SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-255
District Docket Nos. IIIB-2009-901E and XIV-2008-077E

IN THE MATTER OF	
HERBERT F. LAWRENCE	
AN ATTORNEY AT LAW	Concurring 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 involves, among other things, an allegation that respondent failed to safeguard client funds, in violation of RPC 1.15(a), when he withdrew over $90,000 from his trust account in 2006. There is no dispute that respondent is separately guilty of negligently misappropriating $2,295 and of recordkeeping violations. He stipulated to these at the hearing

and did not contest them at the Disciplinary Review Board. What gives us pause is the conclusion by five or our members (the majority) that there is clear and convincing evidence that respondent also failed to safeguard client funds when, we believe, there is no evidence in the record that any of the funds at issue belonged to clients.

During the hearing before the District IIIB Ethics Committee (DEC), respondent and the Office of Attorney Ethics (OAE) stipulated 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." The absence of direct evidence may be the result of respondent's destruction of account records after seven years, as he was legally entitled to do. R. 1:21-6(c). The OAE's choice not to seek records from Sovereign Bank, where the trust account was maintained, might also have contributed to the absence of evidence. Whatever the reason, the record is barren of direct evidence proving the charge.

The majority's conclusion that the money in the trust account was clearly and convincingly client funds appears to rest instead on several inferences and on burden shifting. This raises a number of concerns. First, we are not aware of any New

Jersey rule that permits the burden shifting accepted here. Second, we do not think all of the inferences drawn are reasonable. Third, we do not view the suggested inferences as having sufficient probative strength to bear the weight of a clear and convincing finding. The majority's decision on this charge risks being seen as improperly relieving the OAE of its burden of proof on an essential element of the charge.

Burden Shifting Is Improper

The theory on which the OAE based the failure to safeguard charge is inconsistent with the cardinal rule that each and every element of an ethics charge must be proved against a respondent by clear and convincing evidence. R.M. v. Supreme Court, 185 N.J. 208, 214 (2005); In re Pennica, 36 N.J. 401, 419 (1962); R. 1:20-4(a). The OAE was aware from the start that it could not prove that these were client funds. In its carefully-worded complaint, the OAE never explicitly alleged that any part of the $90,000 belonged to clients. Instead, the OAE narrowly alleged that respondent "was unable to provide documentation to support" his contention that the funds were his. The OAE then stipulated that there was no "actual evidence" that the money belonged to clients or to respondent. The OAE's theory necessarily (and we think wrongly) depended on shifting the

burden of proof to respondent to prove that the funds did not belong to clients.

The DEC hearing panel compounded the error by adopting this improper burden-shifting. The panel concluded that respondent's failure to safeguard client funds, in violation of RPC 1.15, had been established because "the respondent disbursed to himself $93,626.76 from his trust account without any documentation to support his contention that the funds were, in fact, due to him and not client funds." In other words, respondent was guilty of failing to safeguard client funds because he failed to carry his burden of proving the funds were his.

Even at oral argument before the Board, the OAE did not suggest it proved that any of the withdrawn funds belonged to clients. To the contrary, the OAE candidly conceded that there was no proof either way, agreeing instead that "they are unidentified funds." After all, that is precisely what the parties stipulated at the hearing. And if the OAE's novel burden-shifting theory were right, such proof was not needed.

We believe the OAE's theory on the failure to safeguard charge was wrong. It should have never been respondent's burden to show that the funds were his. The lack of documentation as to ownership of the funds did not create an evidentiary

presumption. Nor did it shift the burden of going forward or the burden of proof onto respondent. Respondent was entitled to deny that these were client funds and leave the OAE to its proofs. That is a cornerstone rule of our disciplinary system.[1] The OAE's complaint was deficient and the panel's analysis was flawed on this charge. At a minimum, the Board should make crystal clear that the burden-shifting theory relied on by the OAE and the panel here cannot be used to allege – let alone to prove – an ethics violation.

Impermissible Inferences Are Not Evidence

A valid evidentiary inference is not simply one of several possible conclusions that can be drawn from a proven fact. An inference is a probability, not a possibility. A permissible inference arises only when a proven fact makes it more likely than not that the other, inferred fact is true. State v.

