Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 97-281

IN THE MATTER OF

DONALD F. TOMPKINS

AN ATTORNEY AT LAW

Decision

Argued: October 16, 1997

Decided: December 16, 1997

Lee A. Gronikowski 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 the Board based on a recommendation for discipline filed by Special Master Edward F. Seavers, Jr. The complaint filed by the Office of Attorney Ethics ("OAE") charged respondent with knowing misappropriation of trust funds, in violation of RPC 1.15 and RPC 8.4(c).

Respondent was admitted to the New Jersey bar in 1969. He has no prior disciplinary history.

The OAE selected respondent for an audit as part of its random compliance audit program. During the audit, OAE auditor Mimi Lakind discovered evidence of what appeared to be knowing misappropriation of client funds, resulting in the filing of a formal complaint charging respondent with that impropriety. Respondent's position was that the misappropriation at issue was not knowing, but the result of negligence.

* * *

Respondent was counsel to Jay Dee Trucking Company ("Jay Dee") for about seven years. According to respondent, Jay Dee was his most important client. Not only did respondent represent Jay Dee in all of its legal matters, including corporate, commercial and real estate, but the principals of Jay Dee referred its employees to respondent for legal services, such as, for instance, real estate closings. Respondent testified that he had received seventy-four referrals from Jay Dee. In addition, respondent's son was employed by Jay Dee.

Respondent represented Jay Dee in a collection matter against Judy-Phillipine, Inc. Pursuant to the settlement reached by respondent, Judy-Phillipine sent him a check dated January 26, 1996, in the amount of $9,000 (Exhibit C-29). Because respondent had determined not to charge a fee for this particular matter, the entire settlement proceeds belonged to Jay Dee. Thus, although the check was made payable to respondent, it represented client funds and should have been deposited in respondent's trust account.

Instead, respondent deposited the check in his business account. At that time, the business account had a negative balance of $1,373.65.

Respondent also represented Patricia and Nicholas Walsh in an unrelated personal injury matter. In early January 1996 he reached a $30,000 settlement with USAA insurance. Because respondent settled the case before filing suit, he had incurred few, if any, expenses. He was entitled to a $10,000 fee based on a contingent fee agreement.

On February 12, 1996 the Walshes signed the USAA check, a release and a settlement statement (Exhibit C-24). Respondent gave them a trust account check for $20,000, representing their share of the settlement, and asked them not to deposit it for a few days. Respondent deposited the $30,000 USAA check in his trust account on February 12, 1996, the same day it was signed. On February 13, 1996 he issued a check for his fee and deposited it in his business account, which at that time had a negative balance of $6,571.70.

The presenter and respondent agreed with the above statement of facts. However, their points of view regarding respondent's intent differed greatly. The presenter contended that respondent had improperly borrowed the *Jay Dee* funds, deliberately depositing the check in his business account to cover a shortage in that account and intending to replace the *Jay Dee* funds with the *Walsh* fee check. Respondent, in turn, contended that he had simply used a wrong deposit ticket, picking up a business account deposit slip instead of a trust account deposit slip.

The OAE auditor, Mimi Lakind, testified that, at the random compliance audit, she had pointed out to respondent that the *Jay Dee* funds had been placed in the business account, instead of the trust account. According to Lakind, respondent's explanation was

that he thought he had deposited the check in his trust account. Lakind reviewed with respondent his business account records, which showed that, after he deposited the *Jay Dee* check, he issued thirty-five checks totaling $7,732.11. Because the account had a negative balance of $1,658.81 before the $9,000 check was deposited, the subsequent checks depleted the *Jay Dee* funds within six days. According to Lakind, after she pointed out these facts to respondent, he agreed that all of the funds had been spent before he returned the money to *Jay Dee*. From this comment Lakind inferred that respondent had admitted a knowing misappropriation of the funds. Accordingly, after the random audit, the OAE sent to respondent a consent to disbarment form (Exhibits C-20 and C-21). Respondent immediately replied that he had simply acknowledged at the audit that he had placed the funds in the wrong bank account (Exhibit C-22A). Respondent denied that he had admitted a knowing misappropriation.

In an attempt to show that respondent acted with deliberation, the presenter pointed out that respondent failed to maintain a client ledger card for the *Jay Dee/Judy-Phillipine, Inc.* matter. Thus, the presenter argued, if respondent truly believed that he had placed the *Jay Dee* funds in his trust account, he would have prepared a trust account ledger card; his failure to do so suggested that he had intentionally placed the funds in his business account.

The presenter introduced evidence of another instance in which respondent deposited client funds in his business account. After the *Jay Dee* matter, respondent settled a personal injury case for another client, Dr. Harold Tara, for $35,000. On February 29, 1996, respondent deposited that check in his business account, as well as two other unrelated fee

checks (Exhibits C-13 and C-23, attachment 17) totaling $450. Because respondent held those funds intact, albeit in his business account, instead of his trust account, the OAE did not allege an ethics violation with regard to the *Tara* matter. The presenter offered the evidence about the *Tara* matter merely to support the theory that respondent's deposit of the *Jay Dee* funds in his business account was not a mistake. As will be seen below, respondent claimed that his deposit of the *Tara* funds in his business account was inadvertent.

Both the presenter and respondent pointed to respondent's long history of overdrafts in his business account, in support of their respective positions. Respondent had maintained his business and trust accounts with Midlantic Bank for many years. Over that time, respondent repeatedly and continually overdrew his business account. Upon each occurrence, the bank would notify respondent about the overdraft. Respondent would deposit funds to bring the account back to a positive status. Lakind testified that, from November 1994 through December 1995, the fourteen-month period preceding the *Jay Dee* transaction, respondent overdrew his business account on forty-three occasions, resulting in bank charges of $995 and $634 in additional fees charged by the bank for honoring checks drawn against uncollected funds. The presenter contended that, aware of these overdrafts, respondent used the *Jay Dee* funds to pay his business and personal expenses. The checks issued by respondent after depositing the *Jay Dee* check were used to pay office expenses, such as supplies, payroll, telephone bills and the like, as well as personal expenses, including respondent's home mortgage, credit cards and other similar debts.

The presenter argued that, with the exception of the *Jay Dee* funds, respondent's practice was to deposit just enough funds, or slightly more, to cover the business account overdraft; he would make these deposits either on the same day he was notified of the overdraft or the next business day. The presenter noted that, in contrast, the account was overdrawn by $1,373.65, before respondent deposited the *Jay Dee* funds in the account. Thus, the presenter contended, respondent deposited the $9,000 *Jay Dee* check not only to cure that shortage, but also to cover the thirty-five checks for $7,732.11 that he intended to issue. Respondent's January 1996 business account bank statement (Exhibit C-7) showed that, after the *Jay Dee* deposit, respondent deposited a total of only $331.25 in his business account, an amount insufficient to cover the $1,373.65 overdraft.

The presenter questioned respondent's credibility. He pointed to the fourth affirmative defense contained in the answer (Exhibit M-2), which stated that respondent had notified *Jay Dee* of the mistake, upon discovering it. Yet, the presenter noted, respondent had testified at the ethics hearing that he had notified Jay Dee of the mistake after the audit, which took place on July 29, 1996. The presenter also contended that respondent had to know the status of his business account at the time of the *Jay Dee* transaction, because he was a successful businessman who kept meticulous records. The presenter remarked that respondent is not as unsophisticated as he would have others believe.

* * *

Respondent, in turn, contended that the deposit of the *Jay Dee* funds into his business account was the result of a mistake. In support of his position, respondent introduced copies of deposit slips from his business and trust accounts (Exhibit R-1) to attempt to show that they were almost identical and, therefore, easy to be mistaken for one another. Respondent explained that he kept both his business and trust account deposit slips in his pocket diary for convenience, so that he could make deposits without first going to the office; in this fashion, he could stop at the bank to deposit funds either after a real estate closing or on his way to the office. Respondent contended that, in his haste, he must have taken the wrong deposit slip from his pocket diary and mistakenly deposited the *Jay Dee* funds in his business account.

