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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-393

IN THE MATTER OF
DENNIS M. BARLOW,
AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: December 15, 1993

Decided: September 27, 1994

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

Respondent did not appear for oral argument.[1]

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 Susan Reach Winters. The three-count formal complaint charged respondent with violations of RPC 1.15 (knowing misappropriation and recordkeeping deficiencies), RPC 1.1(a)(gross neglect) and RPC 1.3 (lack of diligence).

Respondent was admitted to the New Jersey bar in 1976. He has no prior disciplinary record.

[1] In a letter-brief to the Board, dated December 8, 1993 and received on December 10, 1993 — five days before the Board hearing — respondent asked for a postponement or, in the alternative, that his letter-brief be accepted in lieu of oral argument. Respondent advised the Board that, for health and personal reasons, he was unable to appear.

On June 20, 1991, respondent was notified that he had been selected for a random compliance audit by the Office of Attorney Ethics ("OAE"). The original audit period encompassed records from June 1989 through June 1991. That period was subsequently expanded to cover records from September 1988 through November 1992. The OAE auditor made a total of four audit visits: July 16, 1991, October 18, 1991, March 18, 1992 and September 21, 1992.

At the time of the initial audit, respondent was unable to produce the following required books and records: client ledger cards for any transactions prior to 1990, receipts and disbursements journals, deposit slips, bank statements and canceled checks. Therefore, the OAE auditor, Mimi Lakind, attempted to reconstruct respondent's records during subsequent visits. She did so by obtaining some records from respondent himself and by subpoenaing others from respondent's bank. The reconstruction disclosed a shortage in respondent's trust account, which Lakind attributed to knowing misappropriation on respondent's part. On or about December 31, 1992, the OAE filed a formal complaint, charging knowing misappropriation in two matters.

THE SPINDEL/PREHODKA AND THE GIORDANO MATTERS
(knowing misappropriation)

Respondent represented Karen Spindel and Gregory Prehodka in the purchase of residential real estate from Blanche Goldstein. The closing on the property occurred on November 1, 1988. On or about that date, respondent deposited into his trust account the sum of $368,452.72. Thereafter, respondent made several

disbursements from those funds between November 2, 1988 and April 12, 1989. Exhibits OAE-8 through OAE-19. After the disbursements, the trust account had a balance of $1,809 to the credit of the purchasers. In fact, a review of the Uniform Settlement Statement ("RESPA") disclosed that the sum of $1,889 should have remained on deposit for the payment of title insurance ($1,589) and surveyor's fees ($300). The $80 shortage was attributed to an overpayment to the Passaic County Register for realty transfer tax. That overpayment is not the subject of any disciplinary charges.

Respondent also represented John and Joanne Giordano in the refinancing of their mortgage. Closing in that matter occurred on October 31, 1988. Respondent received and deposited into his trust account the sum of $79,140.63. Thereafter, respondent made several disbursements between November 4, 1988 and March 13, 1989. Exhibits OAE-18, OAE-19 and OAE-29-34. After those disbursements, a balance of $1,085.94 remained in the trust account to the credit of the Giordanos. In fact, the RESPA statement shows that the sum of $1,144 should have remained on deposit for the payment of title insurance ($794) and surveyor's fees ($350). The $58.06 shortage, attributed to a computational error, is not the subject of any ethics charges.

As of April 12, 1989 — over five months after both closings — respondent had not paid either the title insurance or the surveyors' fees relative to the Spindel/Prehodka and Giordano matters. As of that date, thus, there should have remained in respondent's trust account the sum of $2,894.94 attributable to

those clients. Nevertheless, on April 12, 1989, respondent drew to himself trust account check No. 654 in the amount of $2,894.94, the exact amount that should have remained on deposit in those two matters. OAE-16. Respondent then deposited that check (as cash) into his business account on or about April 14, 1989, as part of a total deposit of $2,969.94. Exhibit OAE-43. The memo portion of that check identified those client matters as the source of the funds. Prior to that deposit, respondent's business account had been overdrawn by $186.66. OAE-49. The deposit brought respondent's account into a positive position. In addition, from April 15, 1989 through May 3, 1989, respondent used these funds to pay other business and personal expenses. On May 3, 1989, after a check payable to Marina Associates (a casino) was presented for payment against the business account, the account was returned to a negative balance status.

