SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 90-185

IN THE MATTER OF :

ALFRED G. SANTASIERE, :

AN ATTORNEY-AT-LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: October 17, 1990

Decided: January 29, 1991

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

Justin P. Walder and John Brogan appeared on behalf of respondent.

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

This matter is before the Board on a presentment filed by the District VB Ethics Committee. The complaint charged both negligent and knowing misappropriation of client funds revealed via a random audit of respondent's books and records, pursuant to R. 1:21-6.

Respondent, who was admitted to practice law in New Jersey in 1969, is engaged in the private practice of law in South Orange, New Jersey.

Respondent's books and records were reviewed pursuant to the Random Audit Program in 1985. By complaint dated November 23,

1987, respondent was charged with four counts of failure to safeguard client funds and misappropriation of client funds, in violation of both DR 9-102 (now RPC 1.15 (a))[1] and DR 1-102(A)(4) and (6) (now RPC 8.4(c)). Three of these counts (Count One through Count Three) are interrelated and concern the operation of respondent's attorney trust account only. The Fourth Count, Pappas, is somewhat distinct, and relates to the handling of funds by Essex Title Agency (ETA), of which respondent was president. A discussion of the specific facts of the case follows.

Mattinson Matter.[2]

Respondent represented his aunt, Gertrude Mattinson, in the sale of real estate. On February 2, 1983, respondent received a $5,600 deposit on behalf of Mattinson, and deposited those funds into his trust account. The contract for sale required that the deposit be held in an interest-bearing account. Thereafter, on February 25, 1983, respondent transferred $5,600 from his trust account to an ETA savings account, because that account bore interest. At hearing, respondent testified that he always considered the $5,600 in the ETA account to be trust funds.

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[1] The Rules of Professional Conduct (RPCs), adopted by the Supreme Court to be effective on September 10, 1984, superseded the Disciplinary Rules. Both the Disciplinary Rules and the RPCs were charged herein because respondent's alleged misconduct began in 1983 and continued beyond the effective date of the RPCs.

[2] Unethical conduct was charged in the Mattinson matter under Count Three of the complaint.

At the time respondent transferred the Mattinson funds to the ETA account, he failed to record that transaction on the Mattinson ledger card. Thus, the ledger continued to reflect a balance that inaccurately included the $5,600 deposit.

At the time of the Mattinson closing on June 3, 1983, although the Mattinson funds remained in the ETA savings account, respondent disbursed $5,600 to Mattinson from his trust account, together with interest calculated at $99.07. As a result of these trust account payments to Mattinson, other client funds were invaded. Respondent testified that he believed the Mattinson funds remained in his attorney trust account at the time of closing, and that the Mattinson interest payment was covered by personal funds of respondent deposited when the trust account was opened.

Trust Account Invasions

Respondent's failure to return the Mattinson funds to the trust account prior to the June 3, 1983 closing resulted in numerous shortages in client funds during 1983 and 1984. Specifically, in the Gee and Wong matter,[3] respondent was to hold $10,215.99 in trust from May 18, 1984 through November 1, 1984. During this period, however, respondent's trust account held less than the $10,215.99 required on twenty-two separate dates, with shortages ranging from $715.52, on June 22, 1984, to $6,174.74, on October 29, 1984. On October 31, 1984, a trust account deposit of

[3] Respondent was charged with ethics violations in the Gee and Wong matter in the First Count of the complaint.

$7,500, from respondent's business account, covered the disbursement of the Gee and Wong funds.

In the Murphy, Nolan and Becker matters,[4] respondent also experienced trust shortages. These trust funds were all deposited and disbursed on various dates between December 15, 1983 and June 15, 1984. Respondent's many trust account shortages during this period ranged from $339.98 to $5,717.13.

Following hearing, the District VB Ethics Committee accepted respondent's explanation of the Mattinson matter, and found a direct relationship between respondent's failure to return the Mattinson funds to the trust account from the ETA account and the subsequent numerous shortages in the Gee and Wong, Murphy, Nolan and Becker matters. Although on three dates in 1984, his trust account shortages exceeded the $5,699.07 paid out in error in Mattinson, the committee attributed this excess to mathematical errors by respondent. The committee did not find knowing misappropriation of funds under these facts, but concluded that respondent had negligently misappropriated his clients' funds and had failed to "hold his client's money with the care required of a professional fiduciary," in violation of DR 9-102(B)(1) and RPC 1.15(a). In the committee's view, without considering the Pappas matter, detailed below, respondent's negligent misappropriations would merit a private reprimand.

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[4] Ethics violations in respondent's handling of Murphy, Nolan and Becker were charged in the Second Count of the complaint.

Pappas Matter

In October 1983, respondent represented John Pappas in the sale of real estate. The buyers used ETA, respondent's title agency, to perform the necessary title work. ETA's search located a tax lien. Nonetheless, ETA agreed to issue a clear title policy, provided it was given $7,500 in sale proceeds to hold as security for payment of the taxes owed by Pappas.

At closing on October 14, 1983, the sum of $12,536.35 was deposited in respondent's trust account. With the approval of both the seller and buyers, respondent transferred $7,500 of that amount, which represented the required security for the Pappas tax lien, to an ETA account on October 17, 1983. ETA did not disburse funds in payment of Pappas' taxes until March 14, 1984, when $1,804.08 was paid. A final payment of $5,695.92[5] was made on July 3, 1985. On November 10, 1983, however, prior to any payment on the Pappas lien, respondent disbursed $10,000 from the ETA account for an unrelated matter. The balance in the ETA account was then reduced to $4,512.05. The account continued to have a balance below the $7,500 held for Pappas for several months.[6]

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[5] The funds for both payments were in fact returned to respondent and paid by trust account check although there was no necessity for payment by trust account check.

[6] It was argued before the committee and the Board that ETA, which had several other bank accounts, always had adequate funds on deposit to pay off the Pappas tax liens. Respondent did not comply with the OAE's request for ETA's books and records. As a result, the OAE was required to subpoena available information from ETA's banks. This procedure caused some delay in the resolution of this ethics matter. Direct review of ETA's books and records during the initial audit would have given a faster and clearer picture of ETA and its relationship to the case.

At the ethics committee hearing, respondent contended that the Pappas money held by ETA was never trust money, and that he was not charged by either party to the transaction to hold that money in trust. Respondent distinguished his use of the ETA account for Mattinson client trust funds from ETA's holding of Pappas' money. Although he had previously used the ETA account as an "escrow" account, he contended that the Pappas funds were neither trust nor escrow funds. In his view, the Pappas funds were held by ETA, not by respondent as Pappas' attorney, and, as such, ETA could utilize the Pappas funds for any purpose as long as ETA or its insurance company principal had sufficient assets to replace the funds.

The District VA Ethics Committee did not accept respondent's argument, but found that respondent, in failing to hold the Pappas funds separate from his own, had violated DR 9-102 and RPC 1.15(a). The committee noted that ETA was a small title agency that functioned as "respondent's commercial alter ego." Respondent had, on more than one occasion, transferred money between his attorney accounts and ETA's business and trust accounts as though "all accounts served the same entity," contrary to the mandate that business and trust funds be maintained separately.

The committee further found that the invasion of the Pappas funds held in the ETA account for unrelated purposes represented a failure to safeguard client funds. The committee reasoned that:

> When respondent accepted the sale proceeds into his trustee account as security for payment of the tax lien, those funds initially had, and always retained, the character of escrow or trust funds, even if the parties intended for respondent to transfer them for holding to the ETA account.

> The parties all understood that respondent and ETA were one and the same. Respondent received the Pappas' monies as a fiduciary and transferred them to ETA for a fiduciary purpose. Contrary to respondent's position, ETA had no right to use those monies for any purpose but the stated purpose of their deposit. As an attorney conducting business, respondent remained subject to the ethical obligations of an attorney.

The committee recommended public discipline "short of suspension or disbarment."

CONCLUSION AND RECOMMENDATION

Because "dire consequences" may follow a finding of unethical conduct against an attorney, such a finding must be sustained by clear and convincing evidence. In re Pennica, 36 N.J. 401, 419 (1962). To recommend the imposition of discipline, each Board member must be able to reach "a firm belief or conviction as to the truth of the allegations sought to be established," enabling him or her to find, without hesitancy, the truth of the precise facts at issue. See In re Boardwalk Regency Casino License Application, 180 N.J. Super. 324, 339 (App. Div. 1981), modified on other grounds, 90 N.J. 361 (1982); Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 162 (App. Div. 1960)

As did the District VB Ethics Committee below, the Board has carefully reviewed and independently assessed the record to determine whether the respondent has complied with his ethical obligations. The Board concludes that he did not.

Cognizant of the clear and convincing standard governing its de novo examination of the entire record, the Board concurs with the committee's conclusions that respondent's inaccurate and inadequate recordkeeping resulted in the negligent misappropriation of client funds in the Mattinson, Gee and Wong, Murphy, Nolan and Becker matters (Counts 1, 2 and 3 of the complaint), in violation of DR 9-102 and RPC 1.15(a). The Board disagrees with the committee's finding in the Pappas matter, however, and does not find clear and convincing evidence that respondent violated DR 9-102 (RPC 1.15(a)) in that matter.

The Board agrees with the committee that respondent is subject to the general ethical obligations of an attorney while conducting business. In re Franklin, 71 N.J. 425 (1976). This precept does not, however, require that respondent treat all funds coming into the possession of his business entity in the same fashion as he is required to treat client trust funds, where the rules governing that business entity do not impose the obligation. In this matter, ETA's actions did not run afoul of any insurance regulations governing title insurance agencies and their fiduciary obligations. ETA insured the title to Pappas' property at closing over the exception to clear title - the tax lien - in return for the $7,500. This in effect removed the cloud on the title: the exception became ETA's responsibility and the buyer was given clear title to the property. Simply put, contrary to the situation that applies to standard trust and escrow funds, neither Pappas nor the buyer

had any interest in the $7,500 once it was transferred to ETA.[7] The Board, therefore, does not concur with the committee's finding of unethical conduct in this matter. The record does not prove to a clear and convincing standard that respondent violated any fiduciary obligation to the Pappas funds.[8] The Board, therefore, recommends that this aspect of the committee's recommendation for public discipline be dismissed.

The several instances of negligent misappropriation of client trust funds revealed by this record were initially caused by respondent's failure, in Mattinson, to return funds from the ETA savings account to his attorney trust account. This error was compounded by respondent's continuing lack of compliance with R. 1:21-6. The resulting situation, and the negligent misappropriations that followed, could have been avoided easily, had respondent maintained his attorney books and records in accordance with generally accepted accounting practices, as was always required by R. 1:21-6, or had he complied with the newly

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[7] The Board does not adopt the analogy, presented by the OAE at hearing before the Board, to a real estate deposit held by a broker. The broker is clearly acting as escrow agent for buyer funds that are being held pending transfer to the seller at closing. The matter before the Board does not present the same situation: neither the buyer nor the seller, Pappas, had any entitlement to the funds once transferred to ETA, and the buyer had received clear title to the property in exchange for that $7,500.

[8] The fact that the Pappas funds were returned to, and paid out from, respondent's attorney trust account raises some suspicion as to respondent's motivation. However, absent proofs in the record before the Board that respondent had a continuing fiduciary obligation to the Pappas funds, a finding of unethical conduct by clear and convincing evidence cannot be made.

enacted quarterly reconciliation requirement of R. 1:21-6(b)(8), effective February 15, 1984. The Board considers respondent's resulting violations of DR 9-102(B)(1) and RPC 1.15(a) to be serious: all client trust funds held by respondent, during the more than one and one-half years between the Mattinson error and its discovery, were in jeopardy.

Contrary to the committee's evaluation of the discipline required, the Board is of the view that respondent's negligent misappropriations, standing alone, merit public discipline.

Inadequate recordkeeping and the negligent misappropriations that may follow therefrom are serious acts of misconduct. Matter of Fucetola, 101 N.J. 5, 9 (1985). Recently, the Court imposed a public reprimand on two law partners who failed to comply fully with R. 1:21-6. When one of the partners inadvertently failed to collect $8,940 from a client at closing, other client funds were invaded. In mitigation, the Court considered that the attorneys had taken immediate and appropriate action to replenish the trust account funds upon being notified of each overdraft; that no client complained of or sustained monetary injury as a result of the attorneys' inadequate recordkeeping practices; that the negligent misappropriation of client funds did not inure to the attorneys' benefit; and that they had straightened out their bookkeeping practices. Matter of Bate, 120 N.J. 376 (1990); Matter of Goldfarb, 120 N.J. 335 (1990).

Here, too, mitigating factors abound: respondent realized no personal benefit from his misconduct; no client suffered financial

detriment as a result of respondent's poor accounting practices; respondent has enjoyed an untarnished reputation for twenty-one years; and respondent has not been active in the practice of law for three years. Although respondent has also urged the "passage of time" as a mitigating factor, the Board is of the view that any delay that may have occurred here is justified by the numerous steps needed to obtain the ETA records through a subpoena to the bank.

The Board is ever mindful of the fact that discipline for attorney misconduct does not have as its goal the punishment of the attorney but, rather, the protection of the public from members of the Bar who are unworthy of the trust and confidence essential between attorney and client. Matter of Addonizio, 95 N.J. 121 (1984). Accordingly, upon consideration of the relevant facts, the Board unanimously recommends that the Pappas matter be dismissed, and that respondent be publicly reprimanded for his misconduct in the remaining matters.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for appropriate administrative costs.

Dated: 1/29/1991

By: Raymond R. Trombadore
Chair
Disciplinary Review Board