SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-286

IN THE MATTER OF	:
RANDEE POMERANTZ	:
AN ATTORNEY AT LAW	:

Decision

Argued: October 16, 1997

Decided: February 17, 1998

Brian D. Gillet appeared on behalf of the Office of Attorney Ethics.

Andrew B. Schultz 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 special master Martin M. Barger. The seven-count complaint charged respondent with knowing misappropriation of client funds, in violation of RPC 1.15(a) and RPC 8.4(c), failure to make prompt payment to a client, in violation of RPC 1.15(b), recordkeeping improprieties, in violation of RPC 1.15(d), and misrepresentation to the Office of Attorney Ethics ("OAE"), in violation of RPC 8.4(c).

Respondent was admitted to the New Jersey bar in 1986. She has no prior ethics history.

* * *

Respondent conceded that, as a result of negligence in recordkeeping and supervising staff, her attorney trust account was overdrawn and client funds were invaded. The OAE took the position that respondent committed a knowing misappropriation; respondent argued that her misappropriation of client funds was negligent.

On May 6, 1992 the OAE received two letters from First Fidelity Bank indicating that respondent's trust account had twice been overdrawn In one instance, a check was returned for insufficient funds, creating an overdraft of $875.43. In the other incident, an additional shortage of $1,213.59 occurred when a $1,353 deposit was not credited until the next business day.

By letter to respondent dated May 21, 1992, the OAE requested an explanation for the overdrafts, as well as copies of particular documents, such as checks, client ledger sheets and bank account statements. The letter requested a response within ten business days. More than six weeks later, respondent sent the following explanation to the OAE:

> We represent a client who has been in good standing with us for several years. In order to help them [sic] with a debt consolidation, we were paying debts for them [sic] through our Attorney Trust Account. Our client would first deposit the

> necessary monies into our account and we would draw the necessary checks. One local creditor of our client went directly to the bank, in spite of a dated check.
>
> Unfortunately, our client's check deposit bounced causing the overdraft.

Respondent enclosed copies of her trust account bank statements for March, April and May 1992.

Not satisfied with respondent's explanation, on July 13, 1992 the OAE requested additional documents. Specifically, the OAE asked for copies of client ledger cards, trust account checks and a deposit slip showing reimbursement from the client whose check had been returned for insufficient funds. In respondent's behalf, her accountant, Patrick M. Walsh, sent copies of some documents to the OAE. Still not satisfied with respondent's explanation, the OAE scheduled a demand audit of her books and records. The OAE notified respondent that the records submitted suggested that her account was out-of-trust.

The OAE audit, which took place on September 30, 1992, disclosed numerous improprieties, including trust account shortages.

The Zall Matter

This count of the complaint charged respondent with knowing misappropriation of client funds [RPC 1.15(a) and RPC 8.4(c)] and with failure to make prompt payment of funds [RPC 1.15(b)].

Barbara Zall retained respondent to represent her in a divorce proceeding. At a hearing on February 10, 1992, the parties placed on the record the terms of a settlement agreement. The final judgment of divorce, entered on March 19, 1992, required respondent to disburse from her trust account $22,547.49 to Zall and $10,000 to the attorney for the husband. On February 20, 1992, ten days after the final hearing and about one month before the entry of the final judgment of divorce, respondent sent the husband's attorney a proposed form of judgment, as well as a trust account check for $10,000 for the husband's share of equitable distribution. Respondent did not disburse the $22,000 to Zall until April 6, 1992, eighteen days after the date of the final judgment of divorce, thereby raising a suspicion that, in the interim, the *Zall* funds had not been kept intact in her trust account. The circumstances surrounding the payment to Zall were hotly contested at the ethics hearing.

According to Patty Wooster, respondent's former paralegal assistant, and Catherine Cromlish (a/k/a Catherine Tzounkas), respondent's former bookkeeper, Zall called the office almost every day asking for her funds. Cromlish testified that in March 1992, when respondent was in Florida, respondent told Cromlish that Zall would be paid when respondent returned to New Jersey. According to Cromlish, she discovered that respondent's trust account had insufficient funds to pay Zall and so informed respondent during at least two telephone conversations. Cromlish testified that one of these conversations took place when respondent was in Florida. Cromlish testified further that respondent told her not to worry about the account, assuring her that enough funds would be available to pay Zall.

On March 26, 1992 respondent wrote a check to Zall. As noted earlier, she did not send the check to Zall, however, until April 6, 1992, eighteen days after the date of the final judgment of divorce. It was this check that triggered one of the overdrafts in respondent's trust account, prompting her bank, First Fidelity, to write to the OAE.

Respondent did not dispute that she was out-of-trust. She blamed the problem on poor accounting practices and, in particular, on her bookkeeper's failure to maintain proper records. In essence, thus, respondent contended that the use of other clients funds had been inadvertent.

As to the delay in the distribution to Zall, respondent testified that the reason for such delay was twofold. First, respondent explained, it was her practice not to distribute funds in divorce cases until she had received the final judgment of divorce with a "raised seal;" she added that she was waiting to receive that document to send the funds to Zall. Respondent acknowledged that she deviated from this practice when she distributed the $10,000 funds to the attorney for Zall's husband. She claimed, however, that she and the attorney had agreed that the payment would be made before the execution of the divorce documents. The second reason for the delay, respondent asserted, was that she wanted to wait until her return from Florida to send a check to Zall. When pressed by the presenter for documentary proof of her trip to Florida, such as an airline ticket, respondent was unable to produce any.

Respondent testified that she still represents Zall, who has never complained about her services.

