SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
DOCKET NO. DRB 99-343

IN THE MATTER OF

BENJAMIN A. SILBER,

AN ATTORNEY AT LAW

Decision

Argued: December 16, 1999

Decided: September 18, 2000

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

Respondent appeared pro se.

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

This matter was before us based on a stipulation between respondent and the Office of Attorney Ethics ("OAE"), wherein respondent admitted that he was guilty of negligent misappropriation of client trust funds in four instances, in violation of RPC 1.15(a) and (d) and R.1:21-6.

Respondent was admitted to the New Jersey bar in 1976. He maintains an office for the practice of law in Carneys Point, Salem County.

On April 20, 1995 respondent was reprimanded for improperly communicating with a party known to be represented by counsel and for improperly drafting a release that attempted to insulate him from disciplinary proceedings. In re Silber, 139 N.J. 605 (1995).

In May 1998 Charles Doyle and his son, Michael, filed a grievance against respondent, alleging that Charles had given respondent $1,000 to represent Michael in a criminal matter and $5,000 to make restitution to the victim of the crime, a financial institution.[1] According to the grievance, although respondent was to turn the $5,000 over to the Salem County Probation Department in Michael's behalf, respondent did not do so promptly. The grievance further alleged that a partial restitution check that respondent issued in January 1995 to the probation department had been returned for insufficient funds. Because of the suggested misuse of trust funds and respondent's failure to communicate timely with the district ethics committee investigator, this matter was referred to the OAE for investigation.

On February 24 and March 3, 1999 the OAE conducted a demand audit of respondent's attorney trust and business accounts. Mary E. Waldman, Assistant Chief, Random Audit Program, conducted the audit. Waldman's analysis of respondent's records revealed that he had negligently misappropriated the funds earmarked for restitution to the victim of Michael's crime. Waldman also found instances of negligent misappropriation of client trust funds in three other matters (Brown, Zitkevitz and Burns) as a result of

[1]By letter dated October 6, 1999, the OAE advised us that Charles Doyle had paid respondent $7,000, not $6,000, as set forth in the stipulation. Thus, it appears that respondent's fee was $2,000.

respondent's failure to deposit client funds into his attorney trust account. In certain cases, respondent used an "expense account" for the deposit of trust funds.

During the audit, respondent explained that his expense account was generally funded from his attorney business account and was used to pay small business-related costs. According to respondent, he also processed client transactions through the expense account if the matter involved a small amount of money to be paid out within a relatively short time. Respondent acknowledged knowing that these moneys were technically trust funds, but explained that he used the expense account so he would not have to "bother with bookkeeping and accountability issues." Respondent did not maintain client ledgers for transactions in his expense account and did not reconcile the account. These omissions resulted in respondent's unintentional use of trust funds for purposes other than those for which they were intended.

The Doyle Funds

As noted earlier, on November 30, 1994 respondent received $5,000 from Charles Doyle for the purpose of making restitution to a financial entity. The funds were deposited into respondent's expense account. On January 20, 1995 respondent remitted a check for $2,500, drawn on his expense account, to the Salem County Probation Department for partial restitution of the $5,000 owed by Michael Doyle. Respondent could not recall why he had remitted only $2,500, instead of the full $5,000. The check was returned for insufficient funds.

On February 17, 1995 respondent released to Michael $2,500 of the restitution funds. According to respondent, "[f]or an inexplicable reason, when I received a phone call from Michael Doyle stating that he had spoken to his father and that I was to give him $2,500.00 to pay his rent, electric and other essentials, I released $2,500.00 to Michael." Respondent did not recall if he had contacted Charles to confirm his consent to the release of the money. There is no dispute that Michael received the funds.

When the original check for $2,500, dated January 20, 1995 and drawn on respondent's expense account, was presented for payment by the probation department, the balance in the expense account was only $1,298.18. Respondent began making use of the funds given to him by Charles as early as January 19, 1995 and continued to use them through early March 1995, as evidenced by bank records.

Respondent admitted knowing that the check sent to the probation department in January 1995 was returned for insufficient funds. It was not until March 1995, however, that he made good on the check. According to respondent, he "lost track of time." Respondent made payment to the probation department with bank checks backed by his own funds.

Due to respondent's disbursement of $2,500 to Michael, a balance of $2,500 in restitution funds remained due to the probation department. Lorraine Harris, an attorney who had undertaken Michael's representation, contacted respondent in June 1995 and demanded that the balance owed be paid to the probation department, lest she take legal action against respondent. According to respondent, in order to "wash [his] hands of this matter," he replaced the funds he had given Michael with personal funds. He paid the restitution balance

of $2,500 on June 13, 1995 with funds from a personal line of credit. Ultimately, respondent paid $7,500 in Michael's behalf ($5,000 to the probation department and $2,500 to Michael), although he only received $7,000 from Charles.

The Brown Funds

Respondent represented Mark and Wendy Brown in a chapter 13 bankruptcy proceeding. On January 18, 1996 respondent received $1,300 from the Browns and deposited the funds in his expense account to make payment on a mortgage to Harbourton Mortgage Company. Respondent received an additional $520 from Brown and deposited those funds in his expense account on January 26, 1996.