[1] A respondent has the burden of going forward when raising an affirmative defense (such as lack of competency, In re Jacob, 95 N.J. 132 (1984), or duress, In re Hahn, 84 N.J. Eq. 523, (Ch. 1915)) or when asserting mitigating factors. R.1:20-6(c)(2)(C). However, there is an important difference between an affirmative defense and a denial of an allegation. Respondent's position here that the funds did not belong to clients was a denial of an element of the OAE's charge; it was not an affirmative defense. Thus, respondent did not have the burden of going forward on this issue, much less carry the ultimate burden of proof. Both burdens remained on the OAE.

Felder, 2010 WL 3516918, *3 (N.J.Super. App.Div., Sept. 8, 2010). If two possibilities can be equally supported by the evidence, no valid inference can be drawn. McNamara v. United States, 199 F. Supp. 879 (D.D.C. 1961). Some of the inferences cited by the majority seem to be more conjecture than inference.

The majority drew an inference that, because the $90,000 was in a trust account, and a trust account is supposed to hold only client funds, the money more likely than not belonged to clients. This is not a reasonable inference. We have seen countless occasions when money in a trust account belongs to an attorney (even, unfortunately, if this may be improper commingling, a violation of RPC 1.15(a)). In this very case, the parties stipulated that respondent withdrew from the same trust account $60,040 that was legitimately his. If the OAE agrees that a huge chunk of the money in the trust account was respondent's, how can the single fact that the remaining $90,000 was in the same trust account make it more likely than not that the $90,000 belongs to clients? The reality is that money in an attorney trust account may be owed to a client, to a third-party, or to the attorney. Without more, the mere presence of the money in a trust account does not make any one of these outcomes more likely than another.

The majority also drew an inference that the funds in the account represented client funds because respondent did not withdraw them for seven years and did not declare them as income. This is not a reasonable inference either. It seems just as likely that respondent did not withdraw the money or declare it as income because, for these years, he was not sure whether the money belonged to him or to clients. Evidently, he is still not sure and intends to deposit the money into the Superior Court. Likewise, not declaring the money as income can hardly be proof that it is not respondent's. It is fair to say that people who fail to declare money as income on tax returns do so for scores of reasons, other than a belief that it is not their money.

If anything, some evidence suggests that the funds in the trust account were respondent's (or at least that he believed they were). First, he certified in his affidavit of compliance with R. 1:20-20, following his earlier suspension, that he had no clients at the relevant time. Second, no clients have come forward to claim any of the funds. Third, respondent put the money in longer-term real estate investments, rather than in a more liquid investment vehicle from which the funds could readily be paid to any clients who might assert a claim. Of

course, if all or part of the funds belonged to respondent, other ethics charges might have been appropriately raised. None were.

Finally, the majority drew an inference that these were client funds because respondent destroyed the account records that might have shown to whom the funds belonged. This seems akin to an adverse inference permitted in a civil suit as a penalty for spoliation of evidence. But spoliation cannot be found, nor an inference imposed, absent a showing that the party intentionally hid or destroyed evidence knowing it might reasonably be needed for litigation. Rosenblit v. Zimmerman, 166 N.J. 391, 400-01 (2001). There is no evidence that respondent destroyed documents to obscure the sources of these trusts funds. The court rules allow for the destruction of bank records "seven years after the event that they record." R. 1:21-6(c)(1). Respondent complied with the rule. Obviously, a better practice would be to maintain trust account records dealing with undistributed funds until those funds are actually distributed. But a conclusion that these were client funds because the account records were destroyed seems like an inference built on an inference, neither of which is firmly grounded. We can certainly be suspicious of the timing and

motive behind the document destruction, but that is not a valid basis for an evidentiary inference "no matter how strong the suspicions are that flow from that proof." In re Konopka, 126 N.J. 225, 234 (1991).

These Inferences Are Not Clear and Convincing Proof

Discipline may be imposed only where each element of the charge of unethical conduct was proved by clear and convincing evidence. R.M. v. Supreme Court, supra, 185 N.J. at 214. No one denies that there are times when an accumulation of inferences or circumstantial evidence may be sufficient to satisfy the clear and convincing evidence standard. In re Johnson, 105 N.J. 249, 258 (1987). This is just not one of those times.

First, an inference by definition means merely that the inferred fact is more likely than not true. That is a preponderance standard, not a clear and convincing standard. Therefore, courts are understandably hesitant to accept evidentiary inferences alone as clear and convincing proof. See, e.g., In re Gillespie, 124 N.J. 81, 88 (1991); Simon v. Oradell Works Partnership, 2007 WL 1854862, *6 (N.J.Super. App. Div., June 29, 2007). We should be just as hesitant.