The OAE presenter, in turn, charged that respondent deliberately delayed the disbursement to Zall because respondent knew that, due to her personal expenditures, her trust account did not have sufficient funds to pay Zall. In fact, the OAE charged, on April 10, 1992, four days before the check was dishonored, respondent already knew that her trust account was overdrawn. And she knew it, the OAE argued, because on April 10, 1992 she deposited $3,500 of her own funds into the trust account to cover a shortage in another matter, *Danmor*. According to the OAE, this deposit proved that respondent actually knew much more about her trust account balances than she admitted knowing.

The OAE investigative auditor, Barbara Galati, testified that, on twenty separate occasions between October 23, 1991 and April 14, 1992, when the *Zall* check was presented for payment, respondent's trust account contained less than the amount required to be on deposit for the *Zall* matter alone. Moreover, according to Galati, from the date the check was written, March 26, 1992, until it was presented for payment, April 14, 1992, there were not enough funds on deposit in respondent's trust account to cover the disbursement to Zall. Galati testified that the trust account shortages were caused by respondent's use of trust funds to make payments unrelated to the *Zall* matter. Among the payees were: another client, Ronnie D'Esposito; respondent's minor daughters' bank accounts; contractors performing work on respondent's house; respondent's housekeeper; the owner of the building where respondent's husband conducted his business; respondent's husband's business; Freehold Mitsubishi, from whom respondent bought a car; and respondent herself.

The OAE presenter also took the position that, despite respondent's and Cromlish's testimony, respondent was not in Florida during March 1992. The presenter relied on the absence of any documentary proof of that trip. The presenter also pointed to numerous checks signed by respondent during the month of March. The presenter charged that such checks showed one of two things: either respondent was in New Jersey in March or she improperly signed the checks in blank.

The Schneeberg Matter

This count of the complaint charged respondent with knowing misappropriation of client funds, in violation of RPC 1.15(a) and RPC 8.4(c), and with commingling of personal funds and trust funds, in violation of R.1:21-6.

In November 1991 respondent's father, Sidney Schneeberg, passed away, leaving respondent as the sole beneficiary and executrix of his estate. From time to time, respondent would receive installment distributions from the estate. Instead of opening a separate bank account for the estate, she would deposit the funds in her trust account. Respondent told OAE auditor Galati that she used her trust account because it was easier to keep track of the payments and deposits in connection with the estate. The total periodic distributions for the estate amounted to $370,000. It is undisputed that respondent was entitled to such funds. The alleged ethics impropriety consisted of respondent's commingling the estate funds and trust funds and withdrawing funds in excess of those deposited for the estate. According to

OAE auditor Galati, on nine occasions between November 18, 1991, the date of the deposit of the first estate distribution, and September 1992, the date of the last entry on the estate ledger card, respondent withdrew more than the funds on deposit for the estate, thereby invading client trust funds.

Respondent did not deny that she was out-of-trust. In fact, the account reconciliations prepared by respondent's accountant after the OAE notice of the demand audit, showed that respondent had invaded client funds. Respondent claimed, however, that such invasion had been inadvertent, due to poor recordkeeping. Respondent attempted to shift the blame to her bookkeeper, Catherine Cromlish, contending that she had entrusted Cromlish with the responsibility of maintaining the estate account. Cromlish, in turn, testified that respondent knew at all times the exact balance of the estate account and that she, Cromlish, always followed respondent's directions on how much to withdraw from the account. According to Cromlish, respondent asked her constantly, sometimes daily, about the balance in the estate account. Cromlish pointed out that the *Schneeberg* ledger card contained entries made by respondent herself. Hence, Cromlish suggested, respondent had to be aware of the status of the account and, therefore, that the withdrawals exceeded the amount of funds on deposit. In fact, Cromlish testified, respondent was aware that at times the estate account had a negative balance. Cromlish also testified that, whenever she brought this problem to respondent's attention, respondent appeared unconcerned and assured her that there would be additional distributions from the estate.

The OAE's position was that respondent knew the precise balance of the estate account and that she, therefore, knowingly invaded client funds. For example, the OAE pointed out, on January 2, 1992 respondent made the largest deposit of funds toward the *Schneeberg* account, $171,823.59. On that same day, respondent wrote seventeen checks against her trust account, totaling $171,823.48, or eleven cents less than the funds on deposit for the estate. The OAE urged a finding that respondent could not have written a large number of checks (seventeen) and have come within only a few cents of its balance without knowing the exact balance of the account.

Toward the end of the ethics hearing, the OAE presenter introduced a new theory as to why respondent had deposited the estate funds in her trust account. The OAE presented evidence that several judgments had been entered against respondent and her husband, following their default on loans for medical equipment for the husband's business. According to the OAE, respondent deposited the $370,000 inheritance in her trust account to shelter the funds from judgment-creditors.

The D'Esposito Matter

This count charged respondent with knowing misappropriation of client funds, in violation of RPC 1.15(a) and RPC 8.4(c).

During the demand audit, the OAE auditor noticed that a client ledger card for Ronnie D'Esposito showed only one transaction, a $1,460 disbursement to the client on October 30,

1991. The OAE then asked respondent for a prior ledger card, on which a $1,460 deposit should have been recorded. In response to the OAE's inquiry, respondent sent a reconstructed ledger card showing the receipt of a $1,500 partial retainer on June 24, 1991, a payment of $135 on July 3, 1991 to the Superior Court of New Jersey and the $1,460 payment to D'Esposito on October 30, 1991.[1] As additional explanation for the *D'Esposito* disbursement, on May 8, 1996 respondent's counsel sent certain documents and a letter to the OAE, which in part stated as follows:

> Based on these documents, I am advised by Randee that her intention was to refund the sum of $1,460.33 to her client Ronnie D'Esposito, as an unused portion of the previously-paid retainer from Ms. D'Esposito.
>
> According to Ms. Pomerantz, the $1,460 check should have been paid from the regular [business] account on October 31, 1991, but was inadvertently and negligently instead paid from the trust account. It may be noted that Randee's father died on November 1, 1991 after being in and out of a comatose condition for several days.

