SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-255
District Docket Nos. IIIB-2009-0901E
and XIV-2008-0077E

IN THE MATTER OF	:
HERBERT F. LAWRENCE	:
AN ATTORNEY AT LAW	:

Decision

Argued: October 21, 2010

Decided: December 8, 2010

John McGill, III appeared on behalf of the Office of Attorney Ethics.

David H. Dugan, III appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline (censure) filed by the District IIIB Ethics Committee (DEC). The complaint charged respondent with failure to safeguard client funds (RPC 1.15, presumably (a)), negligent

misappropriation of client funds (RPC 1.15(a)), and recordkeeping violations (RPC 1.15(d) and R. 1:21-6). We determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1970. On August 19, 1985, respondent received a private reprimand for failing to act impartially as the escrow agent for two separate clients in a business venture. He withheld information that was to their detriment, thereby benefiting other participants in the venture. In the Matter of Herbert F. Lawrence, DRB 85-5 (August 19, 1985).

On December 1, 2005, he was suspended for six months, effective December 1, 2005, for engaging in several instances of fraud, misrepresentation, and conduct prejudicial to the administration of justice, in his own bankruptcy and matrimonial proceedings, by concealing assets from his wife and from the courts. In re Lawrence, 185 N.J. 272 (2005). Respondent was reinstated to the practice of law by Court order dated November 1, 2006. In re Lawrence, 188 N.J. 477 (2006).

On March 15, 2010, respondent and the Office of Attorney Ethics (OAE) entered into a stipulation of facts. This matter was brought to the DEC's attention by an October 18, 2006 letter from Sovereign Bank, regarding unusual activity in respondent's trust account.

On March 20, 2007, the OAE conducted a demand audit of respondent's books and records, which revealed that he had made two disbursements to himself from his Sovereign Bank trust account, while serving his 2005 suspension.[1] The withdrawals were accomplished by an October 7, 2005 check for $60,040.87 and a February 21, 2006 withdrawal of $93,626.76.

The OAE auditors concluded that respondent was entitled to $60,040.87, which represented outstanding checks to respondent, presumably for fees that had accumulated in his trust account.

The $93,626.76 withdrawal, however, drew the trust account balance to $37,000 and caused a shortage, but not a negative balance, of $2,295 in the trust account. At the time, respondent should have been holding $36,000 on behalf of client Doreen Galvan and $3,295 for client Emmanuel Jones, for a total of $39,295. Respondent admitted that his withdrawal caused the $2,295 shortage in the trust account. In June 2006, respondent deposited $10,000 of his own personal funds in the trust account to cure the shortage.

---

[1] The stipulation states that respondent did not practice law while suspended.

At the OAE audit, respondent explained that he had taken the $93,626.76 because it represented "funds that were due to him," as all other client obligations and outstanding checks had been disbursed already from the trust account. Respondent further admitted that, although he had taken the funds, he had not declared them as income for tax purposes.

The parties stipulated that, if respondent's accountant, Lance J. Vanderveen, had testified at the ethics hearing, he would have confirmed respondent's entitlement to the $60,040.87 withdrawal as earned fees. He could not, however, have "included nor supported [respondent's] contention that the $93,626.76 was due to respondent."

The parties also stipulated that, if respondent's former bookkeeper, Lisa Lazzaro, had testified at the DEC hearing, she would have stated that, from the late 1980s until April 1999, while she was respondent's office "manager/bookkeeper," respondent never commingled personal and trust funds in the account, other than "personal money" in connection with the sale or purchase of real estate that he owned.

The only documentation that respondent furnished the OAE in support of his explanation that the $93,626.76 belonged to him, was a February 15, 2007 letter from Vanderveen explaining that

respondent was entitled to the $60,040.87, but taking no position regarding the nature of the contested amount ($93,626.76).