Respondent also testified that Midlantic Bank always honored his business account checks, whether or not there were sufficient funds in his account. He asserted that, as far back as the 1970s, the predecessor to Midlantic Bank had honored his checks drawn against uncollected funds; that he did not usually keep a running balance in his business account checkbook, relying instead on the bank's notice to him of insufficient funds on deposit to cover his checks; and that, because he maintained a line of credit, the bank would always honor his checks. Respondent acknowledged that this was an unwise practice, which resulted in the charge of substantial bank fees. Indeed, OAE auditor Lakind characterized respondent's banking habits as follows:

> [O]verdrafts were no surprise to Mr. Tompkins, he was almost every single month in bank statements overdrafted a number of times, it was a way of doing business. He didn't have the funds, he wrote the checks, the account overdrafted, the bank called him, he put the money in.
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> [2T161][1]

Respondent testified further that it was his practice to send invoices to his clients early in the month and, that, relying on the satisfaction of at least some of those fees, he would pay his bills at the end of the month, without first checking the balance in his account. Respondent explained that, instead of maintaining a running balance in his business account, he relied both on the deposit of sufficient funds after billing his clients and on the bank's practice to notify him of any overdrafts.

In support of his position, respondent called as a witness June MacFarlane, the former manager of the Midlantic Bank branch where he maintained his bank accounts. MacFarlane explained that, according to Midlantic's procedure, every day the overdraft unit notified the branch manager of overdrafts in that branch. The branch manager then decided whether to honor or refuse payment on each check. MacFarlane confirmed that she never returned a check from respondent's business account. Although respondent agreed with MacFarlane's assertion that she always notified respondent of overdrafts by telephone, he pointed out that,

[1] 2T denotes the transcript of the May 13, 1997 hearing before the special master.

after she retired in 1993, the successor branch manager, Irma Casper, sometimes mailed him a notice, instead of telephoning him.[2] Respondent claimed that he did not receive a telephone call about the *Jay Dee* overdraft and that he learned about it by written notification.

Respondent contended that, because he often overdrew his business account, it was not unusual for the account to have a negative balance. He testified that, although he kept a running balance for his trust account and, thus, was always aware of the status of that account, he was not as meticulous with his business account. In response to the OAE's allegation that he had borrowed the *Jay Dee* funds to cover not only the overdraft that existed at that time, but also the numerous checks he intended to issue, respondent explained that his pattern was to write a lot of checks at the end of the month. He introduced copies of his checkbook stubs and canceled checks from December 1994, April 1995 and August 1995 showing that, at the end of those months, he wrote thirty-five, twenty-eight and thirty-nine checks, respectively. In addition, on cross-examination OAE auditor Lakind conceded that, during other months encompassed by the OAE audit, respondent had paid personal bills from his business account, such as his home mortgage. She added that "attorneys pay these kind of bills out of their Business Account all the time" (1T96)[3]. Respondent confirmed that he did not maintain a personal checking account and that he used his business account for the payment of personal and business expenses.

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[2] At the time of the ethics hearing, Casper was out-of-state and unavailable to testify.

[3] 1T denotes the transcript of the May 12, 1997 hearing before the special master.

Respondent disputed the presenter's suggestion that, after an overdraft, he always deposited just enough or a little more money to cover the shortage and that he always did so within one business day of the overdraft. Respondent contended that, in November 1994, June 1995 and January 1996, overdrafts lasted for four days, while in February 1995 another overdraft lasted for six days. He also claimed that, on other occasions, he deposited much more than was needed to cure the overdraft. In sum, respondent asserted, there was no pattern of depositing funds in his business account in response to an overdraft, as charged by the OAE. Rather, oftentimes when he made a deposit it so happened that there was a negative balance in the account.

With respect to the *Tara* matter, respondent testified that, despite the fact that he had informed his client that he would send him a trust account check, he had deposited the check in the wrong account. According to respondent, his action was "just out and out stupidity . . . I have no excuse for that. There is no excuse" (1T187).