Eventually, respondent paid the title insurance and survey invoices, using other funds. On June 14, 1989, seven and one-half months after the Giordano closing, he paid the NIA Title Agency invoice. The actual amount of that invoice was $594, not the $794 respondent had charged to his clients, pursuant to the RESPA statement. When respondent paid the NIA invoice, he paid the correct lower amount and failed to refund the $200 surplus to his clients. He paid the surveyor's bill in the Giordano matter on March 9, 1990, after the surveyor obtained a judgment against him.

Respondent paid NIA Title Agency's invoice in the Spindel/Prehodka matter on January 19, 1990, fourteen months after

the claim. He paid the surveyor, Ferwerda, on November 16, 1992, four years after the closing.

Respondent testified that, at the time that he drew the $2,894.94 trust account check payable to himself, he knew that he was withdrawing the Spindel/Prehodka and Giordano balances and that his action "zeroed-out" the trust balances for those clients. The withdrawal did not deplete the entire trust account balance. Apparently, approximately $1,000 remained in the trust account after the April 12, 1989 withdrawal. The OAE auditor, nevertheless, was unable to determine whether the amount remaining on deposit after that withdrawal was sufficient to satisfy then existing client obligations. In addition, the auditor apparently did not determine to whom those remaining funds were attributable. It is clear, however, that respondent did not claim that any of those remaining funds covered, at least partially, his client obligations. Indeed, respondent admitted that he knew that the withdrawn funds were earmarked for unpaid invoices for the title insurance and survey fees for both closings. He further admitted knowing that he was not entitled to those funds and that he did not have his clients' permission to use them. Nevertheless, respondent testified , while the "net effect" of the transaction permitted him to cover his business account overdraft and pay his personal expenses, it was never his intention to invade his clients' funds. Rather, he contended, it was always his intention to pay the invoices out of the business account. The demands of his practice,

however, combined with various personal difficulties, allegedly caused him to lose track of his original intention.

When asked by the Special Master why he had not paid the invoices out of his trust account, instead of transferring the funds to his business account, respondent replied that he thought it would be "easier" and "less embarrassing" for him to pay them out of his business account. Respondent could not recall what, if anything, had triggered his memory that the invoices remained unpaid. He remembered, however, being extremely embarrassed by the delay and thinking that it was easier to transfer the funds to the business account for payment. He admitted having an "uneasy feeling" when he made the transfer because he knew he was doing so, in effect, to conceal his failure to make the appropriate payments earlier.

Despite his alleged intentions, however, respondent did not issue the appropriate checks at the time he transferred the funds or for some time thereafter. When confronted with this by the OAE auditor, respondent referred to his actions as "indefensible."

In further support of his position that he did not intend to invade or use his clients' funds, respondent testified that, at the time of the transfer of the funds to his business account, he had no idea what his business account balance was. That was so because he did not consistently review his bank statements. Respondent did not reconcile either his trust account or his business account on a regular basis. Had he known his business account was overdrawn, respondent continued, he would have borrowed from friends or family

the funds needed to replenish it. While respondent admitted that he was usually advised by his bank when an overdraft occurred in his business account, he did not recall whether he had received notice that his account was overdrawn on April 12, 1989. He added that, on numerous occasions, the bank had honored his business account checks, notwithstanding an insufficient balance in the account. In this regard, respondent testified as follows:

Q. So then as far as you know, as far as can be born[e] out by any degree of investigation, there were no other funds in your business account except what is reflected here, that being the Giordano and Spindel funds, and the Rudnick deposit of $75, and the other small deposit of $650?

