SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 89-097

IN THE MATTER OF	
IRA L. ZALEL	
AN ATTORNEY-AT-LAW	

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 19, 1989

Decided: December 6, 1989

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

Stephen S. Weinstein appeared on behalf of respondent.

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

This matter is before the Board based upon a presentment filed by the District IIB Ethics Committee.

Respondent, who was admitted to the New Jersey bar in 1975, is a sole practitioner in Hackensack whose general practice of law concentrates on personal injury matters. While attending law school, respondent worked as a law clerk for an attorney in Paterson, who gave him "quite a bit of responsibility," including authority to sign trust account checks. Following his admission to the bar, respondent first worked as an associate with a sole practitioner in Passaic and then with a law firm with which that attorney merged his practice. Ultimately, respondent started his

own practice.[1] Initially, respondent's clients were family members and friends. Because of his lack of funds, he leased space from an attorney in Paterson. As described by respondent,

> [I] basically rented myself to [that attorney] to try cases half of the time. We had an agreement that he would pay me a sum of money in exchange for giving him 20 or 30 hours a week of trial time, which was enough money for me to support myself and my wife, and in addition to that, he gave me the space and the use of an office to promote my own practice, so that although I didn't really work for him, I was a three quarter independent contractor who worked for him, and that's how I started my own practice.
> [T19-11 to 20.][2]

Eventually, respondent moved his office to its current location in Hackensack.

Respondent did not employ a bookkeeper or an accountant to maintain his books and records. Respondent testified that "... I tried to do everything myself. I was working maybe 60, 70 hours a week, doing this stuff, writing all the checks, doing my own accounting, doing my own payroll . . . ." (T24-23 to 25-1).

On March 1, 1985, the bank dishonored respondent's trust account check No. 1098 in the amount of $13,837.52, drawn to the order of Vera and Levon Tutundjian, respondent's clients. That check resulted in an overdraft of $6,161.22 in respondent's trust account.

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[1] Respondent first opened his trust account in 1980. The record is not entirely clear as to when he opened his own law practice.

[2] T denotes the transcript of the district ethics committee hearing on November 23, 1988.

On March 15, 1985, the Office of Attorney Ethics ("OAE") sent a letter to respondent requesting a written explanation of the overdraft. By letter dated April 2, 1985 (Appendix 2 to Exhibit C-3), respondent gave a false explanation to the OAE. In that letter, respondent contended that the defendant's carriers were to pay the $21,300.00 Tutundjian settlement in two drafts of $11,000.00 and $10,300.00; that one draft had been received and deposited into his trust account on February 19, 1985; that the clients requested him to expedite the receipt of the second draft; that he telephoned the carrier and was assured that the settlement draft had been mailed to him; that he wrote a trust account check and instructed his secretary not to release it to the clients until the second draft had been deposited in the trust account; that another secretary in his office, unaware of his instructions, delivered the check to the clients prior to the deposit of the draft; and that the draft was finally deposited in his trust account on March 2, 1985. In fact, as demonstrated by an audit conducted by William J. Morrison, an accountant retained by the OAE, the proceeds of the Tutundjian settlement -- totalling $16,000.00, not $21,300.00 -- were received in one draft and were deposited into respondent's trust account some three months earlier, on November 15, 1984.

To support his false explanation, respondent fabricated a

client ledger card[3] (Appendix 3 to Exhibit C-3), showing the deposit of two drafts to the Tutundjian account in the total amount of $23,100.00. These drafts, however, represented proceeds from matters related to two other clients. The ledger card also showed a fictitious disbursement to respondent for legal fees and expenses in the amount of $7,462.48. The disbursement for legal fees and expenses had actually been for a lesser amount -- $2,162.48 -- on November 2, 1984, prior to the deposit of the Tutundjian settlement proceeds into respondent's trust account on November 15, 1984. See Exhibit C-2, Revised Affidavit of William J. Morrison ("Morrison Affidavit").