The OAE audit revealed the following recordkeeping deficiencies:

> (a) Client's [sic] ledger accounts were not reconciled to the bank statement on a monthly basis [R. 1:21-6(c)];
>
> (b) Inactive trust ledger balances remained in the trust account for an extended period of time [R. 1:21-6(c)];
>
> (c) Trust and business receipts books have not been maintained in the manner required by [R. 1:21-6(b)(1)];
>
> (d) A separate ledger sheet was not maintained detailing attorney funds held for bank charges [R. 1:21-6(c)].
>
> If he were to testify, respondent would testify that such ledger was unnecessary since there were no bank charges to be paid; and;
>
> (e) Old outstanding checks were not resolved [R. 1:21-6(c)].
>
> [S¶17.][2]

After the parties entered into the stipulation of facts, a hearing was held on May 24, 2010, at which time the parties entered

---

[2] S denotes the stipulation of facts between respondent and the OAE.

only two documents into the record: the stipulation and respondent's December 20, 2005 affidavit of compliance with R. 1:20-20, relating to his six-month suspension. Among other things, respondent's affidavit stated that, prior to his December 1, 2005 suspension, "all files, whether pending litigation or otherwise, were either concluded or transferred to other attorneys. On the date of December 1, 2005, I had no client matters whatsoever and thus sent no notices under this section of the Rule."

In his answer, respondent stated that he had maintained records of the transactions tied to the $93,626.76 for the seven-year period required by R. 1:21-6(c)(1) and had destroyed them sometime prior to the OAE investigation. The parties stipulated that, had respondent testified, he would have so stated. No testimony was taken at the DEC hearing.

At the ethics hearing, counsel for respondent and the OAE placed on the record their respective positions regarding an issue for which the hearing panel chair requested briefs: which party, based on the stipulated facts, had the burden of proving the character of the $93,626.87 withdrawn by respondent from the trust account in February 2006.

The OAE argued that it was respondent's burden to prove that the $93,626.76 belonged to him, and that the only document that

respondent had produced for the audit was Vanderveen's February 17, 2007 letter. As indicated above, Vanderveen's letter addressed the $60,040.87 taken in October 2005, which was attributed to respondent as accumulated legal fees. The letter was silent about the nature of the $93,626.76.

The OAE relied on R. 1:20-6(c)(2)(C) to argue that respondent had to prove that the funds belonged to him. The relevant portion of that rule states: "Burden of Going Forward. The burden of proof in proceedings seeking discipline or demonstrating aggravating factors relevant to unethical conduct charges is on the presenter. The burden of going forward regarding defenses or demonstrating mitigating factors relevant to charges of unethical conduct shall be on the respondent."

According to the OAE, funds in excess of that necessary to pay bank charges (which are permitted by RPC 1.15(a) to remain in trust accounts) are presumed to be client funds. OAE Counsel believed that it was incumbent upon respondent to prove that the funds in the account were not client funds.

Respondent's counsel argued, on the other hand, that the burden of proof regarding the funds belonged to the OAE and never shifted to respondent. Counsel pointed to count one of the complaint, charging respondent with having failed to safeguard

client funds, which, if true, would violate RPC 1.15(a). Counsel's position was that the OAE bore the burden to prove that the $93,626.76 included some client funds, in order to sustain the charge that respondent failed to safeguard his clients' funds. Counsel argued that, because, the OAE did not prove that any of the funds taken from the $93,626.76 belonged to clients, the charge must be dismissed.

Secondarily, the OAE argued, because respondent could not prove that the funds belonged to him, they amounted to unidentified funds. As such, they should be disgorged and placed in the Superior Court Trust Fund as "unidentifiable and unclaimed trust fund accumulations." R. 1:21-6(j).

At the DEC hearing, respondent's counsel addressed the issue of unidentified funds, stating that "there is no actual evidence to support that it was client money, nor is there any actual evidence to support that it was earned counsel fees. Our approach to that would have been testimony based on inferences." Counsel was referring to respondent's answer to the complaint, in which respondent stated, in connection with the charge that "[s]pecific client and case documentation to support Respondent's claim that the $93,626.67 referenced in Count One was earned counsel fees is no longer available, having been destroyed after the required seven

year [sic] retention. The 'best evidence' available is Respondent's own testimony."

