respondent knew, post-audit, that he was operating under constant deficits and, hence, knowingly misappropriating client funds.

The Board unanimously so finds. The Board also unanimously finds, for the same reasons expressed above, that respondent knowingly misappropriated escrow funds in the Maldonado matter. Under In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1985), respondent must be disbarred.

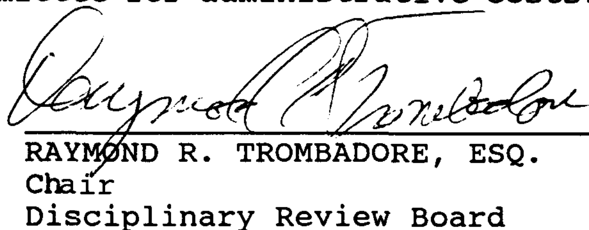
Even if the record were not to support clearly and convincingly a finding of knowing misappropriation, the Board is nevertheless convinced that disbarment would be the only appropriate sanction. In the Board's view, respondent's handling of his recordkeeping responsibilities was so reckless as to merit nothing less than the ultimate sanction of disbarment. Respondent's relinquishment of his trust account obligations constituted a deliberate attempt to shield himself from the truth,

as in In re Skevin, 104 N.J. 476(1986) and In re Davis, 127 N.J. 118(1992). Like attorney Davis, this respondent continued to misappropriate client funds after he had been placed on notice of his egregious bookkeeping practices. His actions post-audit were, at the very least, the product of "willful" ignorance. "The intentional and purposeful avoidance of knowing what is going on in one's trust account will not be deemed a shield against proof of what would otherwise be a 'knowing misappropriation.'" In re Johnson, 105 N.J. 249, 260(1987).

One member did not participate.

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

Dated: 9/27/1994



RAYMOND R. TROMBADORE, ESQ.
Chair
Disciplinary Review Board