At the committee hearing, respondent admitted that the explanation given to the OAE was false:

> Q. Tell us, what, in essence, the letter said, and would you tell us why did you respond [sic] not --
>
> A. Well, basically, what I attempted to do was to blame the circumstances, which were not really correct, upon -- for the bouncing of the check. You see, I kept such lousy -- I was -- really didn't keep records. I did keep records, but I would write a check out and I would list it in the book and I had this one write system at one time, and then I found I was incapable of using that because I really could never quite understand how to use the system, although the accountant that prepared my income tax insisted that was a better way of doing things. I really couldn't do it. In any event, what happened was that I got either a call or a letter from [the OAE Director], I don't recall which, and I said to myself, this is a big problem, and I didn't know what to do, so -- I remember it was one of the most scarry [sic] feelings I ever had in my whole life -- maybe the most scared [sic].

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[3] During his review of respondent's books and records, Mr. Morrison discovered the actual ledger card (see Appendix 8-1 to Exhibit C-3).

And I went back to the office and I tried to make heads or tails out of the records that I did have as to what had happened. So I pulled out the bank stubs and the checks and went through the things, and I jotted down some numbers that seem [sic] to make sense.

The fact of the matter is they were not true, okay, and I tried to put it together in a way that would make sense and make the problem go away.

The fact of the matter is that I never did take anybody's money ever on any case or under any circumstances, and I felt that this problem went away, that was the end of it, and [the OAE Director] had said to me there were sometimes logical explanations for these things, and I attempted to offer one.

Q. But it was false?

A. It was false, no question about it.
[T22-8 to 23-18.]

According to the Morrison Affidavit, the March 1, 1985 overdraft in respondent's trust account was caused by a seemingly inadvertent deposit of trust funds of clients other than the Tutundjians, totalling $16,100.00, in respondent's **business** account on February 19, 1985. Even in the absence of this inadvertent misdeposit, however, respondent's trust account would have been out-of-trust on that date because the Tutundjian funds were not on deposit.

The Morrison Affidavit states that respondent's false explanation of the overdraft to the OAE was designed to conceal respondent's practice of systematically withdrawing fees from his trust account prior to the receipt of funds upon which the fees could be legitimately drawn. See Exhibit C-2, paragraph 6. Mr. Morrison found that respondent did so in at least eight personal

injury cases, as follows (Appendix 11 to Exhibit C-3):

Client	Date of Advanced Fee	Check Amount	Date Proceeds Deposited	Premature Fee Withdrawal (By Days)	Proceeds Amount
Mancuso	06/01/84	2,940.00	06/12/84	11	7,500.00
Goetz	07/02/84	1,251.67	07/17/84	15	3,500.00
Said & Khalil	08/15/84	2,819.10	09/13/84	29	6,000.00
Saleh	06/28/84	3,445.47	07/24/84	26	10,222.40
Palumbo	10/12/84	1,500.00	10/31/84	19	3,500.00
Abdeljaver	10/25/84	1,590.67	01/16/85	83	3,650.00
Mayers	10/02/84	1,990.00			
	10/12/84	1,000.00			
	10/16/84	1,000.00	11/19/84	48	4,800.00
Tutundjian	11/02/84	2,162.48	11/19/84	17	16,000.00

After the audit, it came to light that respondent had prematurely withdrawn fees in six additional cases, as follows (Exhibit C-8):

Client	Date of Advanced Fee	Check Amount	Date Proceeds Deposited	Premature Fee Withdrawal (By Days)	Proceeds Amount
Lucky	09/27/84	1,336.00	09/24/84		750.00
			11/05/84	39	2,250.00
Aponte	12/10/84	1,815.73	01/23/85	44	4,250.00
Falk	12/10/84	2,812.00	01/07/85	28	7,500.00
Quiroz	12/14/84	1,253.76	03/06/85	82	2,750.00
Mendez	03/04/85	2,983.33	03/11/85	7	7,850.00
Librizzi	05/28/85	1,718.73	06/05/85	8	5,000.00

Respondent conceded that he had withdrawn his fees prior to the receipt of the settlement funds from which they could be drawn (T47, 48, 49). He explained to the Board that he assumed that this practice was proper because he had seen the "attorney that [he] worked for do it on several occasions (BT23-18 to 22).[4] Yet, at the ethics hearing, respondent testified that he "had no idea" whether that attorney was in the habit of withdrawing fees before the receipt of settlement funds (T66-5 to 8).

Respondent did not dispute any factual information contained in Mr. Morrison's affidavit (T49-18 to 19). He denied, however, having knowledge that there were no monies in the trust account to cover his legal fees. He explained that

> A. . . . the way that monies came in and out of my office was so slipshod, okay, that if you asked me about these specific cases, I really don't know.
> [T50-7 to 11.]
>
> . . .
>
> Q. Now, is it your impression, or was it your impression during the period of time we're talking about, the nine or ten month period back in '84 or '85, that had all the clients -- had all the proceeds from cases been deposited into your trust account?
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> A. Everything would balance out.
> [T78-4 to 10.]

At no time did respondent claim that his trust account contained personal funds to cover the withdrawal of his legal fees in advance of the receipt of settlement funds. He contended that

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[4] BT denotes the transcript of the Board hearing on July 19, 1989.

he did not know that it was unethical to draw a fee prior to the deposit of settlement proceeds (T51, 52). He claimed to be unaware of In re Wilson, 81 N.J. 451 (1979), and of its holding.

Respondent was able to accomplish premature withdrawals of fees by obtaining his clients' authorization, in advance of the receipt of settlement funds, to endorse the settlement draft in their behalf. Respondent would have his clients sign a closing letter listing the amount of the gross settlement, the disbursements for legal fees and costs, and the net recovery. The letter also contained the following language:

> I HEREBY AUTHORIZE MY ATTORNEY, IRA L. ZALEL TO EXECUTE THE SETTLEMENT DRAFT IN THIS MATTER AND FURTHER AUTHORIZE THE ABOVE DISBURSEMENTS. [Appendix 9 to Exhibit C-5.]

At the ethics hearing, respondent testified that he was unaware of the impropriety of employing such a closing letter. It was his belief at the time that

> . . . this vehicle was a great service, in my opinion, to my clients, okay.
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> . . .
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> . . . if you knew my clients, you would know that, at least, 50 percent of the time, and that's no exaggeration, their addresses change at least once, and maybe more than once from the time they first come in to my office until the time the case is over.
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> Number two, it's a practice in my office now that my clients don't believe in mail, okay. I get very few letters mailed to me from my clients. Most of the time they come to my office, physically, even if it's a half hour ride, bring the letter or money or check or whatever it is that they want me to see, and they bring it to me physically. Many of my clients don't have telephones, although some of them do, okay. We have to call their families and friends to get them to come over. Communicating with the people that I represent is a

cumbersome procedure, and in order to avoid some of the pit falls, okay, it was determined by me at one time, and probably originated or generated from the request of a client, if I recall in one specific instance, and I said to myself, hey, that's a good idea, it makes things go a lot easier, that I decided to do it as a general rule and get the money out as quickly as possible, and so were the clients. I mean, clients would be coming in asking me to borrow money, give them money, whatever, and I would. The easiest way seemed to be to have them, instead of having to make two stops down to my office, okay, make one stop, and what they would do is they would sign the letter, and they would understand that when the check came in, I would sign their name on the checks. Checks usually have two names, their name and my full name. Deposit the check, and then I would draw them out a check for the net amount, and pay myself.

[T30-20 to 31-8.]

Paragraph three of the Morrison Affidavit states that respondent conceded having advanced fees to himself because of "cash flow problems as a new practitioner." In his Answer, respondent denied that he made such an admission to Mr. Morrison. At the committee hearing, however, respondent testified as follows:

Q. . . . you told [Mr. Morrison] that . . . yes, you did make a practice of making advance fees to yourself, did you not?

A. I'm not going to deny that. I don't know that if I did or if I didn't. Mr. Morrison and I sat down and talked, and whatever I said I said frankly, and if he says that I said that, I'm not going to deny it. I don't have any specific recollection.

Q. Did you also admit to him, at that time the reason you did it was because of your cash flow problem?

A. Well --

Q. Did you make that statement to him? Yes or no.

. . .

A. I don't deny that, but I don't recall it either, specifically, making that statement.

[T54-9 to 55-12.]

. . .

A. I'm not going to deny that I didn't say that I didn't have cash flow problems. I don't recall ever saying that. But if I said it and [Mr. Morrison] says I said it, then I said it.
[T56-23 to 57-1.]

The audit, which encompassed the period June 1, 1984, to June 30, 1985, also revealed that, during the time that respondent was prematurely advancing fees to himself, he was out-of-trust an average of $25,000.00 per month, as follows:

Month	Minimum Required Client Balance	Adjusted Trust Account Balance	Amount Out-of-Trust
September 1984	$ 30,647.97	$ 8,505.29	$ 22,142.68
October 1984	33,315.90	7,558.33	25,757.57
November 1984	50,284.52	27,485.95	22,798.57
December 1984	53,527.02	31,134.36	22,392.66
January 1985	29,717.96	2,994.74	26,723.22
February 1985	43,027.54	23,023.18	20,004.36
March 1985	95,769.77	68,165.10	27,604.67
April 1985	124,821.28	87,043.56	37,777.72
May 1985	126,840.23	86,398.16	40,442.07
June 1985	20,891.14	18,377.21	2,513.93
			$248,157.45

In his affidavit, Mr. Morrison pointed out that respondent was "probably out of trust by more than the above amounts." As a result of respondent's poor records, however, Mr. Morrison was unable to identify all client trust deposits.

In June 1985, respondent deposited personal funds into his trust account, in the amount of $31,602.75, as follows:

1. June 19, 1985 $27,957.43 (Appendix 13-1 to Exhibit C-3)
2. June 20, 1985 $ 1,900.00 (Appendix 14-1 to Exhibit C-3)
3. June 25, 1985 $ 1,745.32 (Appendix 15-1 to Exhibit C-3)

Respondent testified that he did not realize that his trust account was out-of-trust until he prepared for the audit, whereupon he deposited personal monies into the account to cover the shortfall (T33, 34).

In addition to disbursing fees to himself prior to receipt of the settlement funds, respondent delayed payment to his clients for considerable periods of time after the deposit of those funds in his trust account. Some examples follow (Appendix 11 to Exhibit C-3):

Client	Date Proceeds Deposited	Date Payment Made To Client	Number Of Days
Mancuso	6/12/84	08/17/84	66
Goetz	7/17/84	11/08/84	114
Said & Khalil	9/13/84	11/10/84	58
Saleh	7/29/84	01/29/85	189
Palumbo	10/31/84	01/23/85	85
Mayers	11/19/84	06/18/85	211
Tutundjian	11/19/84	02/20/85*	113

*Check bounced - payment made 3/11/85.

As can be seen from the above chart, the delay ranged from

fifty-eight to 211 days. At the committee hearing, respondent claimed that one of the clients, Mrs. Mayers, had requested that he "hold on to the money because she was not around" (T76-20 to 23). Respondent had no recollection of the reasons for the delay in the remaining cases.

The audit also revealed that respondent did not maintain his books and records pursuant to R. 1:21-6. More specifically:

1. there were no cash receipts or cash disbursements journals;

2. client ledger cards were incomplete and inaccurate;

3. deposit slips were not maintained; and

4. the trust account was not reconciled to the client ledger cards and the bank statements. See Exhibit C-2, at 3.

At the conclusion of the ethics hearing, the panel found that respondent had failed to comply with the recordkeeping provisions of R. 1:21-6; had invaded client funds by withdrawing legal fees in advance of the receipt of settlement proceeds; had failed to promptly pay funds the clients were entitled to receive; and had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, by submitting to the OAE a false explanation of the overdraft and a fictitious client ledger card. The panel concluded that respondent had violated R. 1:21-6; RPC 1.15(a) and

(d); RPC 8.1(a); and RPC 8.4(c).[5]

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the full record, the Board is satisfied that the conclusions of the district ethics committee in finding respondent guilty of unethical conduct are supported by clear and convincing evidence.

As the audit conducted by Mr. Morrison revealed, respondent committed numerous recordkeeping violations by failing to maintain cash receipts and cash disbursement journals, deposit slips, and client ledger cards, and by failing to reconcile the trust account balance to the bank statements and to the ledger cards, in violation of DR 9-102(B)(3) and (C) and RPC 1.15(d).

Moreover, respondent engaged in a systematic practice of withdrawing anticipated legal fees for a particular client without having funds on deposit for that client in his trust account. Simply put, respondent invaded the funds of one client to advance to himself fees owed by another client. As the above factual recitation demonstrates, respondent did so in at least fourteen instances. See Appendix 11 to Exhibit C-3 and Exhibit C-18. In some cases, such as in Abdeljaver and Quiroz, respondent withdrew his legal fees as many as eighty-three days prior to the deposit

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[5] The Rules of Professional Conduct replaced the Disciplinary Rules effective September 10, 1984. Respondent's unethical conduct occurred both before and after that date. Hence, both the Disciplinary Rules and the Rules of Professional Conduct apply.

of the relevant settlement funds.