Second, even if we accept the inferences drawn by the majority, they still seem fairly weak, individually and together. Failure to safeguard funds does not stand alone. It is an umbrella term that covers many evils, including negligent and knowing misappropriation. If the evidence had clearly and convincingly established that respondent knew that the funds belonged to clients, then his withdrawal of those funds to invest in real estate would support a charge of knowing misappropriation of client funds. Had the OAE charged this violation, we might well now be recommending respondent's disbarment. In re Wilson, 81 N.J. 451, 453 (1979). That would be an incongruously draconian and doubtful result based on this sketchy record.

The OAE seems to agree. At the DEC hearing, the OAE implied that it felt foreclosed from bringing at least some ethics charges because it lacked sufficient proof that these were client funds: "[the OAE] does not have specific evidence that they're client funds. If we had, we may be charging respondent with something more serious at this point" (T19-8 to 12).[2] The OAE similarly admitted to the Board that "we could not have charged respondent with knowing misappropriation because we

[2] T refers to the transcript of the DEC hearing.

could not have specifically. . . shown that client funds were misappropriated" (BT6-16 to 20).[3] It is hard to imagine how the OAE can logically claim that it proved these were client funds for a failure to safeguard funds charge but admit that it could never prove they were client funds for a misappropriation charge.

Third, the OAE might have had a chance to get from Sovereign Bank the direct evidence it needed to prove this charge. Although it seems unlikely that the bank's records would have shown anything dispositive, documentation that even some small part of the $90,000 belonged to a client would have been enough to sustain the charge. We will never know what evidence the bank has because the OAE decided not to look (BT9). We should not be filling in the blanks, especially when reasonable sources of direct evidence have not been explored.

Fourth, the hearing below was decided on stipulated facts and exhibits. We do not have the sort of detailed testimony and probing cross-examination that might have strengthened or weakened the proposed inferences. If the OAE had argued at the hearing level all of the inferences now suggested by the majority (it did not), the OAE could have presented other evidence that might have strengthened those inferences. At the

[3] BT refers to the transcript of oral argument before the Board.

same time, respondent could have presented evidence that might have defeated those inferences. It seems more than a little unfair now to invoke as evidence inferences the OAE did not assert and the parties did not robustly address. Indeed, it may violate respondent's procedural due process rights to base a final disciplinary decision on evidence or theories of liability respondent did not have fair notice of or a full opportunity to address.

There is another reason to question the weight of some of the evidence here. In portions of the Stipulation of Facts submitted to the hearing panel, the parties represented what a witness would testify about if he or she appeared at a hearing, rather than directly stipulating to the truth of the facts the witness would testify about (S¶14;S¶15;S¶19).[4] Stipulating to what a witness would say leaves open questions of the witness' personal knowledge, demeanor, credibility, and bias. If the parties in a disciplinary matter want to agree on a fact, they should expressly stipulate to the truth of the fact itself. If the parties are unable or unwilling to agree unambiguously that a fact is true, then they cannot expect a hearing panel or the

[4] S refers to the Stipulation of Facts.

Board to accept the fact as true based on a representation that a witness would say it.

Conclusion

It was the OAE's burden to prove by clear and convincing evidence that respondent failed to safeguard client funds. Based on this thin record, the OAE did not carry its burden on this charge. We would impose a censure based on respondent's negligent misappropriation (RPC 1.15(a)) and recordkeeping violations (RPC 1.15(d) and R. 1:21-6), as well as on the aggravating factor of his prior disciplinary history. We also would give respondent a date certain to deposit all of the "unidentified" funds from the trust account in the Superior Court Trust Fund.

The Court might also consider prospectively adopting an adverse inference – or even creating a burden-shifting presumption – that an attorney has improperly handled client funds if there is a finding that the attorney destroyed documents relating to the funds for the purpose of preventing the discovery or proof of an ethics violation. Such a presumption would allow more than just a failure to cooperate or recordkeeping charge; it would make proof of the underlying

ethics violations easier and not reward lawyers for covering their tracks. At least one state seems to apply a rebuttable presumption of this sort. In re Kellett, 388 S.C. 365, 369, 697 S.E.2d 536, 538 (2010) (lawyer's failure to maintain adequate records of trust account transactions creates a presumption of misappropriation). If such a rule existed in New Jersey, the OAE and respondent might have approached their proofs at the hearing quite differently. The facts in this record, however, do not show that respondent had an unethical motive in destroying the documents and would not support such a presumption.

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