Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-310

IN THE MATTER OF :
:
GEORGE W. PRESSLER, :
:
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: November 18, 1992

Decided: December 28, 1992

John J. Janasie appeared on behalf of the Office of Attorney Ethics.

Steven D. Altman 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 upon a recommendation for public discipline filed by the District VIII Ethics Committee (DEC). This case arose out of a random compliance audit on July 6, 1988, conducted by Robert J. Prihoda, an auditor with the Office of Attorney Ethics (OAE).

Respondent was admitted to the practice of law in New Jersey in 1971. At all times relevant to this matter, he practiced as a sole practitioner in East Brunswick, Middlesex County. He has since formed a partnership for the practice of law and continues his practice at the same location.

The facts of this matter, as alleged in the complaint, were not disputed by respondent.

COUNT ONE: MISAPPROPRIATION OF INTEREST EARNED ON TRUST ACCOUNT

From 1984 through June 1986, respondent maintained an interest-bearing trust account. During that time, one of respondent's employees maintained a client ledger sheet to keep track of bank charges against the account and interest earned on the deposited funds. According to this ledger sheet, the account showed a net interest income of $8,802.15 through June 30, 1986. On July 1, 1986, respondent drew a trust account check payable to himself for that amount. Respondent admitted that these funds were used for personal and business purposes.

Respondent testified that, in 1984, when he had his business account transferred to an interest-bearing account, the bank also changed his trust account to an interest-bearing account.[1] According to respondent, he was unaware for a period of time, that the bank had made the latter change, the interest money remaining in the account for two years. The change in the account status was brought to respondent's attention at least one and one-half years later by his accountant, when the issue of reporting the funds to the IRS arose. Respondent testified that, after the interest-bearing account was brought to his attention in June 1986, he had the account changed to a non-interest-bearing account. He also testified that his accountant had advised him to keep the $8,802.15 interest amount, inasmuch as he had paid taxes thereon (T12/5/91 22).

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[1] According to respondent, it was his banker's idea to transfer the account and it was done without his knowledge (T12/5/91 21).

According to Prihoda's report, respondent told him that, "[o]n the advise [sic] of his accountant, he removed the interest to zero out the interest ledger" (Exhibit P-1, exhibit A, at 6). Respondent testified that he was unaware, at that time, that the interest belonged to the clients who had funds in the account (12/5/91 23).[2] According to respondent, although he has made no attempt, since July 1988, to determine to whom the $8,802.15 belonged, he would have no objection to doing so, if it was plausible and practical (T12/5/91 23-24).

COUNT TWO: NEGLIGENT MISAPPROPRIATION OF CLIENT TRUST FUNDS

During the course of the audit, respondent provided Prihoda with his trust account reconciliation for the twenty-nine-month period preceding May 31, 1988.[3] The reconciliation revealed negative balances on various client ledger cards, totaling $13,392.60.[4] The negative balances occurred when respondent disbursed trust funds on behalf of the clients in excess of trust funds held on deposit for clients. The overdisbursements were due to errors made by respondent and/or his employees. When respondent

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[2] The impropriety of his action was brought to his attention by Prihoda (12/5/91 23).

[3] According to Prihoda's testimony, two sets of books were maintained in respondent's office. One was maintained by his real estate secretary, who recorded the transactions that should have taken place at closings; a second set of books was prepared by the accountant, after the transactions occurred. Prihoda added that this second set was more accurate (T12/5/91 14).

[4] According to Prihoda's report, many of the negative balances existed for over one year; some dated back to 1979 (Exhibit P-1, exhibit A, at 2).

made the overdisbursements, trust funds of other clients were invaded and misappropriated.[5]

Following Prihoda's audit, respondent deposited $12,392.60 into his trust account, substantially covering the negative balances.[6]

In his answer and at the DEC hearing, respondent admitted that there were negative balances in his trust account. Although accepting much of the blame in this matter, respondent testified that one of his former secretaries had apparently stolen attorney fees and trust funds as well. According to respondent, the secretary would go to the post office, go through his mail and remove fees sent to him (T12/5/91 26). She was discharged after he learned of her conduct.[7]

After Prihoda's audit, John Janasie, Deputy Ethics Counsel, Howard Merkel, investigative auditor, and Gerald Smith, chief investigative auditor, all from the OAE, met with respondent. During their review, other items were apparently discovered,

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[5] Prihoda testified that no client suffered any loss due to respondent's misconduct, other than the interest owed to them (T12/5/91 11) (See discussion under Count One, supra).

[6] Respondent testified that he misunderstood Prihoda, believing the sum of $12,392.60 to be the amount of the deficit. Although he had not done so by the date of the DEC hearing, respondent indicated that he would have "no problem putting in that additional thousand dollars" (T12/5/91 24).

[7] Respondent testified that, when he believed that the secretary was taking funds from him only, he confronted her. She allegedly told him that she had taken the money because her bills were overdue and she was about to lose her car. Respondent then dismissed her. When he came to believe she was also taking client funds, he did not confront her with this fact (T12/15/91 27-28).

indicating that the secretary was also taking client funds.[8] Respondent testified about one particular case where the defendants were obligated to pay $500 or $1,000 per month, which they would bring, in cash, to the office. If respondent was not in the office, the money was allegedly given to the secretary, who would keep it for her own use (T12/5/91 24-25, 39). Respondent apparently wrote checks against these funds, believing that they had been deposited (T12/5/91 46).[9] Respondent testified that it was his belief that, of the total $13,392.60 deficiency in the account, his secretary was responsible for $4,000 or $5,000 (T12/5/91 28).[10]

With regard to the remaining deficiency in the account, Prihoda noted that, in one matter, a $625 error occurred because a check received from a bank was for an amount smaller than that anticipated by respondent (T12/5/91 14-15). Janasie also indicated that, in another case, money was escrowed to pay off a lien after closing. Apparently, by the time the real estate secretary paid off the lien, the amount had grown by $1,200, resulting in an invasion of other clients' funds. Janasie spoke of similar

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[8] Prihoda testified that he found no evidence of theft by any of respondent's employees (T12/5/91 11). Janasie stated that, subsequent to Prihoda's review, respondent uncovered evidence that supported his belief that his secretary had stolen from him. Janasie further stated that he spoke with the individual in question, who denied any wrongdoing. Janasie added that there was nothing that his review revealed that would refute respondent's belief as to the employee's conduct (T12/5/91 11-12).

[9] There was testimony given at the hearing that, on at least one occasion, the secretary took client funds being deposited in the trust account and credited them to the client whose funds she had taken (T12/5/91 44).

[10] There was no evidence that the secretary stole funds directly out of the trust fund that belonged to a client (12/5/91 42).

examples where clients did not have sufficient funds at closing; when that fact went undetected by respondent, overdisbursements occurred (T12/5/91 15-16).

According to Prihoda's report, respondent told him that he was aware that the negative balances existed in his trust account. Respondent also told Prihoda that reconciliations of the trust account were done by a C.P.A. until November 1986. They were not prepared again until November 1987, when another individual began to reconcile them, going back to November 1986. Respondent further stated to Prihoda that he periodically reviewed the bank reconciliations (Exhibit P-1, exhibit A, at 3).

However, when questioned as to why he never took any steps to correct the deficiencies in his trust account, respondent testified that he was not aware of them and that his accountant, a personal friend, never made him aware of the problems (T12/5/91 31). When asked if he ever reviewed his trust account, respondent replied:

> Stanton, I couldn't tell you that, I never looked at these, all right? But at the bottom line was that it appears as though everything was -- even that the negative balances balanced out to positive balances, no one ever said to me, George, you've got a problem here, you've got to cover these debit accounts. [T12/5/91 31].

In its report, the panel stated:

> [w]hile there does not appear to be any indication that the Respondent converted any of the trust funds to his own use, it is quite clear that he failed to reconcile, balance or clear his trust account over an extended period of time. The list appears to be the result of errors and loose ends which accumulated over an extended period of time

> rather than a misappropriation of funds by the attorney for his own benefit.
> [Panel Report at 4].

The panel determined that respondent had violated RPC 1.15(a) (failure to safeguard client trust funds), RPC 5.3(a), (b) and (c) (failure to properly supervise non-lawyer assistants), and Opinion 326 of the Advisory Committee on Professional Ethics, 99 N.J.L.J. 298 (1976).

A majority of the panel recommended the imposition of a public reprimand; one member believed a private reprimand would be sufficient discipline. In addition, the panel recommended that respondent pay over to IOLTA the net amount of the interest he withdrew from his trust account after deducting any income tax paid on those funds.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the findings of the DEC that respondent was guilty of unethical conduct are supported by clear and convincing evidence. However, the Board does not find sufficient evidence of a violation of RPC 5.3.

With regard to Count One, there is no dispute that respondent removed interest in the amount of $8,802.15 earned on his clients' trust funds and used it for his own purposes. Respondent claimed that he was not aware of Opinion 326, which deals with investing

client property. That Opinion provides that "it must be clearly understood that any interest or accretion is the property of the client."

This issue is similar to that seen in In re Goldstein, 116 N.J. 1 (1989). Goldstein maintained an interest-bearing trust account. None of the interest was turned over to the clients. Instead, between 1982 and 1986, Goldstein withdrew the sum of $25,000 in interest monies and deposited it in either his business account or in a money market account. For those clients who specifically requested that their funds earn interest, Goldstein opened separate interest-bearing accounts. He contended that he was unaware of Opinion No. 326. Following an audit by OAE, he agreed to calculate the accrued interest and to make prompt restitution to his clients. The Court imposed a public reprimand, but issued a warning to the bar that, in the future, similar misconduct would be met with harsher discipline. See also In re Sorensen, 122 N.J. 589 (1991). The Board has noted that respondent's misconduct in this regard predated the Court's warning in Goldstein.

The misconduct that is the subject matter of the second count of the complaint is more complex. This is not a simple case of poor recordkeeping but, rather, a failure to adequately review the records that existed.

In In re Barker, 115 N.J, 30 (1989), the Court considered a similar case of grossly negligent accounting procedures. That attorney was guilty of inadequate recordkeeping, failure to

reconcile his accounts on a timely basis, generally maintaining his accounts in a sloppy manner, and failure to overview his records to a responsible degree. Barker also "failed to exercise proper supervision over his bookkeeper so as to ensure that regular reconciliations were being performed, as mandated by R.1:21-6(b)(8)." Id. at 35. The Court noted that Barker's problems resulted primarily from a very inadequate bookkeeping system, the combination of an incompetent part-time bookkeeper and Barker's failure to supervise her work. After taking into account several mitigating factors, including the lack of harm to any client, the Court publicly reprimanded Barker. See also In re Fucetola, 101 N.J. 5 (1985) (public reprimand for recordkeeping violations that did not lead to harm to any clients); In re Hennessey, 93 N.J. 358 (1983) (public reprimand for relatively minor shortages in trust account as a result of poor accounting procedures).

More severe discipline was imposed in In re Gallo, 117 N.J, 365 (1989), where the Court suspended for three months an attorney who, for five years, was seriously inattentive to proper accounting and bookkeeping procedures. See also In re James, 112 N.J. 580 (1988) (three-month suspension for numerous bookkeeping irregularities over a period of twenty-four years, which ultimately caused negative balances in his trust account.)

In James, the choice between a suspension and a reprimand was discussed:

> That leaves a choice between the imposition of a term of suspension and the imposition of a stern public reprimand. In making this choice, the Board is mindful of the commentary appended in section 4.13 of the

Standards for Imposing Lawyer's Sanctions, adopted by the Joint Committee on Professional Sanctions of the American Board Association and approved in February 1986 by the ABA House of Delegates. That commentary reads in relevant part:

> Reprimand should be reserved for lawyers who are merely negligent in dealing with client property, and who cause injury or potential injury to a client. Suspension or disbarment . . . is appropriate for lawyers who are grossly negligent. For example, lawyers who are grossly negligent in failing to establish proper accounting procedures for lawyers should be suspended; reprimand is appropriate for lawyers who fail to follow their established procedures.
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> [Id. at 589]

Although respondent established a recordkeeping system, hired an accountant and maintained attorney records, he did not adequately review them. During the DEC proceedings, respondent did not provide any documents from his accountant to show that his trust account was balanced as of the DEC hearing. However, when the panel chair questioned respondent about the steps he had taken to correct the problems that existed with his account, respondent replied as follows:

> A. Stanton, I go the post office every day. I pick up the mail, I open it. I look at this trust account every day. I don't walk out the door in the afternoon unless I know that that trust account, the ledger disbursement sheet and everything else is in order.
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> Q. Well, you're telling us now that you, in effect, have a handle -- hands-on approach to your trust account?
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> A. Absolutely.
>
> Q. Which you didn't before?
>
> A. Yes.

Q. Can you be more specific in telling us what you're doing to keep it in balance and keep it correct?

A. I make deposits, number one, I'm the only one in the office that signs the checks.

Q. All right. At the moment nobody is accusing [sic] of taking the money, it's the accusation, to a large extent, of sloppy bookkeeping.

A. Yes, I understand that.

Q. What have you done to correct the bookkeeping side of this problem?

A. The only thing I can tell you, Stanton, I follow the rules now and the appropriate and proper bookkeeping.

Q. And you do that yourself now?

A. I have a secretary or bookkeeper that does it and I examine those documents almost on a daily basis, I'm extremely sensitive to this.

Q. All right, and do you presently employee [sic] the services of an accountant or --

A. Not to take care of my trust account, I do that in my office with the bookkeeper.
[T12/5/91 37-39][11]

The panel chair also questioned respondent about a great number of small balances in his account that had been carried for many years. According to both respondent's testimony and the information he provided to the OAE, those problems have been corrected (T12/5/91 33-36).

Admittedly, respondent was derelict in his recordkeeping procedure and negligently misappropriated client funds. While

[11] It is not clear from the record how the account was balanced as of the date of the DEC hearing if respondent deposited $1,000 less than the deficiency.

adequate review might not have completely prevented the alleged theft by his employee, it would have mitigated its impact. The Board considered, however, respondent's assurances that he is in control of his recordkeeping responsibilities. Accordingly, the Board unanimously recommends that respondent be publicly reprimanded. In addition, the Board recommends that respondent turn over to IOLTA the $8,802.15 in interest money. One member did not participate. The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 12/28/1992

By: Raymond R. Trombadore

Raymond R. Trombadore
Chair
Disciplinary Review Board