Respondent's contention that he was unaware that he was out-of-trust because of his shoddy bookkeeping practices and that he believed that "everything would balance out" is unworthy of belief. The Board finds it incredible that respondent -- a sole practitioner whose cases did not generally culminate in settlements of inordinate sums of money* -- could not have known that, in at least seven of the fourteen matters, anticipated legal fees had been withdrawn four weeks, rather than a mere few days, before the deposit of corresponding settlement funds. The fact that respondent had such knowledge is corroborated by respondent's admission to Mr. Morrison that respondent advanced fees to himself because of cash flow problems.

In his letter-memorandum to the Board, dated July 7, 1989, respondent's counsel argued that the ethics violations in this matter closely parallel those found in Matter of Barker, 115 N.J. 30 (1989); Matter of Gill, 114 N.J. 225 (1989); Matter of Grabler, 114 N.J. 1 (1989); and Matter of James, 112 N.J. 580 (1988). The Board finds no merit in that argument. Those cases dealt with sloppy recordkeeping practices that resulted in the negligent misappropriation of client funds. There was no knowing, repetitive practice of advancing legal fees prior to the receipt of settlement funds in any of those cases.

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* The record reflects that, in the fourteen matters where respondent prematurely withdrew legal fees, the settlement amounts ranged from $750.00 to $16,000.00.

This situation is identical to the one reviewed by the Court in Matter of Warhaftig, 106 N.J. 529 (1987).[7] There, the attorney withdrew legal fees in advance of real estate closings, which "advances" he subsequently replaced when the funds for the closings were received. Warhaftig admitted that his actions were necessitated by the "gigantic cash flow burden" that he experienced at the time. Warhaftig also admitted that he was aware of the impropriety of his actions. The Court saw no distinction between the facts then under scrutiny and the Wilson rule. It ordered that Warhaftig be disbarred for the knowing misappropriation of client funds. The only distinction between Warhaftig and this matter is the candor exhibited by respondent Warhaftig.

Seldom is there an outright admission by an attorney that he or she knew, at the time of the occurrence, that he or she was misusing client funds. In the absence of such an admission, circumstantial evidence may lead to the conclusion that a lawyer knew or "had to know" that client funds were being invaded. See Matter of Johnson, 105 N.J. 249, 258 (1987). Like the committee, the Board concludes that the evidence clearly and convincingly establishes that respondent knew that he was invading client funds for his personal benefit. This conclusion is corroborated by respondent's deceptive explanation of the overdraft to the OAE and

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[7] Respondent's counsel argued that Warhaftig is inapplicable because respondent's conduct predated Warhaftig. The Board rejects this argument. A review of Warhaftig shows that the Court decided that matter by applying the Wilson rule. Wilson was decided in 1979, long before respondent's ethics violations.

by his contemporaneous submission of a fabricated client ledger card, in violation of RPC 8.1(a) and RPC 8.4(c). The record is clear that respondent carefully planned the manufactured explanation to the OAE. No degree of panic allegedly experienced by respondent could justify his unscrupulous conduct.

Respondent's unethical conduct did not stop at the most serious of the violations committed by an attorney : the knowing misappropriation of client funds. He consistently and unjustifiably delayed the disbursement of funds to which his clients were entitled, in violation of DR 9-102 (B)(4) and RPC 1.15(b). In the eight cases reviewed by the auditor, the delay ranged from fifty-eight to 211 days.

Respondent also violated the principles of In re Conroy, 56 N.J. 279 (1970), where the Court condemned the practice of obtaining clients' authorizations to endorse their names on their settlement checks.

In view of the respondent's knowing misappropriation of trust funds, the Board unanimously recommends that he be disbarred. The mitigating factors enumerated by the committee are irrelevant to a sanction less than disbarment. Matter of Noonan, 102 N.J. 157, 160 (1986). Two members did not participate.

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

Dated: 12/6/1989

BY: Raymond R. Trombadore

Raymond R. Trombadore
Chair
Disciplinary Review Board