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SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
DOCKET NO. DRB 97-048

IN THE MATTER OF

LARRY BLUMENSTYK,

AN ATTORNEY AT LAW

Decision

Argued: April 17, 1997

Decided: June 30, 1997

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

Donald R. Belsole 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 based on a recommendation for discipline filed by the District X Ethics Committee ("DEC"). The complaint charged respondent with knowing misappropriation of client funds, in violation of RPC 1.15 (failure to safeguard client funds) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). Respondent's misconduct was discovered as a result of a random audit of his attorney records conducted by the Office of Attorney Ethics ("OAE"). Respondent admitted the allegations against him.

Respondent was admitted to the New Jersey bar in 1977 and is engaged in the practice of law in Morristown, Morris County.

On several occasions in the course of the DEC proceeding, it was contended that respondent had an unblemished career. On December 20, 1985, however, respondent was privately reprimanded for failure to obtain his client's permission to withdraw legal fees from trust funds.

* * *

By letter dated September 8, 1995, the OAE notified respondent that he would be the subject of a random compliance audit of his attorney books and records, to be conducted on September 27, 1995. Prior to the scheduled date of the audit, respondent's counsel, Donald R. Belsole, Esq., asked the OAE for a postponement of the audit until he could be available and offered to bring respondent's records to the OAE. On September 28, 1995, Belsole delivered respondent's trust account records to the OAE for review. Robert J. Prihoda, Chief of the Random Audit Program, reviewed those records. The OAE's preliminary report, dated October 3, 1995, concluded that respondent had knowingly misappropriated trust funds belonging to two clients. The OAE conducted a demand audit on November 9, 1995. The OAE's findings were as follows:

The Cresitello Funds

Respondent represented Donald Cresitello in a real estate matter. On December 2, 1994, respondent deposited into his trust account $65,000 received from Cresitello. The entire $65,000 should have been held intact from the date of deposit until January 27, 1995, when respondent paid the funds over to the proper recipient. However, on December 19, 1994 and January 16, 1995, respondent invaded client trust funds held in behalf of Cresitello, in the amounts of $10,000 and $5,412.55, respectively. Respondent did not have his client's authorization to withdraw the funds.

The Messler Funds

Respondent represented Edith Messler in a personal injury matter. The case settled for $115,000. On November 1, 1994, January 17, 1995 and March 3, 1995, deposits totaling that amount were made to respondent's trust account. Messler was entitled to receive $76,237.65 of the total deposited. Accordingly, the $76,237.65 should have remained on deposit in respondent's trust account until respondent released the funds on June 15, 1995. (The delay in disbursing the funds to Messler was not respondent's fault). However, between November 3, 1994 and May 3, 1995, respondent drew ten checks payable to himself, totaling $95,412.55. Respondent was entitled to a legal fee of $25,412.55 for the Messler matter. Therefore, he utilized $70,000 ($95,412.55 minus $25,412.55) of the Messler funds for his own purposes. Respondent did not have his client's authorization to withdraw the funds. Respondent misappropriated the following amounts from Messler on the following days:

January 27, 1995	$ 4,587.45[1]
February 7, 1995	$ 5,412.55[2]
March 20, 1995	$ 5,000.00
April 24, 1995	$30,000.00
April 28, 1995	$10,000.00
May 3, 1995	$15,000.00

Exhibit C-1, the investigative report, prepared by Prihoda, sets forth at pages three through five a detailed analysis of the transactions in question in the Cresitello and Messler matters.

* * *

[1] On January 27, 1995, respondent actually withdrew $10,000. However, he was entitled to $5,412.55 for the balance of his legal fee. Therefore, only $4,587.45 was included in the total of funds misappropriated.

[2] The funds taken on January 27 and February 7, 1995 from the Messler account were used to reimburse the Cresitello account.

Respondent knowingly misappropriated a total of $85,412.55[3] of client trust funds over a six-month period between December 1994 and June 1995. On June 9, 1995, respondent deposited $100,046.99 of his personal funds to the trust account, thereby fully restoring the amounts that had been improperly withdrawn from the Cresitello and Messler accounts.

Respondent used the misappropriated funds primarily for personal expenses, including a family vacation to Israel in December 1994 (approximately $15,000), his son's Bar Mitzvah in April 1995 (approximately $30,000) and tax payments to the Internal Revenue Service in April 1995 ($21,199).

By way of explanation for his misconduct, respondent stated that he had made financial commitments with the expectation that he would receive a distribution from a personal trust fund established by his parents, in the amount of approximately $100,000. Respondent anticipated receiving the funds in March 1994. However, because of his parents' physical and marital difficulties, the anticipated distribution was not made until June 1995. Respondent could not bring himself to discuss his finances with his parents or with his wife. Although respondent conceded that he could have borrowed the money he needed from other sources, he chose not to do so because that action would have entailed apprising his wife of his financial situation. Respondent testified that he now realizes that not telling his wife about his finances was "absolutely stupid." Respondent took the funds from his clients' accounts, expecting that he would restore them after the distribution of his personal trust. As noted above, in June 1995, when respondent received the awaited distribution, he returned the misappropriated funds to his trust account. Respondent deposited the funds almost

[3] Respondent disputed the total amount of the misappropriation to the extent that it counts twice the funds taken from the Messler account to replace the funds taken from the Cresitello account.

three months before he was notified that he would be the subject of a random audit.

Respondent admitted his misconduct in this matter and also admitted that at the time, he knew the conduct was wrong. Respondent stated, "I knew what I was doing when I was taking the Messler money. It is hard to think back on what a bizarre thing I did. But I certainly - I wrote the check with my hand and I knew. I hated it and I did it all at the same time."[4]

Respondent was well aware of the state of his attorney trust and business accounts during the time period in question. On several occasions, he transferred misappropriated funds from his trust account to his business account to avoid overdrafts in the business account. Respondent's records also revealed that he had taken loans from sources that included family members.

Although respondent admitted his misconduct in this matter, he argued that the discipline imposed should be less severe than the disbarment mandated by In re Wilson, 81 N.J. 451 (1979). Respondent cited several mitigating factors, including his prior record, his restitution of the funds and the fact that the funds were being borrowed only until he received the proceeds of his personal trust fund.

* * *

The DEC concluded that respondent knowingly misappropriated funds from the Cresitello and Messler accounts, in violation of RPC 1.15 and RPC 8.4(c). In making its recommendation for disbarment, the DEC referred to the rule set forth in Wilson, where the Court held that the penalty for knowing misappropriation is disbarment. Although acknowledging that, in addition to respondent, others are suggesting that the Wilson rule be modified to allow for penalties short of

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[4] Ironically, respondent testified that, in or about 1986, he represented an attorney accused of misappropriation, who consented to disbarment.

disbarment, the DEC noted that its role is not to make new law and that the current rule calls for disbarment for knowing misappropriation of client trust funds.

* * *

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. The Board also agreed that respondent should be disbarred.

True, this is a case where the attorney intended only to borrow his clients' funds, restitution was made and no clients were harmed. In that light, respondent's counsel argued that the Wilson rule is flawed to the extent that it has been applied inflexibly, allowing for no distinction between the facts and culpability in each case. Respondent's counsel cited, among other cases, In re Noonan 102 N.J. 157 (1986) and In re Gallo, 117 N.J. 365 (1989), both cases involving misappropriation, which both resulted in suspension rather than disbarment. In both Noonan and Gallo, however, the Court determined that the misappropriations were negligent, rather than knowing. Clearly, that is not the case here, where respondent admitted that he knowingly misappropriated his clients' funds. The fact that this respondent did not intend to permanently deprive his clients of their funds is of no moment in the context of attorney discipline.

In Wilson, the Court made it clear that the factors cited by respondent as mitigating against the strict rule of disbarment will not be successful. Specifically, with regard to respondent's restitution of the misappropriated funds, the Court stated:

> When restitution is used to support the contention that the lawyer intended to 'borrow' rather than steal, it simply cloaks the mistaken premise that the unauthorized use of clients' funds is excusable when accompanied by an intent to return them. The act is

> no less a crime. [citations omitted] Lawyers who 'borrow' may, it is true, be less culpable than those who had no intent to repay, but the difference is negligible in this connection.
>
> [Wilson, supra, 81 N.J. at 458]