In a September 8, 2010 letter-brief to us, respondent, through counsel, reversed course, conceding that R. 1:21-6(j) applies to the funds in question:

> Here, the parties have stipulated that there is no actual evidence that the $93,626.76 was either client money or earned counsel fees. Given that reality, respondent concedes that R. 1:21-6(j) applies. Respondent should prepare and file an appropriate application with supporting affidavit so that the funds can be paid over to the Clerk of the Superior Court and deposited into the Superior Court Trust Fund.[3]
>
> [Rb4.]

The DEC found respondent guilty of failure to safeguard client funds held in the trust account (RPC 1.15(a)), basing its finding on respondent's inability to prove that the $93,626.76 belonged to him.

The DEC found that the $2,295 stipulated shortage in the trust account, at a time when respondent was required to hold that amount in the trust account for two of his clients,

---

[3] Rb denotes respondent's letter-brief to us.

amounted to negligent misappropriation of client funds (RPC 1.15(a)).

The DEC also found respondent guilty of having violated RPC 1.15(d) and R. 1:21-6, for the enumerated recordkeeping violations contained in the stipulation.

Finally, the DEC concluded that the $93,626.76 constituted "unidentified and unclaimed trust fund accumulations," pursuant to R. 1:21-6(j), and recommended that the funds be deposited with the Clerk of the Superior Court Trust Fund.

The DEC recommended a censure, without supporting caselaw.

Following a review of the record, we are satisfied that the stipulation fully supports findings of violations of RPC 1.15(a), as well as RPC 1.15(d) and R. 1:21-6.

Respondent stipulated that he negligently misappropriated client funds held in the trust account when, on February 21, 2006, he withdrew $93,626.76 from his attorney trust account. At the time, he was required to hold $39,295 in the account for two clients, but his withdrawal brought the account balance down to $37,000. His negligent misappropriation of client funds violated RPC 1.15(a).

In addition, respondent stipulated that he failed to perform monthly reconciliations of the trust account during the

audit period, failed to maintain a number of required records, and left inactive trust account ledger balances in the trust account for extended periods of time. He admitted that he was guilty of recordkeeping violations (RPC 1.15(d) and R. 1:21-6).

As to the charge that respondent failed to safeguard the $93,626.76 (actually, $91,331.76, when the $2,295 that was negligently misappropriated is deducted), five Board members found that respondent failed to safeguard client funds. In doing so, those members agreed with the OAE that several factors, when combined, raised a presumption that served to shift the burden to respondent to prove that the funds were his own. Those factors were: an attorney trust account is supposed to contain only client funds, not an attorney's fees or personal funds; respondent left the funds in the trust account for years before taking them; respondent took the funds more than sixty days after his suspension started, when the rules allow a suspended attorney to access the attorney trust account only for the first thirty days into a suspension (R. 1:20-20(a)(5)); respondent destroyed the records that would have established ownership to the funds, albeit only after the required seven-year period; and respondent used the funds to purchase real estate, a non-liquid investment.

The five-member majority believes that these factors sufficiently raised an inference that the funds belonged to clients, not to respondent, and that the burden of proof shifted to him to establish that the funds were his own. Because respondent provided no evidence that the funds belonged to him (other than to offer to testify that the funds were his), he did not establish an entitlement to the funds. Thus, the majority concluded that he failed to safeguard the $93,276.76, a violation of RPC 1.15(a).

Finally, respondent ultimately conceded, in his brief, that the $93,626.76 should be considered "unidentified" trust account funds and deposited with the Clerk of the Superior Court Trust Fund, until they can be identified.

Generally, a reprimand is imposed for recordkeeping deficiencies and negligent misappropriation of client funds. See, e.g., In re Macchiaverna, 203 N.J. 584 (2010) (minor negligent misappropriation of $43.55 occurred in attorney trust account, as the result of a bank charge for trust account replacement checks; the attorney was also guilty of recordkeeping irregularities); In re Clemens, 202 N.J. 139 (2010) (as a result of poor recordkeeping practices, attorney overdisbursed trust funds in three instances, causing a $17,000

shortage in his trust account; an audit conducted seventeen years earlier had revealed virtually the same recordkeeping deficiencies; the attorney was not disciplined for those irregularities; the above aggravating factor was offset by the attorney's clean disciplinary record of forty years); In re Mac Duffie, 202 N.J. 138 (2010) (negligent misappropriation of client's funds caused by poor recordkeeping practices; some of the recordkeeping problems were the same as those identified in two prior OAE audits; the attorney had received a reprimand for a conflict of interest); In re Fox, 202 N.J. 136 (2010) (motion for discipline by consent; attorney ran afoul of the recordkeeping rules, causing the negligent misappropriation of client funds on three occasions; the attorney also commingled personal and trust funds); In re Dias, 201 N.J. 2 (2010) (an overdisbursement from the attorney's trust account caused the negligent misappropriation of other clients' funds; the attorney's recordkeeping deficiencies were responsible for the misappropriation; the attorney also failed to promptly comply with the OAE's requests for her attorney records; prior admonition for practicing while ineligible; in mitigation, we considered that the attorney, a single mother working on a per diem basis with little access to funds, was committed to and had

been replenishing the trust account shortfall in installments); and In re Seradzky, 200 N.J. 230 (2009) (due to poor recordkeeping practices, attorney negligently misappropriated $50,000 of other clients' funds by twice paying settlement charges in the same real estate matter; prior private reprimand).

A reprimand may still result even if the attorney's disciplinary record includes either a prior recordkeeping violation or other ethics transgressions. In re Toronto, 185 N.J. 399 (2005) (attorney negligently misappropriated $59,000 in client funds and recordkeeping violations; the attorney had a prior three-month suspension for conviction of simple assault and a reprimand for a misrepresentation to ethics authorities about his sexual relationship with a former student; mitigating factors taken into account); In re Regojo, 185 N.J. 395 (2005) (attorney negligently misappropriated $13,000 in client funds as a result of his failure to properly reconcile his trust account records; the attorney also committed several recordkeeping improprieties, commingled personal and trust funds in his trust account and failed to timely disburse funds to clients or third parties; the attorney had two prior reprimands, one of which stemmed from negligent misappropriation and recordkeeping

deficiencies; mitigating factors considered); In re Rosenberg, 170 N.J. 402 (2002) (attorney negligently misappropriated client trust funds in amounts ranging from $400 to $12,000 during an eighteen-month period; the misappropriations occurred because the attorney routinely deposited large retainers in his trust account and then withdrew his fees from the account as he needed funds, without determining whether he had sufficient fees from a particular client to cover the withdrawals; prior private reprimand for unrelated violations); and In re Marcus, 140 N.J. 518 (1995) (attorney guilty of negligently misappropriating client funds as a result of numerous recordkeeping violations and commingling personal and clients' funds; the attorney had received a prior reprimand).

Here, in aggravation, respondent has a prior private reprimand and a six-month suspension. In further aggravation, he committed the misconduct in this matter while serving that six-month suspension.

We were unanimous in our determination that, because of the aggravating factors, a censure is the appropriate sanction for respondent. We also require respondent, within ninety days, to deposit the $93,276.76 into his attorney trust account and to remit them to the Superior Court Trust Fund with a certification

to the OAE that he has done so. In the event that respondent does not comply with this directive, the OAE may file a motion for his temporary suspension.

Vice-Chair Frost and Members Baugh, Clark, and Doremus filed a concurring decision, voting to dismiss the failure to safeguard charge (RPC 1.15(a)) as to $90,000.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Herbert F. Lawrence
Docket No. DRB 10-255

Argued: October 21, 2010

Decided: December 8, 2010

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			9			

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel