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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-333

IN THE MATTER OF :
WILLIAM J. EWING, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: November 18, 1992

Decided: December 28, 1992

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

Bernard A. Kuttner 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 on a recommendation for public discipline filed by the District VC Ethics Committee ("DEC").

PROCEDURAL HISTORY

By way of procedural background, on the first day of hearing on this matter, March 19, 1991, the panel chair disclosed, on the record, that he was acquainted with Mimi Lakind, the Office of Attorney Ethics' auditor who was about to testify in the matter, because Ms. Lakind had conducted a random audit of his attorney records four years before. Similarly, one of the panel members disclosed that, seven years before, Ms. Lakind had been employed

for two years as a staff accountant at his law firm, Lowenstein, Sandler. Although respondent's counsel interposed no objections at that particular time, on the second day of hearing, April 23, 1991, counsel made a motion before the DEC for a mistrial and/or recusal by the panel members based on the two foregoing disclosures and, further, on the fact that Ms. Lakind, after the March 1991 hearing, had conversed for a few minutes with the hearing panel's public member, a medical doctor, about either her own illness or someone else's. That conversation had taken place in the presence of respondent and his counsel. The DEC denied that motion. In its brief to the Board, respondent's counsel renewed the motion for a mistrial, which was also denied by the Board.

This disciplinary matter arose from a random audit conducted by the Office of Attorney Ethics ("OAE") on June 23, 1986, July 21, 1986, September 22, 1986, December 2, 1986 and April 6, 1987. The audit, which covered the period from January 1, 1981 to May 31, 1986, was conducted by auditor Mimi Lakind of the Random Audit Program of the OAE. The audit report is annexed to the complaint as Exhibit A.

The complaint charged respondent with knowing misappropriation of clients' funds on six occasions between December 15, 1983 and November 14, 1984 (Count One); knowing misappropriation of clients' funds by advancing trust funds, on two separate occasions, to a business entity in which respondent's mother had an interest (Count

Two); knowing misappropriation of clients' funds by issuing several trust account checks for the benefit of a business concern owned by his in-laws (Count Three); knowing misappropriation of clients' funds by issuing a check in the amount of \$3,195.32 to the tax collector of Montclair to satisfy unpaid real estate taxes on property owned by his secretary (Count Four); knowing misappropriation of clients' funds in the amount of \$2,534.30 to pay personal expenses (Count Five); knowing misappropriation of clients' funds by advancing costs on behalf of clients for whom he was not holding trust funds (Count Six); knowing misappropriation of clients' funds by transferring monies from the trust account to his business account (Count Seven); and recordkeeping violations (Count Eight).

The OAE audit disclosed that, on six separate occasions, respondent's trust account showed shortages ranging from \$5,164.23 to \$20,978.92, as follows:

<u>Date</u>	<u>Total Trust Funds</u>	<u>Bank Balance</u>	<u>Shortage</u>
12/15/83	\$ 25,454.48	\$ 20,290.25	(\$ 5,164.23)
12/31/83	126,144.69	113,674.12	(12,470.57)
02/28/84	25,929.81	6,542.44	(19,387.37)
04/30/84	17,546.94	2,251.10	(15,295.84)
05/18/84	42,940.66	29,588.86	(13,351.80)
11/14/84	20,932.22	(46.70) o.d.	(20,978.92)

The audit further revealed that, on November 15, 1984, when the account was overdrawn by \$46.70, respondent deposited \$10,000 of his own funds into the trust account in order to remedy the deficiency. According to the auditor, the distribution of the total \$20,978.92 shortage was as follows:

<u>CLIENT</u>	<u>BALANCE</u>
"379 Bloomfield"	(\$ 6,417.53)
"Garment Clinic"	(1,141.32)
Marcia Brewington	(4,263.18)
Bank Charges	(504.00)
WJE Personal Funds	(2,534.30)
Messina	(3,148.75)
Laughinghouse	(1,675.00)
Sims	(1,114.70)
Ramsey	(75.00)
Wilson	(60.54)
Daves	(35.97)
Comer	(8.63)
TOTAL	(\$20,978.92)

A - 379 Bloomfield Avenue

Respondent's mother owned investment property located at 379 Bloomfield Avenue. According to respondent's testimony, his office manager, Evelyn Smith, managed the property as a favor to his eighty-year old mother. As the audit report indicates, on March 4, 1982, trust account check number 2492 was issued to 379 Bloomfield Avenue in the amount of \$6,180.21. This check was endorsed by Ruth Wright, respondent's mother. At that time, there were insufficient funds standing to the credit of 379 Bloomfield Avenue to cover the withdrawal. Four months later, on July 6, 1982, respondent deposited into his trust account \$9,785.76 in personal funds, of which \$6,180.21 were allocated to 379 Bloomfield Avenue. On November 14, 1984, respondent again advanced \$6,417.53 of trust funds on behalf of 379 Bloomfield Avenue. This advance was also made at a time when insufficient funds standing to the credit of

379 Bloomfield Avenue were on deposit in the trust account. On November 15, 1984, respondent deposited \$7,208.45 in his trust account, which sum was allocated to 379 Bloomfield Avenue. It is the position of the OAE that respondent's advancement of funds on behalf of a business owned by his mother constituted knowing misappropriation of clients' funds.

Respondent's defense to the charge of knowing misappropriation in the 379 Bloomfield Avenue matter — as to the other charges of knowing misappropriation — was his complete ignorance of the misuse of clients' funds because of his reliance on Evelyn Smith, his office manager/legal secretary/bookkeeper, during the relevant period. Evelyn Smith passed away in January 1988.

Respondent explained that, in May 1980, he had been stricken with cancer of the kidneys, as a result of which one of his kidneys had to be removed. During his prolonged stay in the hospital, respondent lost fifty pounds and all of his strength. He believed that he would die. Upon leaving the hospital, he entertained the thought of closing his law practice, but was persuaded by a longtime friend, a retired judge, to keep his office open and to "hang in there." The judge suggested that his wife, Evelyn Smith, who had considerable experience in running a law office, manage respondent's practice. Respondent agreed. In addition to Evelyn Smith, respondent employed a legal secretary, Marcia Brewington, who, as of the date of the ethics hearing, had worked in his office for nineteen years.

In 1983, respondent had a recurrence of his illness. He truly

believed that he would not survive this time, having been told previously by his doctor that, if the cancer returned, he would surely die. For the next five years, respondent hardly left his house. He explained that Evelyn Smith and Marcia Brewington would come to his house several times a week, bringing him work and blank trust account checks for his signature. Respondent testified that he would sign blank trust account checks in bulk — as many as twenty at a time — which Evelyn Smith would subsequently fill out with the appropriate amounts and payees, whenever required. He explained that he trusted her implicitly and that she was a very experienced, honorable person. Respondent also relied on attorney friends and young associates, whom he employed from time to time, to manage his law practice. Incredibly, respondent's practice thrived in those five years, despite his prolonged absence.

It was against this backdrop that respondent denied knowledge of any misuse of clients' funds to benefit 379 Bloomfield Avenue. He testified that he was unaware of the trust account shortages, for which he had no explanation. He could only assume that Evelyn Smith, although honorable and trustworthy, had been responsible for the trust account deficiencies. Indeed, respondent went on, when Evelyn Smith apprised him of the fact that the trust account had a \$46.70 shortage in November 1984, he was shocked. When queried by respondent, Evelyn Smith was at a loss to explain the reason for the shortage. Respondent also testified that, when Ms. Smith advised him that there were several outstanding trust account checks, he promptly deposited \$10,000 of his own funds in the trust

account in order to cure the deficiency.

B - The Garment Clinic

This dry cleaning business was owned by James Monroe, respondent's father-in-law, as well as by respondent's mother-in-law and respondent's wife. Although respondent was listed as the Chair of its Board, he testified that he had absolutely no involvement with that business concern.

According to the audit report, in February and March 1982, \$15,900.05 were deposited and disbursed on behalf of the Garment Clinic. Thereafter, in April and May 1982, respondent disbursed \$3,804.40 from the Garment Clinic account, despite the fact that there were no longer any trust funds on deposit for that business.

Again, respondent denied knowledge of misuse of other clients' funds on behalf of the Garment Clinic. He testified that a portion of the \$3,800 sum consisted of legal fees owed by the Garment Clinic for services he had rendered over several years prior to 1982. He explained also that a \$5,000 trust account check made out to his father-in-law, James Monroe, charged against the Garment Clinic, had been improperly issued, without his knowledge. Respondent explained that the \$5,000 check had been issued in March 1982, when the business was sold to a third party. Respondent surmised that James Monroe must have informed Evelyn Smith that he was due \$5,000 from the proceeds of the sale of the Garment Clinic. Respondent clarified that the check should have been made out to the Garment Clinic, not to James Monroe personally, and then

transferred to the 379 Bloomfield Avenue account to satisfy certain obligations owed by the Garment Clinic to 379 Bloomfield Avenue. According to respondent, had the check been properly issued and transferred to the 379 Bloomfield Avenue account, no trust account overdraft would have resulted.

C - Marcia Brewington

As stated above, Marcia Brewington has been respondent's legal secretary for the past nineteen years. In July 1984, Brewington acquired from her brother, Marshall Brewington, a house located at 27 Irvin Street, Montclair, which had been previously owned by their mother, now deceased. According to respondent, this was not, strictly speaking, a real estate transaction but, rather, an inter-family deal designed to allocate, among Marcia Brewington's seven brothers and sisters, the assets inherited from their mother. While this transaction was accomplished through respondent's office, he did not attend the closing of title or otherwise participate in the transaction as an attorney.

In any event, as the audit report discloses, a total of \$4,963.18 of other clients trust funds were misused to accommodate disbursements on behalf of Marcia Brewington. Specifically, on October 25, 1984, a trust account check in the amount of \$3,195.32 was issued to the tax collector of Montclair to satisfy unpaid municipal real estate taxes on the property. At the time, however, respondent held no funds in his trust account on behalf of Marcia Brewington.

Respondent's and Marcia Brewington's explanations were as follows: it had been agreed that Marshall Brewington would be personally responsible for the payment of the outstanding taxes on the property. According to Marcia Brewington's testimony, at the closing her brother gave an equivalent cash amount to Evelyn Smith for the payment of the taxes, for which Marcia Brewington was issued a receipt. Evelyn Smith then issued a trust account check to pay the taxes. For some inexplicable reason, the cash was never deposited in respondent's trust account. Marcia Brewington was also unable to produce a receipt for the cash, speculating that it had been destroyed by a fire on her house. Once again, respondent denied any knowledge of impropriety, allegedly relying on Evelyn Smith for the proper disbursement of trust funds in accordance with the rules.

D - Personal Expenditures

On April 27, 1984, by trust account check number 3329, respondent paid himself \$1,648.17, although he had only \$92.86 to his credit in the account. Similarly, on October 11, 1984, he wrote to himself trust account check number 3577 for \$1,250.00, creating a total debit balance of \$2,534.30, funds that he expended for his personal benefit.

Respondent's testimony was that those two checks were intended as withdrawal of fees earned by him. Respondent again attributed that shortage on an oversight by Evelyn Smith. According to respondent, "I can only say that at no time did I authorize any

payment to be paid to me, that I did not render or it was not rendered to me to be a payment for fees" (T10/30/1191 66).

E - Advancement of Costs to Clients

Pursuant to the audit report, in 1984 respondent advanced costs on behalf of certain clients, notwithstanding the fact that he was not holding trust funds to their credit. The clients and respective advances are as follows:

Messina	\$3,148.75
Laughinghouse	1,675.00
Sims	1,114.70
Ramsey	75.00
Wilson	60.54
Daves	35.97
Comer	<u>8.63</u>
TOTAL	\$6,118.59

Respondent's testimony was that he had never authorized Evelyn Smith to write those checks; she had issued them without his knowledge.

F - Bonus to Marcia Brewington

On December 31, 1983, respondent drew trust account check number 3169 to himself in the amount of \$5,400 at a time when he had no legal fees or other funds on deposit. Thereafter, on January 5, 1984, respondent deposited this check into his business account and drew certified business account check number 6112 for \$5,400, payable to Marcia Brewington and Essex Subaru. In four

additional instances, respondent also drew certified checks from his business account following the above pattern (Count Seven).

At the ethics hearing, respondent testified that the \$5,400 check represented fees due to him in the Erna Carter matter, which fees he had withdrawn in December 1983 to pay a bonus to Marcia Brewington. Respondent explained that, in 1980, when he first became ill, he had promised Brewington that, if she remained working at the law office, he would pay her a bonus in 1983; Evelyn Smith had received a bonus the year before.

Respondent testified that he had given explicit instructions to Evelyn Smith to draw the bonus from a special trust account that had been set up in connection with the Ralph Shulman matter, in which account respondent had kept a \$90,000 fee; respondent had left the legal fees in the special trust account, instead of depositing them into his business account. Contrary to respondent's instructions, however, Evelyn Smith drew the \$5,400 check not from the special trust account, but from respondent's regular trust account, thus creating a deficiency therein.

Respondent's explanation was that Evelyn Smith must have made a mistake; in his view, there was no reason for her to issue a check to Marcia Brewington from the regular trust account. Respondent added that he had \$59,000 in the special trust account at that time, December 1983, and that, consequently, there were sufficient funds available in that account to cover the bonus to Marcia Brewington.

G - Recordkeeping Violations

As stated in the audit report and in the complaint, respondent failed to comply with the bookkeeping requirements of R. 1:21-6. Specifically, although the trust account checking system was part of a Safeguard One-Write System, respondent failed to maintain and supply original receipt and disbursement journals, as well as original client ledger cards.

Respondent admitted that the records had not been produced to the auditor for review. He contended that, as soon as he had been made aware of the audit, he instructed Evelyn Smith to gather all of his attorney records, in preparation for the audit; Evelyn Smith, however, informed respondent that she had been unable to locate the records, which apparently had been lost when respondent's law office had moved from one floor to another, in the same building. Respondent added that it was at this time that he determined to have his attorney records reconstructed and computerized, for which he engaged the help of a CPA. After every record had been reviewed and placed on the computer, it was the CPA's opinion that the result was more accurate than the One-Write System would have been. Respondent also testified that he had every reason to believe that Evelyn Smith had utilized the One-Write System to maintain his misplaced records.

* * *

At the conclusion of the ethics hearing, the DEC found that

"the facts concerning respondent's attorney trust account as set forth in the report by Mimi Lakind, OAE Compliance Officer, reflect the condition of the account on the date stated." Hearing Panel Report at 19. According to the DEC, although there had been shortages in the trust accounts on the dates specifically mentioned in the audit report, it could not find that respondent had knowingly misappropriated clients' funds. The DEC concluded that, because respondent had "basically surrendered control of his trust account to his office staff. . . the specific account shortages and activities set forth in the second, third, fourth, fifth, sixth and seventh counts of the complaint were the result of a well-meaning but misguided, unprofessional and unsupervised staff." Hearing Panel Report at 19-20.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent acted unethically is fully supported by clear and convincing evidence. Like the DEC, the Board cannot find that respondent knowingly misappropriated clients' funds.

In the absence of an outright admission by an attorney that he knowingly misappropriated clients' funds, the evidence must be so clear, direct, weighty and convincing to enable the fact finder to conclude, without hesitancy, that a knowing misappropriation has occurred. State v. Hodge, 95 N.J. 369, 376 (1984).

The OAE argued that respondent's claimed ignorance of the

numerous instances of misuse of clients' funds is unworthy of belief. The OAE pointed to the fact that either respondent or Marcia Brewington, his secretary of long-standing, personally benefitted from the missing trust funds and that, while respondent was purportedly too sick to oversee his law practice — and, consequently, his trust and business accounts — his law practice in New Jersey was growing and thriving during the same period; in fact, respondent was contemplating starting a law practice in New York as well. The OAE further contended that respondent's attempts to place the blame for the trust account shortages on Evelyn Smith should be rejected. The OAE noted that, at no time during the audit visits, did respondent or Marcia Brewington, whom respondent assigned to assist the OAE auditor, even mention to the auditor Evelyn Smith's name, much less her responsibilities as the firm's bookkeeper. In the OAE's view, the inescapable conclusion is that respondent used Evelyn Smith, now deceased, as a scapegoat.

In refuting this latter contention, respondent testified that he had assigned Marcia Brewington to assist the OAE auditor because Evelyn Smith was "an old lady" and Marcia Brewington knew "how to find things;" he thought this was a "gopher job." T10/30/1991 130. He conceded that he had not mentioned Evelyn Smith's name to the OAE auditor. He denied, however, any ill motives on his part. He explained that, when the OAE auditor asked him whether he had an accountant or a bookkeeper, he understood that question to mean a full-time, formally trained bookkeeper, which Evelyn Smith was not. When asked by a panel member why he

had not mentioned Evelyn Smith's name to the OAE auditor, respondent replied:

I answered every question honestly. . . . I will tell you this, I did not consider. . . . Evelyn to be a bookkeeper. Now, I hope I'm not giving the wrong impression here. She was the one responsible for keeping the books and records. So, in a lay sense, she's a bookkeeper. In a professional sense, she was not a bookkeeper. I don't know how else to say it. In a lay sense, I had no one else to rely on in my office during my period of illness or otherwise. As long as Evelyn was there, Evelyn was the person who was responsible for keeping the records. I relied on her totally for that. There's no question about that. Why she was not -- if there was a misunderstanding by Ms. Lakind or whatever, she was not a professional bookkeeper. She had no training. She had -- when I say no training, as I understand, the bookkeeper I have now is trained as a bookkeeper. She's almost a CPA. . . . That's a professional bookkeeper. I did not have a bookkeeper. Evelyn is the nomenclature. Evelyn was the person who kept the records, that was her responsibility. She was the person who kept the books. She was the person who wrote the checks. . . .Incidentally, I might just add this, Doctor, so that we could be -- at the time that Ms. Lakind asked these questions, and I don't know where the exhibit is, there was not the slightest indication that anything was wrong, not at all. In other words, when she came there, there was no indication that she would even be coming a second time. These were questions. Whatever she's talking about, she asked on her visit before she even got to know my name.

[T11/21/1991 146, 149-151.]

After an independent review of the record, the Board is unable to conclude that respondent knowingly misappropriated clients' funds. The record does not clearly and convincingly establish that respondent was aware of the invasion of clients' funds. It is

unquestionable, however, that he displayed reckless disregard for the rights of his clients in handling his trust account responsibilities. During a period of five years, respondent practically surrendered his law practice and his recordkeeping obligations to his secretary and to his bookkeeper. Astonishingly, his practice thrived and grew in that period. If not for fortuity, the consequences might have been disastrous.

Because trust account accounting responsibilities may not be delegated and attorney obligations may not be abdicated, a period of suspension is appropriate for respondent's misconduct. After taking into account respondent's serious physical illness and consequent emotional difficulties — which evoke great sympathy — as well as the passage of eight years since respondent's ethics misdeeds, the Board unanimously recommends that he be suspended for one year. In the absence of the above relevant considerations, the Board would have recommended more stern discipline. One member did not participate.

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

Dated:

12/21/1992

By:



Raymond R. Trombadore
Chair
Disciplinary Review Board