True, respondent's restitution of the funds prior to notification of the random audit of his records evidences that he truly did intend only to "borrow" funds. It does not, however, make him less culpable under the rule set forth in Wilson. In Noonan, the Court again announced that the attorney's intent and motives are irrelevant:

> It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of Wilson is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind, is irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment.
>
> [Noonan, supra, 102 N.J. at 160]

Respondent's assurance that no client would be harmed because he knew that he would eventually receive the proceeds of his personal trust is of little moment. Any number of factors could have interceded to prevent the release of the funds to respondent. As respondent testified, it was "serendipitous" that he received the funds in June 1995, enabling him to make a timely disbursement to Messler. Respondent testified that, had the funds not arrived, he would have come forward and explained his situation to his wife and/or parents and obtained the money. Perhaps that would have been the case, perhaps not. Furthermore, had some unforeseen illness or accident

befallen respondent, the funds might never have become his and, therefore, might never have been available to his clients. In any event, all of the above is irrelevant in light of the Court's pronouncement in Noonan that no amount of mitigation will save attorneys who knowingly misappropriate trust funds from disbarment.

With regard to respondent's twenty-year career, the Court has made it clear that, in a knowing misappropriation case, that factor does not carry weight:

> The inexperience or, conversely, the prior outstanding career, of the lawyer, often considered a mitigating factor in disciplinary matters, seems less important to us where misappropriation is involved. This offense against common honesty should be clear even to the youngest; and to distinguished practitioners, its grievousness should be even clearer.
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> [Wilson, supra, 81 N.J. at 459-460]

Furthermore, the personal expenses for which respondent misappropriated the funds do him no service in light of prior matters where attorneys have set forth far more compelling needs for funds. For example, in In re Warhaftig, 106 N.J. 529 (1987), the attorney withdrew anticipated fees in real estate matters from his trust account in advance of the closings and in advance of receipt of the funds. The attorney knew that the taking was wrong and rationalized that, if closings fell through, he would replace the money and no one would be harmed. The attorney began the improper practice because a decline in his real estate practice had taken a toll on his finances at a time when his wife was undergoing treatment for cancer, his son needed extensive psychiatric counseling and his health insurance covered little of the costs. The Court found knowing misappropriation and the attorney was disbarred.

Respondent's misconduct, taking funds to which he had no claim, in order to pay for a

vacation and a party, clearly lacks the urgency experienced by Warhaftig. (See also In re Manning, 134 N.J. 523 (1993) where an attorney was disbarred for misappropriation of funds taken to pay for his own life-saving medical treatment).

One other point warrants mention. In his answer, respondent stated that he "claims and will offer expert testimony on the causal connection between the offense charged and a psychological disability brought upon by the various events and pressures set forth at length in his Answer." Respondent testified that he has been seeing a psychologist. However, he offered neither expert testimonial nor documentary evidence of a psychological disability. His claim of disability was, therefore, disregarded. See also In re Siegel, 133 N.J. 162 (1993) (where an attorney knowingly misappropriated law firm partnership funds, and Siegel claimed, in mitigation, that several of his family members suffered from illnesses of varying severity). As stated by the Court,

> [m]any lawyers have suffered far worse without stealing from their clients or their partners. We cannot excuse respondent without exonerating every lawyer who suffers personal hardships and misappropriates funds.
>
> [Id. at 171]

There are no tragic overtones here - respondent was not compelled to misappropriate funds to save his home or the life of a loved one. To the contrary, this attorney made a conscious choice to invade client funds, thereby engaging in knowing misappropriation of those funds, simply because his pride would not allow him to seek funds from a legitimate source. There is no question but that

he should be disbarred. In re Wilson, 81 N.J. 451 (1979). The Board unanimously so recommends. One member recused himself.

The Board further determined that respondent be required to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 6/30/97

By: _____
LEE M. HYMERLING
CHAIR
DISCIPLINARY REVIEW BOARD

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Larry Blumenstyk
Docket No. DRB 97-048

Hearing Held: April 17, 1997

Decided: June 30, 1997

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling	x						
Zazzali	x						
Cole						x	
Lolla	x						
Maudsley	x						
Peterson	x						
Schwartz	x						
Thompson	x						
Total:	7					1	

Robyn M. Hill 7/7/97
Robyn M. Hill
Chief Counsel