

Book

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket Nos. DRB 99-369 and  
DRB 99-370

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IN THE MATTER OF :  
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EDWARD J. BERGMAN :  
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AN ATTORNEY AT LAW :  
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IN THE MATTER OF :  
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MICHAEL T. BARRETT :  
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AN ATTORNEY AT LAW :  
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Decision

Argued: December 16, 1999

Decided: April 12, 2000

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

Arnold C. Lakind appeared on behalf of respondents.

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

These related matters were before us based on a stipulation signed by the Office of Attorney Ethics ("OAE") and respondents. In the stipulation, respondents admitted that they violated *RPC* 1.15(a) (negligent misappropriation of client funds), *RPC* 1.15(d) and *R.* 1:21-6 (recordkeeping deficiencies) and *RPC* 5.3(b) (failure to supervise nonlawyer employee).

Respondents Bergman and Barrett were admitted to the New Jersey bar in 1974 and 1982, respectively. Neither respondent has any prior disciplinary history. They practice law as a partnership known as "Bergman & Barrett" in Skillman, New Jersey.

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On October 20, 1997 First Constitution Bank notified the OAE of an overdraft in respondents' trust account. This notification prompted the OAE to conduct a select audit of respondents' trust and business accounting records. The auditor determined that the overdraft resulted from an embezzlement by a nonlawyer employee, Arlene Hansen, who had been employed by the firm as a secretary, bookkeeper and office manager since May 1993. Respondent Bergman had been serving as guardian for Blanche W. Peters, an incompetent. Most of the funds that Hansen embezzled were from the *Peters* guardianship

accounts. Respondents discovered the embezzlement in mid-October 1997 and reported it to the Somerset County Prosecutor's Office.

According to the OAE investigative auditor's report, from December 1994 through September 1997, Hansen made unauthorized transfers of funds from the firm's business and trust accounts and from the *Peters* guardianship account, in the amount of \$359,897.50. Of that sum, \$293,117.17 represented unauthorized transfers from the guardianship accounts to the trust and business accounts. The balance of \$66,779.33 represented various transfers between the trust and business accounts. The effect of these transfers was a \$15,724.77 trust account shortage. After Hansen transferred funds from the guardianship and trust accounts to the business account, she made disbursements to herself from the business account. Ultimately, Hansen embezzled the entire \$359,897.50 sum.

Hansen used several methods to remove the funds from the firm's accounts for her own use. In some cases, she issued checks to herself as "reimbursement" for various items or issued checks payable to cash, with different explanations appearing in the "memo" section of the check. Hansen then endorsed the checks payable to cash. In addition, Hansen sometimes issued duplicate payroll checks to herself. In one month, for example, she disbursed eight payroll checks to herself, instead of four. Hansen also established a phony business entity called D & D Express Messenger Service ("D & D") and opened a bank account under that name. She routinely issued checks payable to D & D, in amounts from \$75 to \$1,000, and then deposited them in the D & D bank account. Whether the checks

were payable to Hansen, cash or D & D, Hansen obtained Bergman's or Barrett's signatures under false pretenses or simply forged their signatures. Hansen used some of these funds to pay interest penalties incurred as a result of her failure to timely satisfy mortgages after real estate closings.

Respondents replenished the \$15,724.77 trust account shortage with two deposits totaling \$12,388, made during September and October 1998. The remainder of the shortage represented fees to respondents, not client funds. As of October 31, 1998 the trust account had a \$1,038.91 surplus.

Hansen was solely responsible for the recordkeeping of the trust and business accounts. Her duties included receiving funds, preparing bank deposit slips, making bank deposits, preparing checks, posting entries to the accounting records, billing and reconciling the bank accounts. Respondents did not contemporaneously review the bank statements. They assumed that she was properly reconciling the bank accounts. Hansen was a trusted employee and had been favorably recommended by a prior employer whose judgment respondents respected.

The audit revealed that (1) a schedule of clients' ledger accounts was not prepared and reconciled quarterly to the trust account bank statement and (2) clients' ledger cards had debit balances. It was noted that recordkeeping deficiencies cited in a previous audit in 1991 had been corrected.

Respondents admitted violations of *RPC* 1.15(a) and *RPC* 5.3(b), that is, that they had neglected their duty to properly safeguard client assets and to adequately supervise Hansen, a nonlawyer employee, thereby causing the embezzlement of guardianship funds totaling \$293,117.17. Respondents further acknowledged that, because of the above inadequate supervision, \$66,779.33 had been improperly transferred by Hansen between the trust and business accounts for overdrafts, bank charges and interest penalties associated with her embezzlement scheme. Respondents also conceded that the recordkeeping deficiencies were the result of their lack of attention to their attorney trust account. According to the stipulation, there is no evidence that respondents took part in the thefts. Respondents fully cooperated with the OAE, hired a certified public accountant to reconstruct all accounts and, as of the date of the stipulation, were in full compliance with the recordkeeping rules.

A bonding company reimbursed the losses incurred by the embezzlement from the *Peters* guardianship accounts. Respondents used their own funds to replace other losses in the trust and business accounts.

The OAE recommended the imposition of a reprimand, relying on *In re Hofing*, 139 *N.J.* 444 (1995).

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Respondents acknowledged that they violated *RPC* 1.15(a) and (d), *RPC* 5.3(b) and *R.* 1:21-6. The stipulation provides ample basis to find those violations. Indeed, had respondents complied with the recordkeeping requirements, they no doubt would have detected the embezzlement much sooner and prevented some of the losses. The only issue, thus, is the quantum of discipline.

In recommending a reprimand, the OAE relied on *In re Hofing, supra*, 139 *N.J.* 444 (1995). In that case, the attorney had turned over all bookkeeping, recordkeeping and banking duties to his office assistant and bookkeeper. The attorney did not review any trust account records or reconciliations. Moreover, he signed trust account checks in blank to permit the bookkeeper to conduct trust transactions. Over a four-year period, the bookkeeper embezzled more than \$870,000 from respondent's trust as well as personal accounts, resulting in the loss of client funds of more than \$490,000; the balance of the loss was sustained by the attorney and his family. Some of the mitigating factors were as follows: (1) the attorney's prior unblemished record of thirty-three years; (2) his contribution to the community; (3) his reputation for honesty and integrity among his peers; (4) his prompt disclosure of the true facts to the OAE, following his discovery of the improprieties; (5) his full cooperation with the OAE; (6) his cooperation with the Prosecutor's Office in the prosecution and ultimate conviction of his bookkeeper; (7) his quick action in retaining the services of an accounting firm to ascertain the extent and identity of client funds stolen by

his bookkeeper; (8) his prompt restitution to his clients; and (9) his personal and financial injury as a result of his bookkeeper's criminal acts. Hofing received a reprimand.

Other attorneys also have been reprimanded for misconduct similar to respondents'. See *In re Moras*, 151 N.J. 500 (1997) (attorney failed to adequately supervise secretary, who stole \$650 in client funds, failed to maintain required records and failed to safeguard client funds; attorney made restitution); *In re Klamo*, 143 N.J. 386 (1994) (attorney failed to maintain required records, commingled personal and client funds, failed to adequately supervise a paralegal, who embezzled at least \$14,345, exhibited gross neglect and failed to cooperate with the OAE; numerous mitigating factors were noted) and *In re Pressler*, 132 N.J. 155 (1993) (attorney permitted numerous instances of negligent misappropriation during a period of more than one year; in one instance the attorney's former employees had stolen funds from the attorney as well as from clients; other misappropriations resulted from errors made by the attorney or his employees).

In at least one case, *In re Stransky*, 130 N.J. 38 (1992), an attorney was suspended for similar misconduct. In *Stransky*, the attorney completely delegated the management of his attorney accounts to his wife/secretary/bookkeeper. He improperly authorized her to sign trust account checks. Over the course of one year, the attorney's wife embezzled \$32,000 in client funds. Finding that the attorney was "completely irresponsible in the management of his attorney accounts and totally abdicated his fiduciary responsibilities to his clients," the Court suspended him for one year. Unlike *Hofing* and the within matter, no mitigating

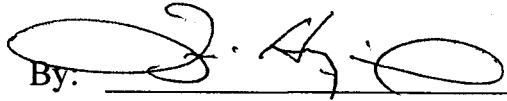
factors were noted. Moreover, here, respondents did not authorize their employee to sign trust account checks; instead, she either forged their names or obtained their signatures by false pretenses. *Stransky*, thus, is distinguishable from this case.

Many of the mitigating factors that led to the imposition of a reprimand in the *Hofing* matter are present here. Prior to this incident, respondents Bergman and Barrett enjoyed unblemished careers of twenty-five years and seventeen years, respectively; they fully cooperated with the OAE; they promptly reported the embezzlement to the Somerset County Prosecutor's Office; they hired a certified public accountant to reconstruct all bank accounts associated with their practice; they are now in full compliance with the recordkeeping rules; and losses resulting from the embezzlement were reimbursed by a bonding company and by respondents' own funds.

Based on the foregoing, we unanimously determine to impose a reprimand.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 4/12/00

By:   
LEE M. HYMERLING  
Chair  
Disciplinary Review Board