Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-279

IN THE MATTER OF
SILVIA A. BRANDON-PEREZ,
AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 16, 1992

Decided: November 5, 1992

Thomas J. McCormick appeared on behalf of the Office of Attorney Ethics.

David A. Pressler appeared on behalf of respondent.

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

This matter was before the Board based upon a recommendation for public discipline filed by a Special Master. Respondent was admitted to the New Jersey bar in 1978 and has been engaged in private practice in Warren, Somerset County.

On August 9, 1990, the OAE received notice that, on July 31, 1990, respondent filed a Chapter 11 personal bankruptcy petition with the United States Bankruptcy Court for the District of New Jersey. By letter dated August 20, 1990, respondent was notified that a demand audit of her trust and business accounts would be

scheduled.[1] Thereafter, respondent was charged with three counts of knowing misappropriation and one count of recordkeeping violations. During the hearing on this matter, the OAE voluntarily dismissed the third count (knowing misappropriation) of the complaint.

The facts, as found by Special Master Susan Reach Winters, are as follows:

> Respondent maintained her attorney trust account with First National Bank of Central Jersey for the time period encompassed by the audit, January 1, 1988 to September 10, 1990.
>
> The records for respondent's attorney trust account, which respondent produced for the audit, were computer printouts from a trust account software program. Initial review of the records by McKay on September 10, 1990 disclosed deficiencies in respondent's trust account.
>
> McKay attempted a reconciliation of the trust account as of August 31, 1990 (Exhibit C-4). The preliminary schedule of client ledgers reflected credit balances of $20,314.17 while the bank reconciliation showed an ending balance of $12,156.80 -- a shortage of $8,157.37. The ledger cards also disclosed substantial trust account deposits the morning of the audit, prior to respondent's printout of the client ledger cards.
>
> Respondent admitted depositing over $20,000 in personal funds into the account just prior to the audit.
>
> Respondent also admitted that no trust records, other than the trust account checkbook stubs, existed <u>prior</u> to the scheduling of the audit. Respondent said she spent considerable time on the weekend before the September 10, 1990 initial audit reconstructing trust records for 1989 and 1990 using a software program she had purchased in 1989 but never used. Included in the records created for the audit were client ledger cards,

---

[1] The audit, conducted by OAE auditor Chris McKay, began on September 10, 1990 and continued on seven other occasions, through March 25, 1991. OAE's First Assistant Ethics Counsel Thomas J. McCormick and OAE's Investigator Jeanine Verdel were also present at some of these meetings.

receipt and disbursement journals and a form of reconciliation entitled "Summary Balances".

The demand audit was continued on October 9, 1990 at which time McKay reworked the August 31, 1990 reconciliation. (It was necessary to rework the original reconciliation because respondent supplied additional ledger cards which were not made available during the initial audit visit.) The second reconciliation determined that the credit balances should be $40,173.17 against an ending bank balance of $12,156.80. This resulted in a shortage of $28,016.37. Client ledger card debit balances accounted for $24,406.88 of the shortage (Exhibit C-6A through C-6M). The source of the additional shortage, $3,609.49, could not be determined.

• • •

COUNT ONE - KNOWING MISAPPROPRIATION - DELREY

• • •

The facts surrounding the DelRey matter are as follows:

Respondent represented DelRey, the seller, in the sale of certain property which closed on December 31, 1986. At the time of settlement, $6,200 was escrowed for payment of an outstanding judgment to one Rupp (Exhibit C-7). Approximately 1-1/2 years after settlement, respondent learned for the first time, that there was also an IRS lien of approximately the same amount against the subject property. The IRS lien did not appear on the copy of the title report because an "old" title policy was relied upon for the closing. The buyer's attorney had not obtained a current title report nor had respondent insisted on one, apparently due to the time constraints involved as a result of the parties' intention that the closing take place on December 31, 1986 to avoid new tax laws that would come into effect as of January 1, 1987.

On April 13, 1988, the buyer's attorney, Jorge Gonzalez, Esq., wrote respondent that the IRS lien had not been satisfied and threatened legal action against respondent if the lien was not paid immediately (Exhibit C-8). Respondent was unsuccessful in her attempts to locate DelRey (who had since moved to Florida) to collect the monies from him to pay the IRS lien and eventually

paid the IRS lien with the funds escrowed for the Rupp judgment. On August 9, 1988, Gonzalez confirmed in a letter to respondent that the lien had been satisfied (Exhibit C-8A).

Thereafter, respondent received several requests from Rupp's attorney, Vincent Cozzi, Esq., that the judgment be satisfied. Because the judgment resulted from dog bite injuries received by Rupp while on DelRey's property, respondent intended to litigate the claim against DelRey's property insurance carrier. However, since she was unable to contact DelRey to assist in litigating the claim, she was unsuccessful in doing so.

