

10/2/07
M

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-120

IN THE MATTER OF
JOHN KELVIN CONNER
AN ATTORNEY AT LAW

:
:
:
:
:
:
:

Decision

Argued: July 19, 2007

Decided: September 6, 2007

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter came before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-14(a), following respondent's nine-month suspension in Pennsylvania for negligent misappropriation of clients' funds and recordkeeping violations. The OAE urges a reciprocal nine-month suspension, retroactive to the date of the

Pennsylvania suspension, May 11, 2006. We determine that a reprimand is the appropriate form of discipline in this case.

Respondent was admitted to the New Jersey bar in 1991 and to the Pennsylvania bar in 1992. He has no prior discipline in New Jersey. However, in 2002, he received an informal admonition in Pennsylvania. In that matter, respondent was paid \$5,000 to file a brief, never filed the brief or entered an appearance, and did not disclose to the client that no brief had been filed. Altogether, respondent violated RPC 1.1(a) (gross neglect), RPC 1.4 (failure to communicate with client), RPC 1.5(a) (unreasonable fee), and RPC 8.4(c) (misrepresentation).¹

On November 2, 2004, Pennsylvania disciplinary authorities filed a petition for discipline against respondent, alleging failure to safeguard client funds/negligent misappropriation (RPC 1.15(a)), failure to promptly deliver funds to clients (RPC 1.15(b)), and misrepresentation to ethics authorities (RPC 8.1(a), RPC 8.4(b), and RPC 8.4(c)). The latter charge was subsequently dismissed.

¹ Office of Board Counsel learned from the OAE that a Pennsylvania informal admonition is minor, private discipline. The OAE does not consider it as discipline warranting reciprocal discipline in New Jersey or as an aggravating factor to be considered in a subsequent disciplinary matter.

In his answer to the petition, respondent admitted violating RPC 1.15(a) in two client matters: The Wood Funeral Home Matter and the Cumberland Insurance Group Matter. Thereafter, the parties entered into a stipulation of facts, in which respondent admitted certain misconduct.²

I. The Wood Funeral Home Matter

According to the stipulation,

In August 2001, Cynthia Wood, on behalf of the Wood Funeral Home, retained Respondent to assist her in collecting funds owed to the funeral home from the account of Henry Thomas, Sr.

A judgment was obtained by Respondent against the Estate of Henry Thomas, Sr., in the amount of \$5,356.56.

In June 2002, American Abstract and Search, Inc. sent Respondent a check in the amount of \$4,112.57, representing a portion of the aforesaid judgment.

Respondent deposited the aforesaid funds into his business account at the First Union Bank ("First Union") on or about June 11, 2002.

Respondent failed to deposit the funds into any trust, attorney escrow or IOLTA account.

² Notwithstanding the stipulation, the parties disagreed about the interpretation of the facts. The Pennsylvania Office of Disciplinary Counsel argued that respondent knowingly misappropriated client funds and lied to ethics authorities. Respondent countered that his actions were inadvertent and that he was truthful with ethics authorities.

After allowance for Respondent's fees, the amount of \$2,983.31 was due and owing the Wood Funeral Home from the \$4,112.57 referred to above.

Respondent did not disburse the \$2,983.31 until January 2003.

Although Respondent was entrusted to hold fiduciary funds on behalf of the Wood Funeral Home in the amount of \$2,983.31, Respondent made personal use of those funds as demonstrated by the following balances in Respondent's First Union Bank account:

a. As of June 17, 2002, the end of the day balance in Respondent's First Union business account was \$2,059.52.

The end of the day balance in Respondent's First Union business account was less than \$2,983.31 owed to the Wood Funeral Home for the period from June 17, 2002, until July 25, 2002 (with the exception of the end of the day balance for the one day of June 26, 2002).

b. On September 25, 2002, the end of the day balance in Respondent's First Union business account was a negative \$47.31.

c. During the period from October 9, 2002, until January 9, 2003, the end of the day balance in Respondent's First Union business account was continuously below the amount of \$2,983.31, that was due and owing the Wood Funeral Home, and ranged from a high of \$1,870.49, to a negative balance of \$28.83, on December 10, 2002.

d. By check dated January 19, 2003, drawn on a non-escrow account Respondent maintained at Commerce Bank, and not from Respondent's non-escrow account at First Union Bank in which the Wood Funeral Home's funds were deposited, Respondent paid the Wood Funeral Home the amount of \$2,983.31 that was owed to it.

By letter dated July 15, 2003, Respondent advised Disciplinary Counsel that after the Wood Funeral Home proceeds were "initially deposited into my First Union account," Ms. Wood's "portion of the funds were subsequently transferred to my Commerce Account which is used for my New Jersey Law Office." The parties further stipulate that Respondent's entire letter of July 15, 2003, will be admitted into evidence.

The parties further stipulate that Respondent's letter to Disciplinary Counsel dated April 29, 2004, will be admitted into evidence. In said letter, Respondent advised Disciplinary Counsel that:

a. his First Union account was "used for [his] overall business operations";

b. he "personally maintained sufficient funds to cover Ms. Wood's portion of the settlement until the funds were deposited into [his] Commerce account in January 2003"; and

c. that Respondent had "deposited into [his] Commerce account that portion of the funds owed to Wood Funeral Home after Cynthia Wood requested her portion of the funds."

The audit conducted by the Office of Disciplinary Counsel of Respondent's First Union and Commerce Bank accounts reveals that no transfer of the Wood Funeral Home proceeds was made from First Union to Commerce Bank prior to June 17, 2002, the date when the balance on Respondent First Union account fell below \$2,983.31.

In fact, the audit of Respondent's First Union and Commerce Bank accounts reveals that at no time from June 2002, through January 2003, did Respondent transfer any funds on behalf of the Wood Funeral Home to his account at Commerce Bank, or any other funds in or about the amount of \$2,983.31.

[OAEb.Ex.C2 to Ex.C5.]³

II. The Cumberland Insurance Group Matter

Respondent represented the subrogation interests of the Cumberland Insurance Group, a/k/a Chester County Mutual Insurance, with reference to the claims of Christine and Derrice Pankey arising out of a loss which occurred on January 30, 1999.

In Respondent's representation of the Cumberland Insurance Group, funds were received in which the Cumberland Insurance Group had an interest, and the following deposits were made into Respondent's First Union business account:

<u>Date</u>	<u>Maker</u>	<u>Amount</u>
August 12, 2002	One Beacon Insurance	\$5,545.00
October 7, 2002	Continental Casualty Co.	\$500.00
October 7, 2002	PMA Insurance Group	\$500.00
November 4, 2002	One Beacon Insurance	\$1,000.00

³ OAEb refers to the OAE's brief in support of its motion for reciprocal discipline.

Respondent's agreement with the Cumberland Insurance Group entitled him to retain a one-third contingent fee, and the remaining two-thirds were to be held by Respondent as fiduciary funds on behalf of the Cumberland Insurance Group.

Respondent failed to deposit and maintain the funds he received on behalf of the Cumberland Insurance Group in any trust, attorney escrow or IOLTA account.

Beginning with the initial deposit of \$5,545.00 on August 12, 2002, and prior to the request of the Office of Disciplinary Counsel for a statement of Respondent's position dated April 13, 2004, Respondent failed to transmit any funds received by him to the Cumberland Insurance Group, and he converted said fiduciary funds to his own personal use.

During the period from August 23, 2002, to September 30, 2002, the balance in Respondent's First Union account was continuously less than the amount of \$2,983.31 that he was required to hold on behalf of the Wood Funeral Home, or the \$3,631.82, representing the two-thirds recovery from his initial receipt and deposit of \$5,545.00 on August 12, 2002, that he was required to hold on behalf of the Cumberland Insurance Group.

[OAEb.Ex.C at 5-7.]

On January 19, 2006, the Pennsylvania Disciplinary Board found respondent guilty of the RPC 1.15(a) and (b) charges and recommended a nine-month suspension:

In connection with the Wood Funeral Home matter, Respondent violated Rules 1.15(a) and 1.15(b). He failed to hold funds due and owing to the Wood Funeral Home in a separate

trust account and commingled the funds in his business account. Respondent's bank account became out of trust just days after his deposit of the Woods proceeds in June of 2002. Despite receiving Ms. Wood's letter on November 29, 2002, Respondent delayed returning the funds for seven weeks. Respondent acknowledges his violation of these Rules.

Respondent was charged with violating RPC 8.1(a) and 8.4(c) by allegedly making misrepresentations to Disciplinary Counsel. At issue are letters to Disciplinary Counsel from Respondent regarding the handling of the Wood Funeral Home Funds. By letter of July 15, 2003, Respondent advised Disciplinary Counsel that Ms. Wood's "portion of the funds were subsequently transferred to my Commerce account which is used for my New Jersey law office". By letter dated April 29, 2004, Respondent advised Disciplinary Counsel that he had "deposited into [his] Commerce account that portion of the funds owed to Wood Funeral Home after Cynthia Wood requested her portion of the funds." While neither of these statements is technically accurate, the Board concludes there is not clear and convincing evidence to support a finding that Respondent made a materially false statement to Disciplinary Counsel, nor that he intended to deceive Disciplinary Counsel. Respondent believed he always had the availability of sufficient funds to cover the Wood funds and monies were transferred to the Commerce Bank account. The letter did not state that the transfer to the account came from the First union account. Still, Respondent engaged in an inexcusable failure to maintain records of his client's funds and the fact that the Board finds there is not sufficient evidence to conclude he deceived Disciplinary Counsel does not mitigate the actual wrong he committed in mishandling the funds.