A. Clearly, as a result, that's, in fact, correct, because the beginning balance on April 11 is a negative $186.66.

* * *

Q. Clearly these could not have been any other funds in your business account at the time you wrote the checks?

A. In actuality, that's correct.

Q. Very good. Were you under a misimpression that things were otherwise?

* * *

A. My answer to that is that I was not aware that there was a negative balance in the account. And number two, it did not occur to me, nor did I expect that any funds, earmarked for the payment of title insurance on the surveys, would be used or taken by virtue of an overdraft or whatever else.

* * *

Q. Do you now recall that you did not receive an overdraft?

A. I don't recall whether or not I received it.

* * *

Q. Were you under the impression that there were other funds in that account?

A. I believe so, yes. And the reason I say that is that it would not be me to use funds to cover an overdraft. So, no, my recollection is that I was not aware of any overdraft in the account. And, at this point in time, I had already dealt with a series of checks that, under ordinary circumstances, would have severely overdrafted my account on many occasions. But as far a I know, they were always honored. I don't recall more than a couple of small checks and maybe two of the bigger checks, I don't know if it was before or after this, that weren't honored. I think it was after. My recollection is that they were pretty much honored.

Q. Well, what are you saying, are you saying you didn't have any idea what your balance in your general account was at that time?

A. This, I think, is a reasonable summary of the facts.

[T8/10/1993 150-52]

In order to refute respondent's allegation that he did not know that his business account was overdrawn at the time of the transfer, the OAE auditor interviewed Joseph McGuire, the bank's assistant manager. Although McGuire did not testify at the hearing, a transcript of his interview by the OAE auditor was admitted into evidence as OAE-63. McGuire stated that, if a customer overdrew his account, he or she would be notified either by mail or by telephone call. In respondent's case, McGuire would most often call respondent or tell him personally, when he came into the bank, that his account was overdrawn and that he needed to make a deposit. In short, according to McGuire, respondent would always be made aware of an overdraft in his account, regardless of whether the bank paid the check creating the overdraft. Respondent, in turn, testified that the bank would notify him of the

overdraft when it was "significant," "something more than $100, maybe more than $200." T8/10/1993 160.

Finally, in an attempt to explain what he characterized as the "stupidity" of his actions, respondent claimed that, between June 1988 and July 1989, he moved his office three times. He operated with no staff or secretary, had mail piled up for weeks, files unattended — all the while handling substantial matters in litigation. He admitted that he was neither familiar with his bookkeeping obligations nor had the time to learn them. He attributed his conceded improper actions to the condition of his records, for which he took total responsibility. He believed that his inadequate recordkeeping invited a number of situations — including the failure to make proper disbursements. In closing, respondent asked the Special Master to consider him "stupid" and "an idiot" — but not a "thief."

Although respondent admitted that he had a gambling problem until 1990, he did not assert that problem as a defense to the ethics charges. In addition, he maintained that he never used client money to satisfy his gambling debts.

* * *

The Special Master found that respondent's explanation for the transfer of trust funds to his business account was not credible. She considered it "more likely" that the transfer was motivated by respondent's need "to correct the negative position of his business

account and to satisfy some personal debts." Special Master's Report at 6. The Special Master found respondent's explanation of the transfer to be particularly unbelievable, in light of the fact that his clients' obligations were not, in fact, paid until several months after the transfer and, in some cases, several years later. While acknowledging that it was likely that respondent's shoddy recordkeeping made it difficult for him to determine the balance in his trust and business accounts, the Special Master was unable to conclude that respondent's "inept" recordkeeping had led to a negligent, as opposed to a knowing, misappropriation of client funds. She, therefore, found respondent guilty of knowing misappropriation, "and not simply sloppy recordkeeping." The Special Master recommended public discipline for respondent's violations of RPC 1.15 and RPC 8.4(c).

COUTO, GRIFFITH, SPINDEL/PREHODKA AND GIORDIANO MATTERS
(gross neglect, lack of due diligence, failure to promptly disburse client funds).

The facts are accurately set forth in the Special Master's Report and admitted by respondent:

> Respondent represented Mr. and Mrs. Couto in a residential real estate closing in October 1988. Respondent represented Dr. and Mrs. Griffith in the refinance of the mortgage on their home in October 1989. In both cases, respondent was responsible for the payment of certain real estate taxes due and owing by his clients.
>
> At the time of the audit conducted by the Office of Attorney Ethics on July 16, 1991, the amount owed for the real estate taxes remained unpaid and on deposit in respondent's trust account to the credit of his clients Couto and Griffith. As of that time, respondent had not

properly disbursed these funds to pay the real estate taxes nor had he returned them to his clients.

When these matters were brought to respondent's attention at the time of the audit, respondent made the appropriate inquiries, admitted his error to his clients and refunded the amounts owed to them.

* * *

In connection with the Spindel/Prehodka and Giordano closings respondent failed to cancel the mortgages of record as of July 1991. These matters were brought to respondent's attention during the Office of Attorney Ethics' audit whereupon the respondent attended to the discharge of the mortgages. While no harm resulted to any of respondent's clients, the potential for great harm existed and may have occurred if not brought to light during the audit.

At the hearing, respondent admitted that he was negligent in failing to disburse funds to pay the real estate taxes or to reimburse his clients in the Couto and Griffith matters and in failing to timely cancel the mortgages in the Spindel/Prehodka and Giordano matters.

[Special Master's Report at 8-9].

There is no claim that respondent failed to satisfy any of the mortgage balances. Respondent was charged only with the failure to cancel those mortgages of record.

* * *

The Special Master found that respondent's failure to handle these matters in a timely and diligent manner and his failure to promptly deliver funds to his clients that they or third persons were entitled to receive constituted violations of RPC 1.1, RPC 1.3 and RPC. 1.15.

RECORDKEEPING

The Special Master's Report accurately sets forth the facts with regard to respondent's recordkeeping practices. In addition, respondent admitted those facts, both during the DEC hearing and in his answer to the complaint:

> Respondent admitted that he 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)), duplicate deposit slips and bank statements (R. 1:21-6(b)(7); or prepare quarterly reconciliations for the trust account (R. 1:21-6(b)(8)) during the period encompassed by the audit.
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> Respondent testified that proper records were not maintained due to his lack of knowledge of the proper operation of an attorney's trust account, busy work and home schedule and lack of staff to assist him. Respondent had no bookkeeper or accountant and was in the process of moving his office during the period encompassed by the audit.
>
> Respondent and Lakind testified that he was embarrassed by the errors and deficiencies discovered by the audit and fully cooperated with the OAE's auditor. Respondent hired an accountant to assist him in the audit and in properly maintaining his books and records at the auditor's suggestion.
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> However, respondent was an experienced attorney having been in practice for 15 years at the time of the audit. He had apparently made no effort to establish any type of recordkeeping procedures in conformance with the Rules of Court and may never have done so had the audit not taken place. I find that respondent's reckless disregard of his accounting obligations and grossly negligent recordkeeping constitutes a clear violation of R. 1:21-6 and RPC 1.15.3[sic].
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> [Special Master's Report at 10-11]

CONCLUSION AND RECOMMENDATION

Following an independent 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 violated RPC 1.15, RPC 1.1(a) and RPC 1.3.

The Board is divided, however, on the issue of knowing misappropriation. Three members conclude that respondent knowingly utilized for his own benefit funds that his clients had entrusted to him for particular purposes. Those members do not find credible or plausible respondent's explanation that he had transferred those funds from his trust account to his business account because he was embarrassed by his delay in making the payments to the title company and the surveyor. Respondent's claim that he wanted to disburse the closing proceeds through his business account is directly contradicted by his own actions. After transferring the funds to his business account, respondent made no effort to make those payments and used the funds for personal and business debts. In fact, the required payments on behalf of his clients were not made until months, even years, after the transfer of the funds. Respondent's contention that he forgot to make the payments is simply not worthy of belief.