Neither respondent nor her counsel offered any further explanation for respondent's alleged inadvertence. Included with the above letter were copies of a $2,000 check dated June 24, 1991 from D'Esposito to respondent, a $1,500 check dated June 28, 1991 from

[1] Although the disbursements exceeded the $1,500 partial retainer by $95, that is not the focus of the OAE's charge of knowing misappropriation. The disbursement of the $1,460 is the essence of that charge.

D'Esposito to respondent and respondent's business account bank statement for October 1991.

At the hearing before the special master, the OAE auditor testified that, although counsel's letter to the OAE indicated that the $1,460 refund to D'Esposito on October 30, 1991 had been mistakenly made from the trust account instead of the business account, on the day of the refund, October 30, 1991, the business account had only $1,216.66 on deposit, or $243.34 less than $1,460. The OAE auditor further testified that, although the *D'Esposito* ledger card contained a deposit entry of $1,500 on June 24, 1991, there was no source document, such as a deposit slip, showing that the $1,500 had been deposited in respondent's trust account. Accordingly, the OAE auditor concluded, because respondent had made the *D'Esposito* disbursement from the trust account without corresponding funds on deposit, other client trust funds had been necessarily invaded. According to the OAE, such misappropriation was knowing, as respondent knew that she had insufficient funds in her business account to issue a refund check to D'Esposito.

For her part, respondent testified that she had deposited the $3,500 retainer received from D'Esposito in her business account. Respondent could not explain why she had issued the refund check from the trust account instead of the business account. To refute the OAE's contention that her motive for issuing a trust account check was a low balance in her business account, respondent contended that the business account bank statement for October 1991 showed a deposit of several thousand dollars on October 31, 1991, one day after the $1,460

check was issued. Therefore, respondent argued, had she written the refund check against the business account, there would have been sufficient funds to cover the amount of the check at the time of its presentation for payment.

The "Out-Of-Trust" Matter

This count charged respondent with knowing misappropriation of client funds, in violation of RPC 1.15(a) and RPC 8.4(c).

OAE auditor Galati testified that, on twenty-eight occasions from June 13, 1991 to August 14, 1992, respondent's trust account was out-of-trust, that is, there was not enough on deposit to equal the funds that respondent should have been holding for her clients. Galati prepared a chart showing each out-of-trust instance and the client's funds that were invaded. Before preparing the chart, Galati obtained information from client ledger cards, as reconstructed by a trust analyzer software program, using source documents such as canceled checks, deposit slips, checkbook stubs and the end-of-month reconciliation statements prepared by respondent's accountant. According to the chart, during this fourteen-month audit period, the shortages in respondent's trust account ranged from $987.60 to $12,046.38, resulting in the invasion of trust funds held in behalf of fifteen different clients.

Respondent denied that she knowingly misappropriated client funds, attributing the invasion of those funds to negligent recordkeeping.

The Danmor Matter

In this count, too, respondent was charged with knowing misappropriation of client funds, in violation of RPC 1.15(a) and RPC 8.4(c).

Respondent's husband, Allen Pomerantz, is a physician who operated a radiology practice known as Danmor, Inc. Because his rental payment checks were often returned for insufficient funds, Pomerantz's landlord, Bruce Frankel, required him to pay the $1,108 weekly rent by cash or certified check. In March 1992, after Pomerantz continued to make untimely rent payments, respondent announced to Frankel that she was assuming responsibility for Danmor's financial affairs. Respondent declared that she would pay Danmor's rent from her trust account, which she described as being "good as gold."

During March and April 1992 respondent wrote trust account checks for Danmor's rent, in the amount of $1,108 each. She also wrote weekly checks in the amount of $245 against the *Danmor* account. These checks were made payable to cash and contained the reference "Angel" in the memo column. Angel Bretney was respondent's housekeeper. Respondent had an arrangement with her husband whereby Danmor would give respondent a check for $1,353 every week, which respondent would deposit in her trust account to pay the landlord and Angel.

On April 20, 1992 respondent's trust account check number 1609, payable to the landlord, was dishonored. After Danmor's check to respondent was returned for insufficient funds, First Fidelity Bank contacted the OAE. In response to the OAE's inquiry, respondent

offered the explanation discussed above, that is, that she had been helping a client with a "debt consolidation" and that, "in spite of a dated check," a creditor had gone directly to a bank, causing the client's check to "bounce." Respondent did not disclose that the client was her husband. OAE auditor Galati testified that, at the demand audit, she had asked respondent who Danmor was. According to Galati, respondent replied that Danmor was a very good client, never offering that Danmor was owned by her husband. Respondent, in turn, countered that she would have disclosed her husband's interest in Danmor if the OAE had asked her about Danmor.

Frankel, Danmor's landlord, testified that, after respondent's trust account check was returned in April, he insisted that the rent be paid by cash or cashier's check only. Frankel added that, after Danmor made sporadic and partial payments, it vacated the premises in July 1992, in violation of its lease. Frankel stated that, until respondent suggested making the rental payments from her trust account, he was not familiar with attorney trust accounts. He recalled that respondent's stated reason for paying Danmor's rent through her trust account was the avoidance of expense with certified checks. Respondent denied offering such a justification.

Respondent admitted her arrangement with Danmor. In her answer, she acknowledged that she was negligent in agreeing to this procedure, rather than suggesting that Danmor pay rent with its own certified funds. Respondent further conceded that, because Danmor's checks to her were returned for insufficient funds, a "temporary shortfall"

occurred in her trust account, which she then remedied by depositing personal funds in the account. Indeed, on April 10, 1992 respondent deposited into her trust account $500 from her business account and $3,000 from her personal account, followed by another $1,500 from her personal account on April 24, 1992. The latter deposit bore the notation "loan to trust - Danmor."

Galati testified that, at the demand audit, she had asked respondent who Angel was. According to Galati, respondent had identified the person as Angel Bretney, a creditor of Danmor, claiming to know no more than that or the reason why Angel was paid in cash. At the ethics hearing, respondent denied having been specifically asked about Angel and asserted that she would have given more information if asked.

Respondent's alleged misrepresentations on the identity of Danmor and Angel were the subject of a charge of a violation of RPC 8.4(c).

Recordkeeping Violations

The complaint charged respondent with the following fourteen recordkeeping violations: a cash receipts journal was not maintained for the trust account or for the business account; a cash disbursements journal was not maintained for the attorney trust account; a running cash balance was not maintained in the computerized attorney business account cash disbursements journals reconstructed by respondent's accountant; seventy-four attorney trust account checks from November 20, 1991 to July 30, 1992 did not have client references; a

client ledger card was not maintained for bank charges of $234.82 from December 13, 1991 to June 3, 1992; twenty-one deposit slips from November 20, 1991 to July 30, 1992 did not have client references; small client balances were carried on client ledger cards for excessive periods of time; no quarterly or monthly reconciliations were prepared; from November 21, 1991 through July 30, 1992 eighteen trust account checks, totaling $13,655.97, were made payable to cash; not all attorney fees were deposited in respondent's attorney business account; personal funds and trust funds were commingled; transactions for one client were incorrectly entered on the client ledger card of other clients; client ledger cards did not accurately reflect the transactions as they occurred; and trust account checks were post-dated, as admitted by respondent in her July 7, 1992 letter to the OAE.

Respondent told the OAE that she thought her bookkeeper, Catherine Cromlish, had prepared the trust account reconciliations, although respondent admitted that she had never requested them or seen them. Respondent also accused Cromlish of stealing the cash disbursements and cash receipts journals. Galati and Cromlish testified, however, that those journals never existed.

Of particular note to the OAE was a check for attorney fees that respondent deposited in her trust account instead of her business account. On March 16, 1992 respondent deposited into her trust account $20,300 from Temi Frank, a client. Respondent then disbursed those funds to herself the next day. Respondent's records showed that the $20,300 deposit was recorded on two client ledger cards: the *Schneeberg estate* card, and a

"reconstructed" ledger card for Temi Frank. The *Frank* card had been reconstructed because there was no original client ledger card. The OAE urged a finding that respondent's deposit of the *Frank* funds into the trust account was intended to cover the trust account check to Barbara Zall, as respondent was aware of the shortage in her trust account. Obviously, the crediting of one deposit on two different client ledger cards was improper.

The record is replete with numerous other questionable office practices by respondent. Respondent admitted that she went to her office only about once a week. On other days, she did not go inside, but sat in her car in the office parking lot, while her staff brought her checks and paperwork to sign. Respondent's frequent absences from the office also led to her authorizing her staff to sign her name on trust account and business account checks. Cromlish, Patty Wooster (a former paralegal assistant) and Kathleen Kurpiel (a former paralegal) testified that respondent had permitted Cromlish to sign respondent's name on numerous checks. In fact, respondent's method of paying her staff every week was to have Cromlish prepare, sign, endorse and cash the checks at the bank, returning with cash for each employees' salary plus respondent's own draw.

Respondent, in turn, vigorously denied authorizing Cromlish or any other person to sign trust account checks. She was equivocal about whether she had authorized Cromlish to sign business account checks, except for a period of one week and then only to pay office bills.

At the ethics hearing, when respondent was shown checks that she clearly had not signed, instead of conceding that they had been signed by another person, respondent attributed the difference in the signature to a "movement" in the check.

Respondent admitted, though, that she signed trust account checks in blank:

Q: Did you sign checks in blank?
A: It looks like I must have.
Mr. Barger: As a practice did you?
A: I shouldn't have. I really don't remember going now - I don't now [sic].
Mr. Barger: Not whether you should have, or even as a general practice, did you at times sign checks in blank?
A: I would have to say looking at the mess I did I could have.
Mr. Barger: And might this have been one of them?
A: Yes, it could have. It is a terrible thing to say, but I could have.
Mr. Barger: So you did sign trust account checks in blank?
A: It is very possible. I wish I could go back. I can't.

* * *

A troubling event took place just before the first scheduled ethics hearing date. The hearing was scheduled for Monday, May 13, 1996. On Friday, May 10, 1996, respondent signed a certification alleging that Cromlish had forged her signature on checks and had stolen funds from her. Respondent referred the matter to the Monmouth County Prosecutor's Office. A grand jury proceeding ensued. At its conclusion, a protective order on the

transcripts of the proceedings was entered. The parties advised the Board that the grand jury returned a no bill on respondent's criminal complaint.

At the ethics hearing, Galati testified that respondent "actually told us on the day of the audit, that she found out subsequently that no funds were stolen."

Another unsettling revelation was Cromlish and Wooster's testimony that they had left respondent's employ because respondent had directed them to "backdate" papers to be filed in court, which they had refused to do.

At the ethics hearing, a lot of attention was focused on several checks from respondent's trust and business accounts. Specifically, Cromlish testified that respondent had asked her to travel to Florida to remove items from the condominium owned by respondent's father. Cromlish agreed. She drove to Florida in a car rented by respondent. According to Cromlish, although respondent had agreed to reimburse her for expenses, they had a dispute about the reimbursement. Cromlish testified that ultimately, on March 11, 1992, respondent gave her a reimbursement check for $385.97, issued against the trust account. Cromlish used the proceeds from that check to purchase three money orders to pay personal expenses.

Respondent, however, accused Cromlish of forging the March 11, 1992 check for $385.97 and improperly retaining the proceeds for her personal use. According to respondent, on February 7, 1992 she reimbursed Cromlish with business account check number 2112 for $412.32, payable to cash. Respondent, however, claimed that it was unlikely that Cromlish's three bills plus the bank service charges for issuing the three money

orders would have equaled the exact amount of Cromlish's requested reimbursement of $385.97. On the other hand, the presenter pointed out that on February 6, 1992 respondent issued business account check number 2062 to Jaguar of Westfield in the amount of $412.32, the exact amount of the business account check number 2112 issued eight days later, payable to cash. After the presenter suggested that respondent had paid Jaguar of Westfield out of the business account and then issued another check in the same amount to reimburse herself for that expense, respondent insisted that check number 2112 had been paid to Cromlish as reimbursement for the Florida trip. Cromlish could not recall whether she had received those funds.

By way of explanation for her trust account improprieties, respondent testified that she had experienced the loss of several family members in a short period of time. Respondent stated that she lost her mother in January 1990, her brother in February 1991, her father in November 1991 and her mother-in-law in December 1991. In addition, respondent testified, she had been injured in an automobile accident in April 1991. Respondent also blamed others for her ethics infractions, particularly her recordkeeping violations. Respondent claimed that it was Cromlish's responsibility to maintain the necessary books and records in order to reconcile the accounts. Respondent faulted her accountant as well, asserting that it was his responsibility to take care of her books. Respondent admitted, however, that she never discussed her financial affairs or the requirements of R. 1:21-6 with the accountant.

Respondent also remarked that, when she was admitted to the bar in 1986, there was no requirement that she complete an accounting course.

* * *

Three of respondent's clients testified that they were pleased with respondent's legal services, that they would not hesitate to avail themselves of her services in the future and that they received from respondent any and all funds to which they were entitled.

* * *

The special master found that respondent committed recordkeeping violations, misused trust funds, allowed staff to sign trust account checks and commingled personal and trust account funds, contrary to R. 1:21-6. The special master concluded that respondent's misappropriation of client funds was negligent, not knowing. The Special Master found violations of RPC 1.15(a), RPC 1.15(d), and RPC 8.4(c).

The special master determined that respondent's trust account was out-of-trust, as alleged in the first five counts of the complaint. However, he attributed the invasion of client funds to shoddy recordkeeping, concluding that respondent did not intend to take any funds

belonging to others. The special master made the following remark with respect to respondent's trust account and recordkeeping practices:

> Respondent's problems began with Count Two - the Schneeberg Estate. This was her father's estate and the funds therein were hers, but they should not have been in the trust account and they should not have been commingled with the other trust account funds. Respondent used the Schneeberg funds as a piggy bank, taking the funds for automobiles, repairs and improvements to her home, payments to and for family members, etc. Respondent's cavalier attitude about these funds, her failure to separate these funds from the other funds in the trust account and her refusal to keep an accurate, daily tally of the funds that should have been in the trust account at all times led to her violations. She obviously felt that she had plenty of money in the Schneeberg account and could cover anything that came along.
>
> She was wrong, she bought expensive items without determining what these purchases did to the balance of the funds in the trust account, she did not keep accurate or current records and she didn't care. Respondent did not give her trust account the attention that was required and she reacted only when checks were returned for insufficient funds and she was reported to the Office of Attorney Ethics.
>
> The Schneeberg 'piggy bank' would cover all, clients would not be hurt and no one would ever know the difference. Of course, if you overspend the Schneeberg account, or if you permit your husband to deposit 'bad' checks in the Danmor account, you are out of trust, your clients will suffer, and the funds of your clients will be in jeopardy. Apparently this did not bother Respondent and she went on a spending spree without regard to whose money she was spending. If she got into trouble, which she obviously never anticipated, she would blame all the problems on her bookkeeper, Ms. Tzounakos. However, I found Ms. Tzounakos to be honest and forthright in her testimony, which I cannot say for Respondent. . . .

> This arrogance carried over to Count Seven - recordkeeping violations. Respondent, admittedly, did not keep proper books and records, documents mandated by the Rules of Court. She allowed her bookkeeper to sign checks, particularly trust account checks, which is absolutely prohibited. She couldn't be bothered to go into her office to check the accounts or sign checks and other documents.
>
> Respondent sat in the parking lot of her building and had everything brought down to her for signature. It was too much of an effort for her to go into her own office, which she is totally responsible for, and check to be sure that all was in proper order. When something went wrong she blamed everyone and everything but herself. No wonder she was out of trust, no wonder that checks were returned for insufficient funds.
>
> Respondent admittedly failed to keep records required by R. 1:21-6 and, in doing so, violated R.P.C. 1.15(d).
>
> By commingling [sic] funds, Respondent admittedly violated R.P.C. 1.15(a).
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> I find that by her misuse of the Schneeberg account, her failure to maintain mandated records, her refusal to take responsibility for her own office, her commingling [sic] of funds, and her overspending on personal items that caused her to go out of trust on numerous occasions, Respondent also violated R.P.C. 8.4(c).

The special master also found that respondent used her trust account to pay her husband's business expenses and her housekeeper's salary, improperly drawing funds against the *Danmor* account before the checks had cleared and causing her trust account checks to be returned for insufficient funds. According to the special master, although respondent knew that this procedure was wrong, "her apology and her acknowledgment are not sufficient." The special master concluded that these violations alone warranted a reprimand.

The special master dismissed count VI of the complaint, charging respondent with misrepresentations to the OAE.

The special master determined that respondent did not have an opportunity to defend the OAE's additional arguments raised toward the end of the hearing, noting that these arguments did not add much to the proceeding. Ostensibly, the special master was referring to the OAE's position that respondent placed the *Schneeberg* estate distributions in her trust account to defraud creditors.

The special master dismissed as "absurd" respondent's defense that she had not taken a recordkeeping course.

In recommending a three-year suspension, the special master concluded that respondent's attitude

> was not exemplary or candid and is a further reflection of Respondent's negative perception of how an Attorney should carry out his or her professional responsibilities. . . . Her misuse of escrow funds, her appalling disregard of proper record-keeping procedures and, most importantly, her entirely unacceptable insensitivity to basic ethical considerations went beyond **Hollendonner** and mandate a suspension far greater than one (1) year.

* * *

Following a *de novo* review of the record, the Board was satisfied that the special master's finding of unethical conduct was clearly and convincingly supported by the evidence. Unlike the special master, however, the Board was convinced that the record sufficiently establishes that respondent committed knowing misappropriation of client funds.

In the *Zall* matter, as in the others below, respondent did not dispute that she was out-of-trust. She denied, however, that her invasion of other client funds had been knowing. Instead, she shifted the blame for her financial improprieties to her bookkeeper, Cromlish, alleging that she had not performed her duties. Cromlish, in turn, denied any responsibility for the trust account deficiency, claiming that respondent was fully aware that the account had negative balances and that her withdrawals at times exceeded the funds on deposit for a particular matter. The special master found that Cromlish was a truthful witness and that respondent was less than credible.

The following circumstances persuaded the Board that respondent was guilty of knowing misappropriation in *Zall*:

- Despite respondent's duty to disburse the funds to Barbara Zall promptly, she waited eighteen days after the date of the final judgment of divorce before sending her a check. Yet, she disbursed Mr. Zall's share of equitable distribution with dispatch and, in fact, one month before the entry of the final judgment of divorce.

- On April 14, 1992, when the *Zall* check was presented for payment, respondent's trust account did not have corresponding funds on deposit to cover the check.

- Cromlish, whom the special master found truthful, testified that she had informed respondent that the trust account had insufficient funds to pay Zall.

According to Cromlish, respondent had not expressed panic or surprise at this revelation, but instead had told Cromlish not to worry about the account, assuring her that there would be enough funds available for the *Zall* payment.

- Respondent deposited $3,500 in personal funds to her trust account on April 10, 1992, four days after she mailed the check to Zall and four days before the check was presented for payment, proving that she was aware of shortages in her trust account.

To the Board the combined foregoing circumstances amount to sufficient evidence that respondent's actions were deliberate and that, therefore, her misappropriation of the *Zall* funds was knowing.

In the *Schneeberg* matter, too, the evidence is compelling that respondent knew that at times her withdrawals exceeded the funds on deposit for that account. As noted, there is no dispute that respondent was entitled to a $370,000 inheritance from her father's estate, which she deposited in her trust account as each partial distribution was made. There is also no dispute that respondent overdrew the *Schneeberg* account, thereby invading other client funds. The question is whether such invasion was knowing or negligent. Again, the factors below lead to a conclusion that respondent was aware that the *Schneeberg* account had negative balances and that, by overdrawing it, she was invading other client funds:

- Respondent's bookkeeper, Cromlish, testified that respondent kept a close eye on the account, asking her constantly, sometimes daily, about its balance.

- The *Schneeberg* ledger card contained entries made by respondent herself. This practice suggests that, contrary to respondent's testimony that she relied on Cromlish for the maintenance of the account, respondent, too, played a hand in its management.

- Cromlish recalled particular conversations with respondent concerning the *Schneeberg* account negative balances. According to Cromlish, respondent told her not to worry because there were still funds coming in.

- The great activity seen in respondent's trust account for the payment of her own expenses makes it hard to accept the notion that she had no inkling of how much she personally had in the account. Indeed, even the special master, who did not find knowing misappropriation, concluded that respondent had gone on a spending spree without first verifying whether the account had enough of her funds and without any regard for whose money she was spending.

- After respondent deposited in her trust account the largest distribution from the estate, $171,000, on the same day she wrote seventeen checks against the funds, coming within only eleven cents of its balance. This circumstance suggests that, contrary to her assertions that she relied on Cromlish, she kept close scrutiny on the amount of her funds in the account.

The above convinced the Board that respondent knew exactly how much she had in the account and that she was overspending it; in other words, that she invaded her clients' funds with knowledge and deliberation.

In the *D'Esposito* matter, the Board determined that the proofs fall short of the requisite standard of clear and convincing. There, respondent issued a $1,460 check to a client from her trust account, allegedly for a refund. Respondent claimed that she mistakenly issued to her client a trust account check instead of a business account check. Although a suspicion arises that respondent knew what she was doing, the evidence does not clearly and convincingly establish that her refund to the client by way of a trust account check was anything but inadvertent. Accordingly, the Board determined that respondent's invasion of other clients' funds in this matter was negligent, instead of knowing.

According to OAE auditor Galati, on twenty-eight occasions from June 13, 1991 to August 14, 1992, respondent's trust account was out-of-trust. In other words, there were no corresponding funds on deposit for her clients. Such shortages ranged from $900 to $12,000, causing the invasion of funds held in behalf of fifteen different clients. Respondent denied that her use of client trust funds was knowing, blaming her trust account shortage on her poor recordkeeping practices.

Here, too, the Board found no clear and convincing evidence that respondent's invasion of other client funds was knowing, as opposed to negligent. Indeed, respondent's explanation was reasonable, in light of her pervasive disregard for recordkeeping rules. Respondent's failure to maintain a cash receipts journal, a cash disbursements journal or a client ledger card for bank charges and her other numerous recordkeeping violations militate against a finding that she knowingly invaded client funds.

In the *Danmor* matter, respondent had an arrangement with her husband that she would deposit the checks from his business, Danmor, Inc., into her trust account and then write corresponding checks to pay Danmor's rent and her housekeeper as well. On April 20, 1992 one of the checks given to Danmor's landlord was returned for insufficient funds because Danmor's check to respondent had bounced. According to the OAE, on several other occasions respondent wrote checks without funds on deposit; often the checks were post-dated.

Here, again, the Board concluded that the proofs do not satisfy the standard of clear and convincing evidence. There is no evidence that respondent's husband, at any given time, failed to transfer to her corresponding funds to back up the rent payments made from her trust account. To be sure, respondent's conduct was reckless, as there was always the risk that Danmor's checks would bounce and that other client funds would be invaded. Nevertheless, there is no proof that she acted with the "mens rea" to borrow or steal clients' funds for the benefit of her husband. The evidence reveals that, at worst, respondent wrote checks against uncollected funds.

As to the count alleging misrepresentations to the OAE, OAE investigator Galati testified that, when she asked respondent about the identity of Danmor, respondent replied that Danmor was a good client, without disclosing that Danmor was a business owned by her husband. Galati also testified that, when asked, respondent informed her that Angel Bretney was a creditor of Danmor, omitting the fact that Bretney was her housekeeper. Respondent, in turn, testified that she would have revealed her husband's interests in Danmor, had she been asked.

The Board was unable to agree with the special master's dismissal of this count. Although, technically, respondent's answer to Galati that Danmor was a client was not untruthful, it was incomplete and evasive. Respondent had to know that Galati would be interested in Danmor's identity because of the understandable suspicion of favoritism that could have arisen in Galati's mind from such knowledge. The conclusion is, thus, inevitable

that respondent deliberately concealed that information from Galati. Similarly, the evidence is clear that respondent deliberately omitted telling Galati that Bretney was her housekeeper. When asked, respondent replied that Bretney was a creditor of Danmor. Again, although that might be so, respondent's reply was evasive and misleading. Accordingly, the Board found that, in both instances, respondent made knowing misrepresentations to the OAE auditor.

Lastly, as to the alleged recordkeeping violations, respondent admitted the charges contained in this count of the complaint.

* * *

The unfortunate picture that emerges from this record is that respondent treated her law practice as a hobby, not as a profession. Respondent's office procedures were so deficient as to evidence an extreme disregard for her responsibilities to her clients and for her recordkeeping duties. Respondent's casual attitude toward her professional obligations was illustrated by her continuous absences from the office. The record shows that respondent went to her office, a sole practice, only about once a week. Indeed, respondent's former paralegal, Kathleen Kurpiel, testified that one of the reasons she stopped working for respondent was that "[i]t was very stressful. I felt as though I was there too often on my own . . . ."

Even on those days when respondent went to the office, she often remained in the parking lot and instructed her staff to bring checks and documents for her signature. Respondent completely abdicated her accounting obligations to her staff, short-term employees whose references, at least as to some of them, she had not even investigated. This lack of attention to her law practice was inexcusable. Although respondent attempted to defend or mitigate her conduct by referring to the loss of four family members within a short period of time, her ethics offenses started prior to those events. Similarly, respondent's blame of Cromlish for her recordkeeping infractions was misplaced; respondent's trust account was already out-of-trust before Cromlish's employment. Despite respondent's assurances to the OAE that she had taken steps to improve her recordkeeping, in 1996, four years after the audit, her check for the filing fee to answer a fee arbitration matter was returned for insufficient funds.

Respondent's cavalier attitude toward her responsibilities manifested itself in other ways as well. Her credibility during the ethics hearing was questionable. For example, when faced with checks bearing signatures that did not resemble hers, instead of admitting that she had authorized her bookkeeper to sign those checks, respondent suggested that the check had "moved." Her testimony was inconsistent with that of almost every other witness at the ethics hearing. The following are examples of some of those inconsistencies:

- Respondent testified that, when Cromlish informed her that a trust account check had been returned for insufficient funds, respondent became very upset and was almost in a panic, while Cromlish testified that respondent laughed and told her not to worry about it.

- Bruce Frankel, the landlord of the commercial property leased by respondent's husband, testified that, when respondent proposed paying Danmor's rent with her trust account checks, she complained about the unnecessary cost of obtaining cashier's checks. Respondent denied this contention.

- According to OAE auditor Galati, when she asked respondent who 'Angel' was, respondent answered that her full name was Angel Bretney, that she was a creditor of Danmor and that respondent did not know any more than that or why she needed to be paid in cash. However, respondent testified that no one asked her these questions. Similarly, Galati testified that she asked respondent many times about Danmor, giving her ample opportunity to explain that her husband operated the Danmor radiology practice. Respondent denied any such questioning.

- Three of respondent's former employees, Catherine Cromlish, Patty Wooster and Kathleen Kurpiel, testified that respondent authorized Cromlish to sign trust account and business account checks. According to respondent, she might have permitted Cromlish to sign business account checks during one particular week and never authorized her to sign trust account checks.

In addition to the above examples, there were several occasions when respondent was unable to explain critical matters. For instance, she did not know why she paid her housekeeper from trust account funds drawn on *Danmor* deposits; she had no explanation for putting a $20,300 fee from Temi Frank, a client, in her trust account, and instead of her business account; and she could not explain why the deposit of $171,823.59 was not entered

on the *Schneeberg* client ledger card or why the refund to Ronnie D'Esposito was drawn against trust account funds instead of business account funds.