On July 30, 1990, respondent issued a check for $10,478.30 ($6,200 plus interest) in full payment of the Rupp judgment. This resulted in a deficiency of $7,478.30. However, the available balance for her client, DelRey was only $3,000 which respondent had deposited from her personal funds on July 17, 1990. (Exhibit C-9).

Respondent testified that she believed she had surplus legal fees and personal fees in her trust account which, when added to the $3,000 she deposited for the benefit of the DelRey client account on July 17, 1990, would cover the $10,478.30 DelRey disbursement of July 30, 1991.

Respondent further testified that she was unaware that her use of the escrowed funds to pay the IRS lien constituted any wrong doing since the monies were being paid out on behalf of DelRey.

It is the OAE's position that respondent knowingly and intentionally used other client's monies for DelRey's benefit in order to cover her own negligence in failing to insist upon a current title search.

It is the respondent's position that she believed she had sufficient personal money in her trust account to cover the payment of the Rupp judgment.

• • •

COUNT TWO - KNOWING MISAPPROPRIATION - "LAPPING"

Count Two of the Complaint alleges that respondent was knowingly out-of-trust regarding her clients

Halustick, Benitez and Rodriquez and intentionally used a method known as "lapping" to accomplish her misuse of client funds. "Lapping" is the practice of using funds received for one client to cover monies needed for disbursement to another client. It is the OAE's position that respondent knowingly "lapped" client funds based on the following analysis:

Respondent deposited $1,000 on January 5, 1990 and $26,200 on January 10, 1990 for a total trust deposit of $27,200 regarding her client Halustick (Exhibit C-10). There were no trust disbursements regarding Halustick from January 5, 1990 until March 19, 1990 when $26,569 was disbursed to Halustick. The remaining funds totalling $507.49 were disbursed on April 27, 1990 and September 10, 1990 as fees to respondent.

Review of respondent's trust account bank statements for January, February and March 1990 (Exhibits C-11E, F & G) disclosed that respondent was out-of-trust 17 times on Halustick between January 23, 1990 and March 14, 1990 by amounts ranging from $820.31 to $16,837.29. As of March 14, 1990 the trust account balance was $10,362.71. (Exhibit C-11G).

Disbursement to Halustick was only possible after respondent deposited $16,555.78 on March 16, 1990 and $2,831.11 on March 20, 1990, totalling $19,386.89 on behalf of her client, Benitez. (Exhibit C-12).

The statement balance as of the date the Halustick check was issued, March 19, 1990, was $26,386.18. This balance was below the amount needed to cover the check to Halustick for $26,569.00, which did not clear the trust account until March 23, 1990 (Exhibit C-11G). Additional funds of $2,831.11 deposited for Benitez plus an unidentified deposit on March 20, 1990 for $1,001.28 allowed sufficient funds to cover the Halustick disbursement and left a trust balance of $3,172.63.

Therefore, respondent was again out-of-trust for Benitez by $16,214.26 until March 28, 1990 when $19,700 was deposited for her client Rodriquez. The trust balance after the Rodriquez deposit was $21,872.63.

Of the $19,700 received for Rodriquez, $15,896.31 was to be paid to the law firm of Greenberg, Benisch & Walden (Greenberg). Disbursements of Rodriquez' funds to Greenberg were made on March 30, 1990 and April 6, 1990 in the amount of $12,000 and $3,896.31.

Respondent made a partial disbursement of $7,000 to Benitez on March 30, 1990. The additional funds due on Benitez and Rodriquez were paid after additional funds were deposited to her trust account. On March 30, 1990, after disbursing $12,000 to Greenberg and $7,000 to Benitez, respondent's trust checkbook account balance was $2,365.10. However, she needed to have a balance of $19,086.89 to cover the funds held on behalf of Rodriquez ($6,700) and Benitez ($12,386.89).

Respondent was able to pay the balance due Benitez on April 5, 1990 and the balance due Greenberg on April 6, 1990 after making a trust deposit totalling $15,525.30 on April 3, 1990 and April 4, 1990 comprised of the following: $6,653.85 in personal rental monies collected, $6,539.19 from the sales of a mutual fund, and $2,331.92 representing trust deposits for clients Catalan, Perez-Vega and Milutin.

It is the respondent's position that any "lapping" that occurred was the result of her improvident management of her attorney trust account as well as a mistaken dual entry of an $80,000 deposit on February 28, 1990 and March 1, 1990. (Exhibit C-15). Respondent testified that the dual entry occurred during an extremely emotional time for her inasmuch as her grandmother had just passed away. Respondent testified that she did not notice the dual entry until sometime in early March when she received her bank statement and informally reconciled her check book stub record.

Respondent further contends that the splitting of the disbursements to Greenberg in the Rodriquez matter and to her client Benitez was at the specific request of her client in each case. Respondent testified that in the Rodriquez case, her client acknowledged that he owed at least $12,000 and authorized the first disbursement in that account [sic]. Upon receiving verification of the additional amount owed, respondent made the second disbursement of $3,896.31. With regard to the Benitez matter, respondent testified that her client requested an "advance" of $7,000 of her settlement monies and respondent accommodated her by making such a disbursement on March 30, 1990. Respondent stated that she did not make a full disbursement to her at that time, due to the fact that she did not have the Benitez file available (it was in her other office) in order to determine the exact amounts to be disbursed.

The OAE contends that it was only by "lapping" the funds received for one client that she could cover the monies needed for full disbursement to the other client.

It is the OAE's position that respondent intentionally split the disbursements to Greenberg in the Rodriquez matter and to her client Benitez because she knew she did not have sufficient funds to cover the full disbursement at the time each was made.

Further, the OAE questions respondent's "dual entry" explanation since the running balances which appear in the checkbook stub ledger do not reflect the second entry of the $80,000 deposit ever being added into the running balance. (Exhibit C-15).

• • •

COUNT FOUR - RECORDKEEPING VIOLATIONS

Count Four of the complaint alleges that respondent failed to maintain proper books and records as required by N.J. Ct. R. 1:21-6 in violation of RPC 1.15.

Respondent admitted that she failed to maintain individual client ledger cards (R. 1:21-6(b)(2)), receipts and disbursements journals for the trust and business account (R. 1:21-6(b)(1)), or prepare quarterly reconciliations for the trust account (R. 1:21-6(b)(8)) during the period encompassed by the audit.

Respondent testified that proper records were not maintained due to her lack of knowledge of the proper operation of an attorney's trust account, busy work and home schedule and staffing problems. She had no bookkeeper or accountant and was without a full-time secretary since June 1990. McKay testified that respondent was completely open, cooperative and conciliatory during the audit and, upon learning of the errors and deficiencies discovered during the audit, was surprised, chagrined and penitent. As a result of the audit, respondent has put into use in her office a trust account computer software program in order to properly maintain her books and records.

With regard to Count One, the Special Master found that respondent's "shoddy recordkeeping" made it difficult or impossible for respondent to have determined the amount of money in her trust account belonging to her or to any one client. Under those circumstances, the Special Master remarked, it would not be

unreasonable for respondent to believe that she had sufficient fees due her in her account to prevent the use of other clients' funds. The Special Master found a violation of RPC 1.15, but not of RPC 8.4(c).

As to Count Two, the Special Master concluded that the evidence did not clearly and convincingly show that respondent's conduct had been knowing or intentional. The Special Master found a violation of RPC 1.15.

Similarly, the Special Master found that, in Count Four, respondent's "inept recordkeeping resulted in her unknowing but inappropriate use of client funds." Again, the Special Master found a violation of RPC 1.15.

CONCLUSION AND RECOMMENDATION

Upon a *de novo* review of the record, the Board is of the opinion that the findings of the Special Master are supported by clear and convincing evidence.

With regard to the Count One, the Del Rey matter, the Special Master determined that it was not unreasonable for respondent, to have believed that she had sufficient fees in her trust account to cover the $10,478.30 check, without jeopardizing other clients' funds, given her "shoddy recordkeeping." In the absence of clear and convincing evidence of other violations, the Board agrees with the Special Master on this count and finds a violation of RPC 1.15 (improper recordkeeping).

In Count Two, the Special Master found that respondent was not guilty of the "lapping", as alleged; rather, her "inept recordkeeping" was responsible for the trust deficiency. RPC 1.15.

With regard to Count Four, there is no question, that respondent's attorney books and records were inadequate and that she was in violation of R.1:21-6 and RPC 1.15.[2]

It was the OAE's position during this proceeding that respondent was guilty of knowing misappropriation and not simply sloppy recordkeeping.[3] The Special Master was unable to so find by clear and convincing evidence. The requisite standard of proof of clear and convincing evidence was described in In re Pennica, 36 N.J. 401, 419 (1962) as follows:

> Because of the dire consequences which may flow from an adverse finding, however, we regard as necessary to sustain such a finding the production of a greater quantum of proof than is ordinarily required in a civil action, i.e. a preponderance of the evidence, but less than that called for to sustain a criminal conviction, i.e., proof of guilt beyond a reasonable doubt. Although the specific rule has not been articulated previously in this State, we declare it to be that discipline or disbarment is warranted only where the evidence of unethical conduct or unfitness to continue in practice against an attorney is clear and convincing. [Citation omitted].

Accord, In re Gross, 67 N.J. 419, 424 (1975); In re Rockoff, 66 N.J. 394, 396-397 (1975).

---

[2] There was no specific finding made with regard to respondent's commingling of her own funds and those of her clients in her trust account. She clearly left large amounts of legal fees in the account and placed personal funds directly into the account. The Board also makes no finding on this point.

[3] During the Board hearing, McCormick indicated that the OAE "has no serious disagreement with the findings of the Special Master (BT9/16/82 2)."

In another context, the clear and convincing standard was described in State v. Hodge, 95 N.J. 369 (1984), as

> that which 'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, 'evidence' so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' [In re Boardwalk Regency Casino License Application, 180 N.J. Super, 324, 339 (App. Div. 1981), mod., 90 N.J. Super. 156, 162 (App. Div. 1960].
> [Id. at 376]

Given the state of respondent's books and records, it is difficult to determine to a clear and convincing standard that she had sufficient knowledge of the amount of the funds in her trust account to form the requisite intent to knowingly misappropriate client funds. There is, however, no doubt, on the record before this Board, that respondent was out of trust and negligently misappropriated funds due to her questionable recordkeeping practices.

In the past, the discipline imposed for recordkeeping violations has ranged from a private reprimand to a lengthy suspension. In In re James, 112 N.J. 580 (1988), the choice between a suspension and a reprimand was discussed:

> That leaves a choice between the imposition of a term of suspension and the imposition of a stern public reprimand. In making this choice, the Board is mindful of the commentary appended in section 4.13 of the Standards for Imposing Lawyer's Sanctions, adopted by the Joint Committee on Professional Sanctions of the American Bar Association and approved in February 1986 by the ABA House of Delegates. That commentary reads in relevant part:
>
> > Reprimand should be reserved for lawyers who are merely negligent in dealing with client property, and who cause injury or potential injury to a client. Suspension or

> disbarment . . . is appropriate for lawyers who are grossly negligent. For example, lawyers who are grossly negligent in failing to establish proper accounting procedures should be suspended; reprimand is appropriate for lawyers who fail to follow their established procedures. Reprimand is also appropriate when a lawyer is negligent in training or supervising his or her office staff concerning proper procedures in handling client funds.
>
> [Id. at 589]

James involved an attorney who was found to be out of trust, due to grossly negligent recordkeeping practices for twenty-four years, which practices he had learned from his mentors. In imposing only a three-month suspension, the Court took into account James' otherwise unblemished record, good character and the lack of harm to his clients. See, also, In re Gallo, 117 N.J. 365 (1989) (three-month suspension imposed for inadequate recordkeeping practices); In re Librizzi, 117 N.J. 481 (1990) (six-month suspension imposed for grossly negligent recordkeeping and inadvertent misappropriation of funds, with no resulting harm to clients).

Recently, the Court imposed a public reprimand on an attorney whose reckless disregard of her trust and business accounting obligations led to the negligent invasion of client funds on numerous occasions. In recommending only a public reprimand, the Board noted, inter alia, that the unethical conduct occurred within a brief time period and that the attorney had recently been admitted to the bar. In re Lewinson, 126 N.J. 515 (1992). See, also, In re Fucetola, 101 N.J. 5 (1985) (public reprimand imposed for inadequate recordkeeping where no client was harmed); In re

Barker, 115 N.J. 30 (1989) (public reprimand imposed for grossly negligent recordkeeping resulting primarily from an inadequate system and improper supervision of his bookkeeper).

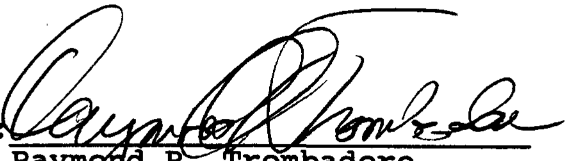
The Board is of the opinion that respondent was grossly negligent in her recordkeeping responsibilities. She apparently made no effort to keep required records, or to make any sense of the transactions taking place in her trust account. Unlike the attorney in Lewinson, respondent is not an inexperienced attorney, having been a member of the bar of New Jersey since 1978. While the Board recognizes that her record, since that time, has been untainted by previous ethics matters, those years at the bar should have taught respondent the magnitude of her recordkeeping responsibilities. The Board was particularly concerned by the fact that, had respondent's misconduct not been brought to light through the random audit program, it might have continued unchecked. The fact that no client was harmed by respondent's misconduct was, at best, fortuitous. Certainly, the potential for great harm existed as a result of respondent's unethical conduct.

The Board is not insensitive to the personal difficulties suffered by respondent, including her great financial losses. However, her misconduct was serious and merits the imposition of a three-month suspension. Accordingly, the Board so recommends.

The Board further recommends that respondent's accounts be periodically audited by the OAE. Two members dissented, believing a public reprimand to be appropriate in this matter. Three members did not participate.

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

Date: 11/5/1992

By: 
Raymond R. Trombadore
Chair
Disciplinary Review Board