Those members' conclusion that respondent intended to use his clients' funds as his own is further reinforced by the fact that the transferred funds made their way into respondent's business

account as cash. According to the OAE auditor, that means that respondent either cashed the check first and deposited the trust funds into his business account in the form of cash or that he specifically requested that the trust account check go in as cash. In those three members' view, such actions or such a request must, necessarily, be deemed as knowledge on respondent's part that he needed immediate availability of those funds to cover the existing business account overdraft and other personal expenses.

Bound by precedent, those three members recommend that respondent be disbarred. In re Wilson, 81 N.J. 451 (1979). Their decision to recommend disbarment is based solely on the recognition that, since Wilson, the Court has invariably disbarred attorneys who have knowingly misappropriated client funds. For those members believe that, in this instance, respondent should be spared from disbarment because (1) no one was injured by his actions, (2) he mistakenly believed that he could have used his clients' funds and then pay the bills with his own funds in view of his personal obligations to satisfy them and (3) he had an unblemished professional record prior to this matter.

One member, on the other hand, finds no knowing misappropriation. In that member's view, the funds used by respondent were not, in a strict sense, client funds. Rather, the funds were reimbursements by the clients to respondent for costs for which he was personally liable. Otherwise stated, it was respondent's obligation, not his clients', to pay for those expenses inasmuch as he personally contracted for them with the

title company and the surveyor, albeit for his clients' benefit. According to that member, the fact that the surveyor obtained a judgment against respondent shows that the surveyor looked to respondent, and not to his client, for the satisfaction of the debt. Under those circumstances, that member believes that the funds advanced by respondent's clients for title insurance and for the survey were not strictly trust funds and, consequently, did not have to be kept inviolate in respondent's trust account; they were reimbursement for business costs and, as such, could have been deposited in respondent's business account. In re Stern, 92 N.J. 611, 619 n.2 (1983).

That member, thus, believes that respondent's actions amounted to a knowing appropriation, but not to a knowing misappropriation. That member is also of the view that, even if it is found that the $2,894.94 were trust funds and, as such, had to be safeguarded in respondent's trust account, respondent's honest, but mistaken, belief that they were not strictly trust funds and that he could transfer them to his business account should save him from disbarment. That member further finds it possible that respondent simply forgot to tend to the payment of the bills after the transfer of the monies to his business account, particularly because he was not being dunned by the title company and the surveyor.

Lastly, in that member's view, the lack of notice to the bar both that such funds might be trust funds and that the failure to keep them inviolate until final payment may result in disbarment

militates against disbarment in this case. That member would impose a six-month suspension for respondent's recordkeeping violation (RPC 1.15(d)), gross neglect (RPC 1.1(a)) and lack of diligence (RPC 1.3).

Two members, in turn, find no clear and convincing evidence that respondent's use of the trust funds for personal purposes was the product of design, instead of neglect. Those members believe that, under certain circumstances, the transfer of trust funds to a business account, while improper, does not rise to the level of knowing misappropriation if the funds are kept intact. In fact, those members believe that, had respondent paid out those bills immediately or within a short period of time, anyone would be hard-pressed to find knowing misappropriation. Those members cannot ignore the possibility that respondent simply forgot to pay the bills after the transfer. In short, they are of the opinion that the proofs do not clearly and convincingly show that respondent intended to use those funds for his own benefit, as opposed to his inadvertent use of the funds because of his shoddy bookkeeping and sloppy office practices. Those two members would impose a two-year suspension for respondent's negligent misappropriation, recordkeeping violations, gross neglect and lack of diligence.

Three members did not participate.

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

Dated: 9/27/1994

By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board