Finally, respondent attempted to place the blame for her improprieties on her bookkeeper, knowing that she was innocent. For example, during the OAE investigation, respondent requested more time to provide documents, contending that Cromlish had stolen original bank statements from April and May 1992 and that she was trying to obtain copies from the bank. However, at the demand audit, respondent produced the original April and May 1992 bank statements with the envelopes attached, showing that they had been received contemporaneously, not at a later date.

In another instance, respondent accused Cromlish of stealing the cash disbursements and cash receipts journals. Yet both Cromlish and the OAE auditor agreed that such journals had never existed.

* * *

In sum, the record amply supports the conclusion that respondent knowingly misused the *Zall* funds by utilizing them for personal purposes and then replacing them with her own monies; knowingly withdrew for her own benefit sums in excess of the funds received from the *Schneeberg* distributions; was out-of-trust on twenty-eight occasions from June 1991 through August 1992; wrote checks against uncollected funds in *Danmor*; committed

numerous recordkeeping violations; and made misrepresentations to the OAE. Although the Board was convinced that the proofs clearly and convincingly demonstrated that respondent knew that she was invading client trust funds, in violation of *In re Wilson*, 81 *N.J.* 451 (1979), at a minimum her conduct amounted to the "willful blindness" found in *In re Skevin*, 104 *N.J.* 476 (1986).

There, the attorney commingled personal and client funds in his trust account, failed to maintain a running balance of personal funds in the trust account, misused client trust funds and failed to maintain contemporaneous trust account records. Although the attorney conceded that client funds had been used, he denied knowingly misappropriating client funds, pointing out that he had deposited almost $1 million of his own money into the account to cover his personal withdrawals. Some of the shortages resulted from the attorney's practice of withdrawing his fees for personal injury cases from the trust account before settlement proceeds were received. The Court characterized the attorney's conduct as "willful blindness", reasoning that, when an attorney acts without satisfying himself or herself that he or she is not misappropriating funds, such a state of mind goes beyond recklessness and satisfies the requisite of knowledge.

The Board was compelled to make one final observation. As noted, respondent attempted to shift the blame for her trust account irregularities to her bookkeeper, Cromlish. She accused Cromlish of not properly maintaining her attorney records; of signing trust account and business account checks without authorization; of forging a check for $358.97

and improperly retaining the proceeds for her own use; and of stealing the office's cash disbursements and cash receipts journals. Respondent went so far as denouncing Cromlish's conduct to the prosecutor's office, who presented the matter to a grand jury that did not indict Cromlish. In fact, respondent herself confessed to the OAE at the demand audit that she had been mistaken: no funds had been stolen. Respondent's groundless accusations, obviously intended to exonerate her of any responsibility and to impugn the good character and integrity of a party whom she knew to be innocent, evokes shades of a troubling case recently decided by the Court, where the attorney received a three-year suspension for grievous misconduct, which included false accusations against a young woman, her babysitter. Two members of the Court dissented, voting for disbarment. *In re Kornreich*, 149 *N.J.* 346 (1997). As in *Kornreich*, respondent's malicious denigration of an innocent party's good name should not be tolerated.

* * *

For her knowing misappropriation of client funds, respondent must be disbarred. *In re Wilson, supra,* 81 *N.J.* 451 (1979). A seven-member majority of the Board so recommends. In *Wilson, supra,* the Court announced the bright-line rule that knowing misappropriation of client funds will, almost invariably, result in disbarment. The Court placed the highest priority on the maintenance of public confidence in the Court and in the

bar, such that "mitigating factors will rarely override the requirement of disbarment." *Id* at 461. Although the use of such terms as "almost invariable" and "rarely override" raised the possibility of a departure from the automatic disbarment rule, since 1979, the *Wilson* rule has been applied without exception. Every attorney who has been shown to have knowingly misappropriated client funds has been disbarred.

In *In re Noonan*, 102 *N.J.* 157 (1986), the Court defined the requirements for a finding of knowing misappropriation:

> The misappropriation that will trigger automatic disbarment under *In re Wilson*, 81 *N.J.* 451 (1979), disbarment that is 'almost invariable,' *id.* at 453, consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money was 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. . . . The presence of 'good character and fitness,' the absence of 'dishonesty, venality or immorality' – all are irrelevant. While this Court indicated that disbarment for knowing misappropriation shall be 'almost invariable,' the fact is that since *Wilson*, it has been invariable. [footnote omitted]
>
> [*In re Noonan, supra,* at 159-160]

Under *Noonan*, thus, intent to steal or defraud and dishonesty are not required. So long as the lawyer knows that the funds are not his or hers and knows that the client has not consented to the taking, the absence of evil motives, the lack of intent to permanently keep the monies, the good use to which the funds may be put, the lawyer's prior unblemished

character and, moreover, the circumstances or pressures impelling the lawyer are all irrelevant. All that is needed to mandate disbarment is proof that the lawyer took the funds knowing that they were not his or hers and knowing that the taking was unauthorized. No amount of mitigation will be sufficient to excuse misappropriation that was knowing and volitional.

Two members dissented, believing that, although respondent's use of client funds in the *Danmor* and *Schneeberg* matters approached willful blindness, it did not rise to the level of conduct requiring disbarment. Those members would impose a three-year suspension.

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

Dated: 2/17/98

LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD VOTING RECORD

In the Matter of Randee Pomerantz
Docket No. DRB 97-286

Argued: October 16, 1998

Decided: February 17, 1998

Disposition: Disbar

Members	Disbar	3-year 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:	7	2					

Robyn M. Hill 3/18/98
Robyn M. Hill
Chief Counsel