Respondent admits violating Rules 1.15(a) and 1.15(b) in the Cumberland Insurance Matter, which involved a commingling of funds owed to the Cumberland Insurance Group in Respondent's business account. This was due to inadvertence as Respondent did not realize that he was holding funds that were due and owing to Cumberland. He believed they were fees for work. The Hearing Committee found, and the Board concurs, that the violations were unintentional and due solely to poor recordkeeping in his law practice.

[OAEb.Ex.I at 11-12.]

Respondent offered the Pennsylvania disciplinary authorities mitigation for his actions, including his prompt replacement of the missing funds, his measures to bring his practice into conformity with the recordkeeping rules, and his involvement in civic and community activities, such as his position as president of the local chapter of the National Association for the Advancement of Colored People and his work with young people in his community through a service fraternity, a church, and a non-profit organization that he founded with his wife. In addition, he offered letters of recommendation attesting to his good character.⁴

On April 11, 2006, the Supreme Court of Pennsylvania upheld the Disciplinary Board's findings and, without further elaboration, imposed a nine-month suspension.

⁴ The letters are not a part of the record before us.

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline.

Pursuant to R. 1:20-14(a)(5), another jurisdiction's finding of misconduct shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state. We, therefore, adopt the findings of the Supreme Court of Pennsylvania.

In both the Wood Funeral Home and Cumberland Insurance matters, respondent inadvertently deposited client funds into his business account, instead of his trust account, an error that led to his negligent misappropriation of clients' funds. In addition, respondent failed to promptly disburse funds to which both clients were entitled. The Pennsylvania Disciplinary Board attributed respondent's violations of RPC 1.15(a) and RPC 1.15(b) to "poor recordkeeping in his law practice."

The Board cited no cases in support of its recommendation for a nine-month suspension. The Pennsylvania Supreme Court issued an order upholding the Board's recommendation for a nine-month suspension, without mentioning any RPCs.

In seeking a reciprocal nine-month retroactive suspension, the OAE cited several New Jersey cases that led to six-month suspensions. We note, however, that two of those cases, In re Gasper, 169 N.J. 420 (2001), and In re Uzodike, 159 N.J. 510 (1999), not only involved additional violations, such as a combination of gross neglect, failure to communicate with

clients, and a pattern of neglect (a more serious infraction), but also proceeded on a default basis. In a default matter, the appropriate discipline for the found ethics violations is enhanced to reflect the attorney's failure to cooperate with disciplinary authorities as an aggravating factor. In the Matter of Robert J. Nemshick, DRB 03-364, 03-365, and 03-366 (March 11, 2004) (slip op. at 6).

The other two six-month cases cited by the OAE, In re Brown, 123 N.J. 571 (1991), and In re Librizzi, 117 N.J. 481 (1990), involved charges of knowing misappropriation and findings of more serious misconduct than that presented here. The attorney in Brown did not maintain a trust account for several years and did not even open envelopes from the bank containing his account statements. The attorney in Librizzi also left unopened envelopes containing trust account bank statements and was so grossly careless in his recordkeeping duties that he failed to reconcile his trust account for twelve years. Finally, Librizzi also took two years to cure a \$25,000 shortfall in his trust account.

Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides:

The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the

discipline in another jurisdiction was predicated that it clearly appears that:

(A) the disciplinary or disability order of the foreign jurisdiction was not entered;

(B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;

(C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

(D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (D). However, with regard to subsection (E), respondent's misconduct, had it occurred in New Jersey, would yield a sanction much less severe than a nine-month suspension.

Ordinarily, a reprimand is imposed for negligent misappropriation of client's funds and recordkeeping violations. See In re Winkler, 175 N.J. 438 (2003) (reprimand for attorney who commingled personal and trust funds, negligently invaded clients' funds, and did not comply with the recordkeeping rules; the attorney withdrew from his trust account \$4,100 in legal fees before the deposit of corresponding settlement funds, believing that he was withdrawing against a "cushion" of his own funds left in the trust account); In re

Rosenberg, 170 N.J. 402 (2002) (reprimand imposed on attorney who 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); In re Blazsek, 154 N.J. 137 (1998) (attorney reprimanded for the negligent misappropriation of \$31,000 in client funds and failure to comply with recordkeeping requirements); In re Goldstein, 147 N.J. 286 (1997) (reprimand for negligent misappropriation of clients' funds and failure to maintain proper trust and business account records); In re Liotta-Neff, 147 N.J. 283 (1997) (reprimand for attorney who negligently misappropriated approximately \$5,000 in client funds after commingling personal and client funds; the attorney left \$20,000 of her own funds in the account, against which she drew funds for her personal obligations; the attorney was also guilty of poor recordkeeping practices); and In re Gilbert, 144 N.J. 581 (1996) (reprimand imposed on attorney who negligently misappropriated in excess of \$10,000 in client funds and violated the recordkeeping rules, including commingling personal and trust funds and depositing earned fees into the trust

account; the attorney also failed to properly supervise his firm's employees with regard to the maintenance of the business and trust accounts).

If compelling mitigating factors are present, the reprimand may be reduced to an admonition. See In re Michals, 185 N.J. 126 (2005) (admonition for attorney who negligently misappropriated \$2,000 and \$187.43 for one and two days, respectively, commingled personal and trust funds, and violated the recordkeeping rules; in mitigation, it was considered that the trust account shortage was limited to a few days and that the attorney fully cooperated with ethics authorities, had no prior encounters with the disciplinary system, assumed full responsibility for the problems with this practice, and subsequently made recordkeeping a priority); In the Matter of Philip J. Matsikoudis, DRB 00-189 (September 25, 2000) (admonition imposed on attorney who miscalculated fees in his favor, thereby negligently misappropriating client funds, and failed to pay a physician's lien, as a result of poor recordkeeping; mitigation included steps taken to remedy the recordkeeping deficiencies and the use of his own personal funds to pay the physician's lien); In the Matter of Cassandra Corbett, DRB 00-261 (January 12, 2001) (admonition for attorney whose deficient recordkeeping resulted in a \$7,011.02 trust account shortage; in mitigation, it was considered that the

attorney reimbursed all missing funds, admitted her wrongdoing, cooperated with the OAE, and hired an accountant to reconstruct her records); and In the Matter of Bette R. Grayson, DRB 97-338 (May 27, 1998) (admonition for attorney who negligently misappropriated \$6,500 in client trust funds as a result of poor recordkeeping practices; mitigating factors were the attorney's full cooperation with the OAE, her subsequent steps to straighten out her records, and her lack of prior discipline).

Here, respondent negligently misappropriated funds in two client matters as a result of poor accounting practices. There are no aggravating factors to consider, as, according to the OAE, respondent's informal admonition in Pennsylvania would not be a factor in determining New Jersey discipline. In mitigation, respondent replenished the misappropriated funds in both instances and took measures to bring his accounting practices into compliance with the rules. It would appear, thus, that respondent's recordkeeping deficiencies and negligent misappropriation, offset by some – although not very compelling – mitigating circumstances, would be properly addressed with a reprimand or maybe even an admonition.

But we must also consider respondent's failure to promptly remit funds to which his clients were entitled, a violation generally met with an admonition. See In the Matter of Douglas F. Ortelere, DRB 03-377 (February 11, 2004) (attorney admonished

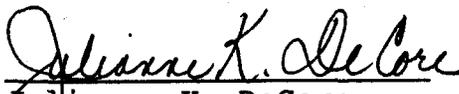
for failure to promptly deliver balance of settlement proceeds to client) and In the Matter of E. Steven Lustig, DRB 02-053 (April 19, 2002) (admonition imposed on attorney who, for more than three years, held in his trust account \$4,800 earmarked for the payment of a client's outstanding hospital bill).

For respondent's overall conduct, we believe that a reprimand is adequate discipline. For the nature and extent of respondent's infractions, a suspension of any duration would not be supported by precedent.

Vice-Chair Pashman and Member Boylan did not participate.

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
William O'Shaughnessy, Chair

By: 
Julianne K. DeCore
Chief Counsel

**SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD**

In the Matter of John Kelvin Conner
Docket No. DRB 07-120

Argued: July 19, 2007

Decided: September 6, 2007

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
O'Shaughnessy			X			
Pashman						X
Baugh			X			
Boylan						X
Frost			X			
Lolla			X			
Neuwirth			X			
Stanton			X			
Wissinger			X			
Total:			7			2


Julianne K. DeCore
Chief Counsel