Although respondent conceded that he was experiencing cash flow problems when he received the *Jay Dee* check, he asserted that there were other sources he could have looked to for financial assistance. Respondent's son, Edward James Tompkins, and his sister, Shirley Haskoor, testified that they had loaned money to respondent in the past and would have done so again, if necessary. Respondent added that he also could have borrowed funds from another sister (she appeared at the hearing but, due to health reasons, was unable to reach the second floor hearing room to testify) or from his wife.

In response to questions from the special master, respondent testified about "playing the float." He related that, prior to becoming an attorney at the age of forty, he had been a controller for a corporation, although he had not had sufficient accounting courses and felt very uncomfortable in that position. According to respondent, because the company had cash flow problems, he learned how to "play the float," which he described as issuing checks without sufficient funds on deposit, knowing that it would take time for the checks to be received, deposited and presented for payment, by which time sufficient funds would be available. Respondent admitted that he used his experience as a controller to "play the float" with his attorney business account. After the company filed a bankruptcy petition, respondent bought and operated it, later selling the company to a competitor. In 1987, respondent became involved in real estate, putting together groups of investors to purchase apartment buildings and convert them to condominiums. After the real estate market became unprofitable, respondent began to concentrate on the practice of law.

Respondent contended that he had not prepared a trust account ledger card in the *Jay Dee* matter because he mistakenly had not deposited the funds in his trust account; accordingly, he had followed the office routine for business account deposits. Respondent asserted that, if he had maintained a running balance in the business account, he would have detected the error.

In essence, respondent argued that his sloppy recordkeeping was the cause of his mistake and that he did not intentionally place the *Jay Dee* funds in his business account.

* * *

The special master found respondent guilty of knowing misappropriation. After remarking that the OAE and respondent agreed that the only issue in this case was whether respondent's conduct was knowing or inadvertent, the special master framed the issue as follows:

> This is not a situation in which the OAE can show a deposit to a trust account and the subsequent utilization of those funds by Respondent for whatever purpose. In this situation, the checks which were made payable from Respondent's business account were appropriate payments to be made from that account; the question is whether the funds that were there were put there knowingly or by mistake. The OAE can present no direct evidence of Respondent's state of mind with respect to that issue, rather all the evidence is circumstantial so as to infer whether Respondent's conduct was knowing. Respondent of course denies that his conduct was knowing and likewise relies upon other factors to support his claim of mistake rather than knowing conduct.
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> [Report of special master at 7]

The special master found that respondent's statement to the OAE auditor did not constitute an admission that he had knowingly misappropriated client funds. He compared OAE auditor Lakind's version – that respondent acknowledged that he could not dispute that all of the *Jay Dee* funds were spent before he returned the money to his client – with respondent's version – that he had placed the funds in the wrong account. Remarking that the OAE had the burden of proof by a clear and convincing standard, the special master declined to find that respondent had admitted an ethics violation.

The special master found it significant to his finding of knowing misappropriation in *Jay Dee* that the $9,000 funds were substantially more than the overdraft of $1,300 and that the funds were deposited within two business days of the overdraft. The special master concluded that this deviation from respondent's pattern of covering deposits on the same or next business day by depositing just enough to cure the overdraft established that respondent needed to borrow the *Jay Dee* funds because he did not have enough personal funds.

Based on respondent's work experience, the special master found that he was a very sophisticated businessman, who admitted that he had "played the float" with his business account. The special master reasoned that, in order for respondent to "play the float," he had to be aware of the status of the bank account. The special master determined that the only reason respondent would call the bank to find out his account balance was to continue "playing the float." Agreeing with Lakind's conclusion that respondent was aware of the state of his account and was able to meticulously account for all funds in his possession, the special master concluded that "it [was] very likely that Respondent knew the status of the account" (Report of the special master at 17).

With regard to respondent's credibility, the special master found as follows:

> The Respondent's demeanor generally suggests truthfulness. What was apparent was when a specific question was asked of Respondent with respect to the transaction in question and whether it was a deliberate deposit into the business account, it appeared that Respondent's tone of voice, pitch and volume of voice became lower and he looked down rather than up at me or even at his attorney. Similarly, when asked if he knew that it is improper to use trust funds, Respondent replied 'yes' immediately. When asked if he knowingly did so, he replied 'no' after a slight hesitation. It appears that what Respondent was not aware of was the automatic punishment of disbarment.
> [Report of the special master at 18]

The special master noted the inconsistency between respondent's answer, in which he alleged that he had informed Jay Dee that he had placed the funds in the wrong account upon making that discovery, and his testimony that he had informed his client about the mistake after the audit, about five months later. Based on this contradiction, the special master suggested that respondent's testimony was not wholly credible.

The special master rejected several of respondent's contentions. He disagreed with respondent's argument that, because he did not keep a running balance in his checkbook, he was not aware of the balance in his business account. As noted above, the special master found that respondent had to know the balance in order to "play the float." In addition, the special master considered that respondent's checkbook stubs noted certain expenses that, according to respondent, were for tax purposes. From this testimony the special master inferred that substantial charges to accounts for library and office supplies were not legitimate, but done for tax purposes, a factor that, in the special master's view, further called respondent's credibility into question. The special master also rejected respondent's argument that, because he could have borrowed funds from his family, he would not have misappropriated client funds. The special master found that the availability of these loan sources negated only the motive for respondent's conduct and did not affect whether such conduct was knowing. The special master rejected respondent's contention that, in the *Tara* matter, he had mistakenly deposited the settlement check in his business account. The special master reasoned that, because the check was deposited with two other checks, both for fees, respondent could not have mistakenly deposited his client's funds in his business

account. The special master concluded that the deposit of the *Tara* settlement funds in respondent's business account supported the presenter's position that respondent had intentionally deposited the *Jay Dee* funds in his business account.

The special master found it significant that respondent did not maintain a trust account ledger card for the *Jay Dee* matter, observing that respondent's "meticulous nature" suggested that there should have been a ledger card. The special master reasoned that, even if it was true that respondent had mistakenly placed the funds in the wrong account, he should have retained the deposit ticket with the trust account records and, therefore, a trust account ledger card should have been created.

The special master questioned respondent's failure to transfer the *Jay Dee* funds to his trust account after he realized that he had deposited them in the business account. Respondent's explanation was that he did not transfer the funds because he did not want to delay payment to his client one more day. The special master noted that it is common knowledge that transfers between accounts maintained within the same bank are accomplished in one day. The special master inferred that respondent failed to transfer the funds to his trust account because he knew he did not have sufficient funds to make the transfer, which would be accomplished in one day, while a check to the client would not be presented for payment for at least several days. By then, the special master determined, respondent expected to have the $10,000 *Walsh* fee in the account.

Based on the foregoing, the special master concluded that respondent knowingly misappropriated the *Jay Dee* funds to cure the existing overdraft in his business account and

to cover future checks. The special master further concluded that respondent used the funds as a short-term loan, knowing that a $10,000 fee was forthcoming.

The special master found that respondent also violated RPC 8.4(c) when he misappropriated the funds and when he tried to make his use of the funds undiscoverable. The special master noted that, after respondent learned that disbarment is automatic in knowing misappropriation cases, respondent claimed that he had mistakenly deposited the funds in the wrong account.

The special master found that, although respondent's actions were knowing, they were not part of a "regular process of utilizing trust funds," that is, part of a pattern.

The special master recommended disbarment.

* * *

Following a *de novo* review of the record, the Board is satisfied that the special master's finding of unethical conduct is clearly and convincingly supported by the evidence. The Board is unable to find, however, that the record clearly and convincingly establishes that respondent committed a knowing misappropriation of client funds.

As pointed out by the special master, there was no direct evidence of respondent's knowing misappropriation; rather, the special master weighed the circumstantial evidence to determine whether the misappropriation was knowing or merely negligent.

In *In re Konopka*, 126 *N.J.* 225 (1991), the Court made the following pronouncement on the sufficiency of proofs in a knowing misappropriation case:

> We insist, in *every Wilson* case, on clear and convincing proof that the attorney *knew* he or she was misappropriating. Obviously, we consider the attorney's records, if relevant, along with all other testimony, but if all we have is proof from the records or elsewhere that trust funds were invaded without proof that the lawyer intended it, knew it, and did it, there will be no disbarment, no matter how strong the suspicions are that flow from that proof.
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> [*Id.* at 234]

Here, the factors to be considered are the following: respondent's "admission" to the OAE auditor; respondent's deposit of the *Tara* settlement check in his business account; the long history of overdrafts in respondent's business account; the absence of a trust account ledger card for the *Jay Dee* matter; respondent's practice of "playing the float;" and respondent's credibility and demeanor.

The special master found that respondent did not admit that he knowingly misappropriated the *Jay Dee* funds, but only that he had inadvertently deposited them in the wrong bank account. This finding was correct. Respondent's version of the meaning of his statement was reasonable.

The evidence shows that, about one month after depositing the *Jay Dee* check, respondent also deposited the *Tara* settlement check in his business account. Again, respondent claimed that he had simply made a mistake and had no excuse for it. While this mistake is somewhat harder to justify because two other checks for fees were also included in the same deposit, respondent's explanation was plausible; it is possible that he might have

made a mistake. Under these circumstances, it cannot be found, to the requisite standard, that respondent acted with knowledge and deliberation.

Much of the evidence centered around respondent's practice of overdrawing his business account. During the fourteen-month period preceding the deposit of the *Jay Dee* check, respondent had overdrawn his business account forty-three times, resulting in bank charges of $995 for the cashing of checks drawn against insufficient funds and $634 for the honoring of checks drawn against uncollected funds. The OAE contended that the overdrafts led respondent to borrow the *Jay Dee* funds temporarily until the *Walsh* fee check was received. The OAE also argued that the overdraft at the time of the *Jay Dee* deposit was different from the others because (1) respondent did not deposit his own funds to cover it and (2) the $9,000 deposit greatly exceeded the $1,300 overdraft. Respondent's pattern, according to the presenter, had been to deposit just enough, or a little more, than was needed to cover a particular overdraft. The OAE further charged that respondent needed the funds in the business account because he knew that he would be issuing numerous checks at the end of January. The record shows that respondent issued thirty-five checks for approximately $7,700 after he deposited the *Jay Dee* funds.

For his part, respondent contended that the long history of overdrafts supported his position that he did not need to be concerned about the $1,300 overdraft because the bank had always honored his checks in the past and because he was expecting his monthly $1,040 social security check and the *Walsh* fee check within a matter of days. To refute the OAE's contention that he had deposited the $9,000 *Jay Dee* check to cover future checks, respondent

also pointed to his pattern of writing a lot of checks at the end of the month. Respondent introduced evidence indicating that, in other months, he had written as many as thirty-nine, thirty-five and twenty-eight checks at the end of each month.

The special master found that the presenter's and respondent's arguments on this issue were "equally compelling," when looked at summarily. In leaning toward the presenter's position, the special master appeared to be swayed by the fact that (1) the *Jay Dee* funds greatly exceeded the overdraft amount of $1,300, contrary to respondent's practice of just barely covering overdrafts, and that (2) respondent needed the money because, excluding the *Jay Dee* funds, he had deposited only $331.25 of his own money into the account, an amount insufficient to cure the $1,300 overdraft.

The Board's review of the record shows that, while the proofs about the overdrafts offered by the presenter demonstrated that respondent's banking practices were unwise, particularly his habit of relying on the bank to notify him of overdrafts and the substantial fees he incurred as a result, they do not establish that respondent intended to take the *Jay Dee* funds to cure the overdraft. There was evidence that the pattern of overdrafts was not without exception. On one occasion, an overdraft continued for six days; on another, it went on for four days. Furthermore, respondent's bank account status was such that, on any given day, there could have been an overdraft. Thus, the fact that an overdraft existed on the day that the *Jay Dee* check was deposited does not establish conclusively that respondent intended to deposit the *Jay Dee* funds in order to cure that overdraft.

The special master relied on his finding that respondent "played the float," in concluding that respondent had to be aware of the status of his account at all times, despite respondent's protestations to the contrary. Respondent testified that his practice was to send out invoices to his clients in the beginning of the month and, without verifying if payments had been made, to write checks at the end of the month. Respondent allegedly relied on the bank to notify him if he overdrew his account. While respondent's banking procedures were troubling, the special master's finding that respondent had to be aware of his account status was not supported by clear and convincing evidence.

Similarly, the special master's finding that respondent's check stub notations for tax purposes indicated some type of impropriety was surprising. Respondent testified that, for tax purposes, he would note on the checkbook the purchases of office supplies as well as expenditures made in connection with his clients (2T108). From that very succinct testimony, the special master found that "[t]he general and substantial charging to accounts for library and office supplies suggests that it is being done for tax purposes and not legitimately, which further supports the questioning of Respondent's credibility" (Report of the special master at 19). The Board disagrees. The record does not support the finding that respondent's conduct in this regard was illegal or even unethical.

The special master also concluded that respondent's failure to prepare a ledger card for *Jay Dee* strongly indicated foul play. Unquestionably, respondent's recordkeeping practices were deficient. However, the fact that he did not create a ledger card for *Jay Dee* does not necessarily lead to an inference of intent to knowingly misappropriate. Moreover,

there were no proofs submitted that respondent always prepared a trust account ledger card for every matter.

In short, while there was clear and convincing evidence that respondent negligently misappropriated client funds and that his banking practices were reckless at best, the proofs did not support a finding of knowing misappropriation. *Konopka* requires a much stronger demonstration of intent to misappropriate client funds than is shown in this record. Similarly, the finding of a cover-up on the part of respondent is not supported by the evidence.

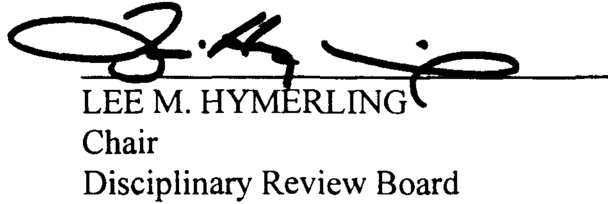
All in all, respondent negligently misappropriated client funds and exhibited horrendous accounting practices. Ordinarily, a reprimand is sufficient discipline for one or two instances of negligent misappropriation and for recordkeeping irregularities. Here, however, in light of the recklessness respondent displayed in the management of his business account, a period of suspension is warranted. *See In re Gallo*, 117 *N.J.* 481 (1989) (attorney suspended for three months for using his trust account as a business account, commingling client and personal funds, failing to keep a running balance of the trust account, failing to maintain trust account receipts and disbursement journals and negligent misappropriation of client funds) and *In re James*, 112 *N.J.* 580 (1988) (three-month suspension imposed for grossly inadequate recordkeeping and negligent misappropriation of client funds).

At a minimum, attorneys have a duty to maintain accounting practices sufficient to prevent the inadvertent misappropriation of trust funds. *In re Fleischer*, 102 *N.J.* 440 (1986). Here, respondent failed to meet even this minimum standard.

In light of the foregoing, the Board unanimously determined to suspend respondent for three months. In addition, for a two-year period, respondent must submit to the OAE quarterly trust account reconciliations prepared by a certified public accountant approved by the OAE.

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

Dated: 12/16/97



LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Donald F. Tompkins
Docket No. DRB 97-281

Argued: October 16, 1997

Decided: December 16, 1997

Disposition: Three-Month Suspension

Members	Disbar	Three-Month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		x					
Zazzali		x					
Brody		x					
Cole		x					
Lolla		x					
Maudsley		x					
Peterson		x					
Schwartz		x					
Thompson		x					
Total:		9					

Robyn M. Hill 1/7/98

Robyn M. Hill
Chief Counsel