

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-346

IN THE MATTER OF :
 :
THOMAS BENITZ :
 :
AN ATTORNEY AT LAW :
 :

Decision
Default [R.1:20-4(f)(1)]

Decided: July 18, 2001

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

Pursuant to R. 1:20-4(f)(1), the Office of Attorney Ethics (OAE) certified the record in this matter directly to us for the imposition of discipline, following respondent's failure to file an answer to the formal ethics complaint.

We had previously reviewed this case under Docket No. DRB 00-098. By letters dated February 14, 2000 and March 9, 2000 the OAE properly served the complaint on respondent. When he failed to file an answer, the matter was certified to us as a default on March 16, 2000. However, on May 10, 2000 respondent "faxed" us a motion to vacate the default, claiming that he had not been aware of the charges. Because the charges included

knowing misappropriation, on August 10, 2000 we vacated the default and remanded the matter for hearing.

On September 11, 2000 the OAE forwarded a copy of the complaint to respondent's home address, via certified and regular mail. The certified mail receipt was returned, signed by respondent. The regular mail was not returned. Respondent did not file an answer.

On October 16, 2000 the OAE forwarded a second copy of the complaint to respondent's home address, advising him that, unless he filed an answer within five days, the allegations of the complaint would be deemed admitted, in accordance with R. 1:20-4(f). Neither the certified mail nor the regular mail was returned.

Respondent did not file an answer to the complaint. The matter was certified directly to us for the imposition of discipline, pursuant to R. 1:20-4(f).

Respondent was admitted to the New Jersey bar in 1975. At the relevant times, he maintained a law office at 301 Bound Brook Road, Suite 105, Middlesex, New Jersey.

In 1999 respondent received a reprimand for failure to act with diligence, failure to communicate with the client, gross neglect and failure to expedite litigation. In re Benitz, 157 N.J. 637 (1999). In December 2000 respondent was suspended for three months for violations of RPC 1.1(a) (gross neglect), RPC 1.4(a) (failure to communicate with the client), RPC 8.4(c) (misrepresentation) and RPC 8.1(b) (failure to cooperate with disciplinary authorities). In re Benitz, 165 N.J. 666 (2000). In December 1999, in connection with the allegations of knowing misappropriation in the present matter, the OAE

filed a motion for respondent's temporary suspension, which was granted. Respondent was temporarily suspended in January 2000. In re Benitz, 162 N.J. 188 (2000).

The first count of the complaint alleged that, on or about December 16, 1996, Patrick Rotondo, then seventy-seven years old, and his wife, Josephine, retained respondent to represent them in connection with injuries sustained in an automobile accident. After filing suit, respondent negotiated a \$35,000 settlement with the defendant. Respondent received a settlement check and deposited it into his trust account on May 27, 1999. From May 27, 1999 until July 17, 1999 the Rotondos repeatedly requested that respondent turn over their share of the settlement funds. Based on the Rotondos' conversations with respondent, their share was in excess of \$21,000. The retainer agreement listed a one-third contingent fee.

On July 17, 1999 respondent finally gave the Rotondos a check for \$18,800. The Rotondos immediately questioned respondent about the shortage and demanded that he provide an accounting for the missing funds. Respondent apologized for the missing funds, told them he was "hurting" and acknowledged that he had made a "big mistake." Respondent, whom the Rotondos had known for thirty years, then assured them they would receive the balance of their funds and requested that they not report him to the authorities. The Rotondos replied that, if they did not receive the full amount immediately, they would contact the prosecutor's office. Respondent did not provide them with an accounting and has not returned the missing funds to the Rotondos. Upon receiving a grievance from the Rotondos, the OAE conducted a review of respondent's attorney accounts.

That review showed that the only expenses related to the Rotondo matter were a filing fee of \$175.00 and a sheriff's service fee of \$16.20. Accordingly, out of the \$35,000 settlement respondent was entitled to receive a fee of \$11,591.33 and \$191.20 as reimbursement for expenses. The Rotondos should have received the balance, or \$23,217.47.

The OAE's review also disclosed that respondent had handled three separate client matters in 1999, the Bayachek matter, the Yaremczak matter and the Rotondo matter. The OAE concluded that respondent had misappropriated funds from all three transactions.

One of the transactions was a real estate settlement for Nicholas and Rose Bayachek, which occurred on January 25, 1999. An examination of the Bayachek client ledger card indicated that from January 25 to May 2, 1999, respondent should have been holding in escrow \$227.50 for homeowner's insurance. Yet, respondent's trust account bank statement revealed that the balance on April 2, 1999 was \$8.87, a shortage of \$218.63 for Bayachek alone. This shortage occurred when respondent issued a check to himself in the amount of \$300 on April 2, 1999. Respondent had previously received his \$500 fee from the Bayacheks. The OAE's review revealed that respondent later used the funds from another matter, Yaremczak, to pay for the Bayacheks' homeowners insurance.

Another transaction involved respondent's representation of Joseph and Elizabeth Yaremczak in a real estate matter that closed on April 6, 1999. Respondent overpaid himself in the Yaremczak matter. In April and May 1999, he issued three checks to himself, totaling

\$1,600.00. According to the statement that the OAE received from the title insurance company, respondent was only entitled to receive a \$200 fee. Respondent, thus, misappropriated \$1,400 from this closing. Moreover, although respondent should have been holding \$1,810.84 of the closing proceeds for the Yaremczaks, his trust account balance as of May 12, 1999 was only \$260. Respondent did not remit the \$1,810.84 to the Yaremczaks until after the Rotondo settlement was received on May 27, 1999.

On May 27, 1999, the date when respondent received the Rotondo settlement, he issued a trust account check in the amount of \$9,075 to Celina Dubay, whom respondent had previously described as his girlfriend. Subsequently, respondent cashed two trust account checks for \$1,000 each, instead of depositing them into his business account, as required by R.1:21-6. The Rotondos never authorized respondent to disburse their settlement proceeds to other clients or to himself, other than for his fee and expenses. Respondent's payments to himself, Celina Dubay and the Yaremczaks were made from the Rotondos' funds, without their knowledge or consent.

The first count of the complaint charged respondent with knowing misappropriation of client funds, in violation of RPC 1.15 and RPC 8.4(c).

The second count of the complaint alleged that, by letter dated June 28, 1999, the OAE scheduled a random audit of respondent's attorney records for July 20, 1999. Respondent failed to appear on the date of the audit. Upon arriving at respondent's office, the OAE auditor observed an eviction notice on respondent's door. Respondent had been

evicted for failure to pay the rent. The landlord told the auditor that the office contained client files and that the mail was still being delivered. Respondent had made no arrangements to pick up his mail or retrieve his files.

On August 6, 1999 the OAE forwarded a letter to respondent, directing him to take custody of his client files and financial records. By letter dated August 11, 1999 the OAE scheduled an audit of respondent's trust account for August 26, 1999. At respondent's request, the audit was postponed to September 1, 1999. At that audit, respondent failed to produce a complete file for the Rotondo matter or to document his handling of the Rotondo funds. The audit was again postponed until September 15, 1999 to allow respondent to produce a list of the files that he kept at home, the complete Rotondo file and an explanation for his failure to turn over the money to the Rotondos. Respondent failed to produce these items.

In September 1999 the OAE left three messages on respondent's answering machine, instructing him to appear at the OAE's office and rescheduling the audit for October 18, 1999. Respondent failed to reply or appear at the OAE's office. The OAE again tried to contact respondent on November 8, 1999, without success. The OAE then interviewed respondent's landlord, who stated that respondent had made no effort to take custody of his office records and client files.

On November 9, 1999 the OAE subpoenaed respondent's trust and business records and the Rotondo file. Upon gaining access to respondent's office, the OAE observed piles

of unopened client-related mail, dated as early as July 1999, which included hearing notices and other official correspondence.

The second count of the complaint charged respondent with failure to cooperate with disciplinary authorities, in violation of RPC 8.1(b), and abandonment of clients, in violation of RPC 1.1(a) (gross neglect). By letter dated October 16, 2000, the OAE amended the complaint to include an additional charge of violation of RPC 8.1(b) for respondent's failure to file an answer to the complaint.

* * *

Service of process was properly made in this matter. Following a review of the complaint, we found that the facts recited therein support a finding of unethical conduct. Because respondent failed to file an answer, the allegations of the complaint are deemed admitted. R. 1:20-4(f)(1).

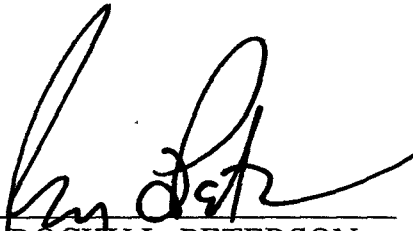
Unquestionably, respondent violated RPC 1.1(a) (gross neglect), by abandoning his office, and RPC 8.1(b), by failing to cooperate with the OAE audit and to file an answer to the complaint. More seriously, the facts detailed in the complaint provide ample basis for a finding of knowing misappropriation of client funds. Respondent misappropriated \$4,417.47 from the Rotondos (the difference between the \$23,217.47 they were entitled to receive and the \$18,800 that respondent gave them), \$1,400 from the Yaremczaks and \$300

from the Bayacheks. Under In re Wilson, 81 N.J. 451 (1979), respondent must be disbarred.

We unanimously so recommend to the Court. Two members did not participate.

We further direct that respondent reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: July 18 2001

By: 
ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

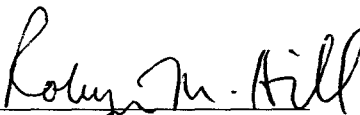
**DISCIPLINARY REVIEW BOARD
VOTING RECORD**

**In the Matter of Thomas Benitz
Docket No. DRB 00-346**

Decided: July 18, 2001

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling	X						
Peterson	X						
Boylan							X
Brody	X						
Lolla							X
Maudsley	X						
O'Shaughnessy	X						
Schwartz	X						
Wissinger	X						
Total:	7						2


Robyn M. Hill
Chief Counsel