Respondent made the following disbursements from his expense account in the Browns' behalf:

2/1/96	$514	Robert Wood, Trustee	cleared 2/8/96
2/27/96	$1,307.78	Harbourton Mtg. Co.	cleared 3/1/96

Although the monies were clearly trust funds and should have been deposited in respondent's trust account, they were deposited in the expense account. In addition, once the funds were deposited in the expense account, respondent failed to maintain them intact, as evidenced by the statement balances. Almost immediately respondent utilized the funds to pay costs associated with his law practice. By February 26, 1996 the balance in the expense account had been reduced to $338.46. At that time, respondent should have been holding $1,307.78 in the account.

The Zitkevitz Funds

Respondent represented Charles Zitkevitz in a tax matter involving the estate of Lawrence Zitkevitz, Charles' brother. On August 4, 1995 respondent received $2,000 for the payment of real estate taxes owed by the estate. The funds were deposited in respondent's expense account. The following disbursements were made:

8/30/95	$1,000	Oldmans Township	cleared 9/11/95
9/11/95	$1,000	Oldmans Township	cleared 9/19/95

Although respondent should have deposited the Zitkevitz funds in his trust account, he placed them in the expense account and, from August 8, 1995 until September 18, 1995, utilized them for business expenses. On August 31, 1995 the balance in the expense account fell to $230.16, although respondent should have been holding $2,000 in the account. Therefore, $1,769.84 were used for purposes other than real estate taxes.

The Burns Funds

Respondent represented Christopher Burns in a personal injury matter. On July 10, 1995 respondent received a settlement check in the amount of $4,050 and deposited it in his expense account, rather than his trust account. On July 12, 1995, a check payable to respondent in the amount of $1,401.31, representing fees and costs in the Burns matter, cleared the bank. On the same date a check for $2,352.62, Burns' portion of the settlement, was returned for insufficient funds. The balance in the account was $2,252.26, when the

check was presented for payment. The check cleared the account on July 17, 1995, after respondent withdrew cash from his business account and deposited it in the expense account.

In sum, the stipulation recites the following:

> Respondent repeatedly violated **R.1:21-6 and RPC 1.15** by routinely depositing trust funds to the Expense Account. Moreover, since respondent failed to view this account as a trust account or even an account falling under the realm of **R.1:21-6**, he neglected to maintain receipt journals, disbursement journals, individual client ledger or to properly reconcile the account.
> [Stipulation at 7]

The OAE found no clear and convincing evidence that respondent had knowingly misused client funds. In addition, the OAE noted that respondent consistently maintained balances in his attorney business account in excess of any trust funds that were improperly deposited in his expense account.

Respondent admitted that, by depositing funds in the above four cases in his expense account, rather than his attorney trust account, he failed to properly safeguard client funds, in violation of RPC 1.15(a). Respondent further acknowledged that he failed to maintain the funds intact and to properly maintain records, as required by RPC 1.15(d) and R.1:21-6.

In recommending a reprimand, the OAE pointed to In re Banas, 144 N.J. 75 (1996) (reprimand where the attorney received $5,000 from his client's mother to be used for the client's bail; when bail could not be met, the attorney applied the funds to his outstanding legal fees); and In re Goldston, 140 N.J. 272 (1995) (reprimand where the attorney failed to safeguard client funds and committed numerous recordkeeping violations).

The OAE also suggested that respondent practice under the supervision of a proctor for two years[2] and that for two years he submit to the OAE quarterly reconciliations of his attorney trust account, prepared by a certified public accountant approved by the OAE.

* * *

Upon a de novo review of the record, we are satisfied that the stipulation contains clear and convincing evidence of unethical conduct. The only issue is the adequate discipline for respondent's negligent misappropriation and recordkeeping violations. We agree with the OAE that a reprimand is appropriate. See In re Blazsek, 154 N.J. 137 (1998) (reprimand where attorney negligently misappropriated client funds and failed to comply with recordkeeping requirements); In re Liotta-Neff, 147 N.J. 283 (1997) (reprimand where attorney commingled personal and client funds and negligently misappropriated); In re Imperiale, 140 N.J. 75 (1995) (reprimand where attorney negligently misappropriated $9,000 in client trust funds) and In re Mitchell, 139 N.J. 608 (1995) (reprimand where attorney negligently misappropriated client funds and failed to maintain required records).

Accordingly, we unanimously determined to impose a reprimand. In addition, for a period of two years respondent is to provide to the OAE quarterly reconciliations of his trust account, prepared by a certified public accountant approved by the OAE.

We noted a reference, in Waldman's investigative report, to a deficiency letter respondent received after a 1984 random audit of his attorney books and records. The letter

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[2]At oral argument before us, the OAE agreed that a proctor would not be necessary if there is a requirement that respondent submit quarterly reconciliations of his attorney accounts.

addressed several recordkeeping deficiencies. In light of that letter, respondent's statement in the stipulation that he used his expense account for client trust fund transactions so that he would not have to worry about recordkeeping and accountability was troubling. Respondent is hereby forewarned that failure to keep his attorney records in strict compliance with the rules will warrant more serious discipline in the future.

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

Dated: 9/18/00

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Benjamin A. Silber
Docket No. DRB 99-343

Argued: December 16, 1999

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Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			X				
Cole			X				
Boylan			X				
Brody			X				
Lolla			X				
Maudsley			X				
Peterson			X				
Schwartz			X				
Wissinger			X				
Total:			9				

Robyn M. Hill 10/26/00
Robyn M. Hill
Chief Counsel

Date: