SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-049

IN THE MATTER OF :
:
WAYLAND H. GOLDSTON :
:
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: May 18, 1994

Decided: April 12, 1995

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

Respondent waived appearance for oral argument.

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

This matter was before the Board on a recommendation for public discipline filed by Special Master Thomas V. Manahan. The Special Master found recordkeeping violations, failure to safeguard property and failure to act with reasonable diligence. Respondent has not been the subject of prior discipline in New Jersey.

The charges against respondent arose as the result of a random compliance audit conducted by the Random Audit Program (RAP) of the Office of Attorney Ethics (OAE). A two-count complaint was ultimately filed. Although respondent failed to file an answer, he testified at the hearing before the Special Master that the facts

stated in the complaint were true. T5.[1]

The pertinent facts are as follows:

Count One

Respondent was first the subject of a random compliance audit by auditor Chris McKay, in late 1987. At the conclusion of the audit, respondent was verbally notified of deficiencies discovered by McKay. A written list of those deficiencies was provided to respondent on October 8, 1987. He was advised at that time that corrective action had to be taken within forty-five days. On November 18, 1987, respondent's accountant forwarded a written response to McKay. That letter contained the following paragraph:

> It should be noted that Mr. Goldston has left monies in his account to cover for checks that might not be honored causing his trust account to be in an overdraft position. This did occur in September when a check for $34,734.04 from an insurance company was not honored. . . . [Exhibit D to P in evidence]

Given the OAE's conclusion that the accountant's letter was insufficient, communication between the parties continued.

Respondent was again selected for a random compliance audit in late 1988. Although the first audit was still pending, that selection was coincidental and not planned by the RAP. The second audit was conducted on January 10 and February 28, 1989, again by McKay. This audit uncovered the fact that respondent had not only failed to correct previously noted deficiencies, but also had additional deficiencies in the operation of his business and trust

[1] T denotes the transcript of the ethics hearing on December 2, 1994.

accounts. These additional deficiencies are evident when Exhibit B to P-1 in evidence is compared, line by line, with Exhibit G in evidence. In addition to notations indicating that the eight continuing violations on Exhibit G were identical to eight violations indicated on Exhibit A, seven more violations were noted, as follows:

No running checkbook balance
Negative balance on bank statement
No ledger card showing attorney funds for bank charges
No individual client's ledger sheets (some not prepared)
Client's ledger sheets not fully descriptive
Improper trust account designation
Disbursements against uncollected trust funds

Respondent testified that, following the first random audit, he had hired an accountant to handle his trust account. Respondent paid $1,500 to that accountant to accomplish the job. The accountant, Haugabrook, did communicate with McKay on one or more occasions. Respondent met with Haugabrook between ten and eleven times, but the accountant "never got the work done." T50. Respondent subsequently hired a new accountant. Despite this situation, at hearing before the Special Master, respondent accepted full responsibility for the problems uncovered during both random audits, as well as the failure to correct the deficiencies discovered during the first random audit. Respondent testified that, in fact, he did not have a bookkeeper, and was the one who kept the books — such as they were — of the day-to-day financial activities of his law practice.

As noted, respondent replaced his prior accountant. In addition, respondent closed his law office in 1990 and moved, for

a time, to the Virgin Islands, where he worked for the Attorney General. Since his return to New Jersey, he has opened new bank accounts. Thus, in his view, the problems encountered in his prior practice should not follow into the new accounts.

Count Two

The second count of the complaint charged respondent with negligent misappropriation, stemming from his representation of Earl Oliver and Eddie Manuel beginning on August 28, 1987, in regard to the purchase of real estate in Newark. At closing, among other items, respondent received an insurance draft, in the amount of $34,737.04, issued by the New Jersey Insurance Underwriting Association, which was to cover damages sustained during a fire in an apartment on the property. The draft was made payable to "Victor Iazzalino as Receiver for Harold Marchell and Jack Bienstock and Maria Bienstock and City of Newark and Miller & Son and State Fire Adjuster."

Respondent testified that, in light of the unusual listing of payees — not separated by any punctuation to indicate that individual endorsements were necessary — he consulted with two other attorneys present at the closing about the necessary endorsements. It was agreed, as respondent testified, that the endorsement of Victor Iazzalino, receiver for the property, was sufficient. That endorsement was obtained and the check was deposited into respondent's trust account. The check was thereafter dishonored by First Fidelity Bank and returned on

September 9, 1987 for failure to obtain the endorsement of all necessary parties.

At closing, respondent deposited $164,737.04 to cover closing-related disbursements of $164,731.74. The $34,737.04 insurance draft was part of that $164,737.04 deposit. Thus, the return of that draft resulted in the invasion of other client funds then on deposit in respondent's trust account. Although the November 18, 1987 response to the RAP/OAE from respondent's accountant, quoted previously, indicated that respondent purposely left his own monies in his trust account to cover just such an event and to avoid the invasion of other client funds, that statement was, at best, misleading. In fact, respondent testified that, while he kept more than $150 of his own funds in his trust account to cover, for example, bank charges, he had nowhere near $34,000 of his own money in his account nor could he easily generate such a large sum, given the nature of his practice. T53.

Following notification of the returned check, respondent tried to resolve the endorsement problem. He discovered that two separate fire adjusters had been hired: one by the former owner of the property and the other by the receiver. Both apparently had filed liens on the property. New Jersey Insurance Underwriting Association (NJIUA) informed respondent that the only additional endorsement required was that of State Fire Adjusters (SFA). For several months, respondent tried to locate SFA, without success. Ten or eleven months after the draft was returned, he finally obtained the required endorsement from SFA and deposited a

replacement draft dated December 2, 1988 in his trust account. That deposit was made some fifteen months following the return of the original insurance draft. Respondent's trust account was, thus, out of trust for that entire period, given the clear absence of a covering deposit. It is noteworthy that, when respondent advised his clients that the draft had been returned, the clients offered to reimburse him by "making good" on the draft. Respondent never went back to the clients for the money — even though he knew his account was, in essence, out of trust. At the hearing, respondent admitted that he should have pursued his clients' offer of reimbursement. T48.

The record discloses that, once respondent located SFA, an agreement was reached whereby SFA released its lien in return for $1,735. The clients apparently gave respondent cash, which was then deposited into respondent's trust account, and a check was issued on November 30, 1988.

No actual overdrafts resulted from the return of the NJIUA draft. Gerald Smith, Chief Investigative Auditor at the OAE, testified that funds held on behalf of respondent's client, a Mr. Ojeda, covered the improper disbursement. Although respondent had attempted to pay off the Ojeda mortgage, his trust check was returned by the mortgage holder because it did not include payment for interest due. Respondent tried to get his client to provide the necessary funds, but was unsuccessful in these attempts. Ultimately, in order to resolve the matter, respondent had to use approximately $7,000 of his own money to pay off the outstanding

Ojeda mortgage.

The OAE did not file a formal complaint against respondent until May 14, 1993. The record does not disclose the reasons for the delay, although aspects of the case, such as questionable cooperation from respondent's accountant, respondent's move to the Virgin Islands and Mckay's departure from the OAE, may have contributed to the lapse of time between the audits and the filing of the formal complaint.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the Special Master's conclusions that respondent acted unethically are fully supported by clear and convincing evidence.

The Special Master properly found that unethical conduct had been proven in both counts of the complaint. The Special Master found that respondent's actions regarding the Oliver/Manuel insurance draft constituted a failure to safeguard client funds, in violation of RPC 1.15 (a), and failure to act diligently, contrary to RPC 1.3. The Special Master further determined that respondent's numerous recordkeeping deficiencies violated R. 1:21-6, RPC 1.15(a) and RPC 8.4(a).

Discipline imposed for conduct similar to that of respondent generally results in a reprimand. For example, In re Fucetola, 101 N.J. 5 (1985) concerns an attorney who was twice audited by the predecessor of the OAE, the Division of Ethics and Professional

Services. Both audits resulted from complaints about the attorney's recordkeeping. Deficiencies in the attorney's maintenance of his trust account were found on both occasions. In one instance, the attorney failed to replace a check for a filing fee that was returned for insufficient funds. Although his account was overdrawn "at various times," there was no evidence of any misappropriation of client finds, whether negligent or knowing. The attorney, who had been privately reprimanded six years before, was publicly reprimanded. See also In re Lewinson, 126 N.J. 515 (1992); In re Barker, 115 N.J. 30 (1989).

Here, it is clear that respondent failed to establish proper accounting procedures prior to the first audit. After that audit, his conduct continued, despite the auditor's instructions. Indeed, the findings of the second audit confirm that respondent did not make any improvements following the first audit and his violations of established accounting procedures worsened significantly thereafter.

In determining the level of discipline to be imposed, however, certain mitigating facts have been considered. Among these are respondent's unrebutted claim that his accountant failed to follow through, despite respondent's numerous requests, as well as the fact that respondent has apparently now reformed his accounting practices and has obtained a new accountant. Additionally, significant time has passed since the event — the violations occurred in 1988 and 1989 and the complaint was not filed until 1993.

Under the facts of this case, the Board unanimously recommends that respondent be reprimanded. The Board further recommends that respondent be required to provide to the OAE certified annual audits, performed by an accountant approved by the OAE, for a period of two years. Two members did not participate.

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

Dated: 4/12/95 By: Elizabeth L. Buff

Elizabeth L. Buff
Vice-Chair
Disciplinary Review Board