

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-089

IN THE MATTER OF :
: :
STEVEN M. OLITSKY :
: :
AN ATTORNEY AT LAW :
:

Decision

Argued: June 19, 1996

Decided: December 9, 1996

Thomas J. McCormick 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 was before the Board based on a recommendation for an admonition filed by the District VII Ethics Committee. Following an independent review of the record, the Board determined to bring the matter on for a hearing.

In counts one and two of the amended complaint, respondent was charged with violations of R. 1:21-6(a)(1) (failure to maintain

trust account separate from personal and business accounts), R. 1:21-6(a)(2) (failing to properly maintain a business account), RPC 1.15(a) (safekeeping property) and RPC 1.15(d) (recordkeeping violations). These charges stemmed from respondent's commingling of personal and business funds with trust funds and his general failure to comply with R. 1:21-6 (recordkeeping). Respondent was charged in count three with violations of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 8.4(d) (conduct prejudicial to the administration of justice) for his failure to submit payroll taxes, which had been withheld from his employees, to the proper authorities. Finally, in the fourth count of the amended complaint, respondent was charged with a violation of RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority).

Respondent was admitted to the New Jersey bar in 1976. He maintains a law office in Irvington, New Jersey. In 1993, respondent was privately reprimanded for violations of RPC 1.4(a) (failure to communicate) and RPC 1.5(b) (failure to provide a written retainer agreement).

* * *

On May 10, 1994, respondent used a trust account check to pay the Ethics Financial Committee for costs assessed in connection with his previous disciplinary matter. As a result, respondent was designated for a select audit by the Office of Attorney Ethics

(OAE).

The OAE auditor, Mimi Lakind, conducted an audit of respondent's trust and business accounts on June 13, 1994. She discovered a ledger card entitled "SMO Disb & Costs". Lakind determined that this account reflected trust account deposits representing costs advanced by clients as well as respondent's fees. Most of the monies had first been deposited into respondent's personal checking account and then transferred to his trust account.

Respondent used his trust account to pay all of his business account expenses as well as client costs because he had closed his attorney business account in October 1993. The auditor explained in her June 13, 1994 report (Exhibit C-2) as follows:

[As] a result of a dispute [between respondent and] his former partners, Abramowitz and Abramowitz of Irvington, \$30,000 owed to him was not paid out when he left the partnership in April or May 1992. Consequently, he was unable to pay tax arrearages owed to the IRS when he failed to pay enough estimated tax for the tax year 1991. [Respondent] blamed the failure to pay enough estimated taxes on the partnership's accountant who miscalculated his estimated taxes for that year. The Internal Revenue Service notified him that he owed \$16,000 which he intended to pay from the \$30,000 expected from his former partners.

[Respondent] stated that he was in financial straits right now as a result of a divorce from his second wife that left \$200,000 in debts to various creditors in addition to the IRS debt for his personal income tax. Additionally, because he has a dispute with his accountant, Ira Geller, CPA (personally brought to the partnership by [respondent] and choosing to remain with the firm after [respondent] left), he has not paid him and no personal tax returns for 1991, 1992 or 1993 have been filed. The attorney stated that he has been trying to stave off filing for personal bankruptcy by hiring Mark Goldman, Esq. of East Orange to handle the IRS problem. [Respondent] is to obtain the IRS tax documents

from Mr. Goldman to document his explanation.

In October 1993, the IRS attempted to levy against the attorney's then existing attorney business account at First Fidelity [#3000462220]; however, the bank vice president warned him of the impending levy assisted him in withdrawing the funds to beat the IRS to the money. There were some outstanding business account checks at that time, but the attorney closed the business account. He then opened a personal interest bearing checking account at Investors Savings Bank of Irvington [#0007 6110438 3] in November 1993 for the sole purpose of attempting to keep the IRS from levying on his fee income. He thinks it is only a matter of time before the IRS discovers this account.

From that point on, the attorney deposited all fee income into the personal account. He kept track of fees and costs advanced by clients that were deposited to the personal account. Whenever he needed to make a disbursement for the law practice or for client costs, he simply transferred over to the trust account a sum of money that he determined was warranted. He therefore contends that the SMO ledger contains his funds and not clients.

In filling out the questionnaire, I asked the attorney whether he had paid over to the government any payroll taxes withheld. He stated that he had. In 1992, I saw a couple of checks for payroll taxes. When I noticed that in 1993 there were no payments to the IRS for withheld social security and withholding taxes for the one employee, I asked him again whether he had paid over to the IRS the withheld payroll taxes from his employee. He then admitted that he had not paid any of the payroll taxes that he withheld from his employee, even though he issued her a W-2 for her wages showing that withholding and social security were withheld along with state deductions for income tax and unemployment/disability.

With 6 quarters in arrears for the payment of payroll taxes, the attorney believed that his failure to pay these taxes was in the same category as failure to pay his personal taxes. (I did not ascertain whether he had actually filed the payroll returns, but shall do so shortly.) I pointed out to [respondent] that in the case of the employee's withheld taxes and the employer's share, the attorney was fiduciary of those funds. Spending the funds entrusted to him as a fiduciary was clearly unethical. He did not have a plan to start paying the current withholding or treating it any

differently than he did in the past.
[Exhibit C-2]

Thereafter, a three-count complaint was filed wherein respondent was charged with recordkeeping violations, commingling personal and business funds with client trust funds and failing to transmit taxes, to the proper authorities, which he had withheld from his employees' salaries during calendar years 1993 and 1994. Exhibit C-1. The complaint was served on respondent under OAE cover letter dated August 24, 1994. Respondent did not file an answer. Respondent claimed in a December 6, 1994 letter that he had not received the complaint, even though the OAE had received acknowledgement of receipt by another individual and respondent had requested another copy so he could file an answer in the matter. Respondent was again served with the complaint on December 13, 1994. Again, respondent did not file an answer. In the interim, the matter was transferred from District VB to District VII because of District VB's "extremely large caseload." Exhibit C-9. Again, respondent failed to reply to the answer and a hearing was scheduled for September 6, 1995. At the hearing respondent sought and obtained a continuation of the hearing to consult with an attorney and to file an answer to the complaint.

Thereafter, on September 6, 1995, an amended formal complaint was filed, adding to count three a violation of RPC 8.4(d) (conduct prejudicial to the administration of justice) for respondent's failure to pay withholding taxes. A fourth count was also added, charging a violation of RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority).

Respondent filed an answer on September 25, 1995. Respondent essentially admitted all of the allegations in the complaint with the exception of count four. Respondent alleged that since he admitted the allegations in the complaint, it was not necessary to file an answer and thus he did not fail to cooperate. He only filed an answer to the amended complaint to deny the allegations in the fourth count.

The DEC hearing was continued to October 10, 1995. At that time, the presenter withdrew count three of the amended complaint based on respondent's recent submission of an affidavit from his accountant attesting to the fact that respondent had filed quarterly employment tax returns with the proper Federal and State authorities. It appears that the returns were timely filed. The relevant tax returns were attached to that affidavit (Exhibit C-12). They are not, however, a part of this record. There is no indication that any payments were submitted with these returns.

At the DEC hearing, respondent reiterated the information contained in the auditor's report: After respondent's partnership broke up, his ex-partners were to pay him \$36,000 within six months. Respondent claimed that a portion of that amount was "ear-marked" for taxes. When respondent's ex-partners refused to pay, he consulted with an attorney and, as a result, decided not to sue them, so as not to "open up a can of worms". 2T11.¹

Apparently respondent filed the appropriate returns with the Internal Revenue Service (IRS) but was unable to make the necessary

¹ 2T denotes the transcript of the October 10, 1995 DEC hearing.

payments. He contended that he contacted the IRS to work out a payment plan. However, once the IRS learned certain information from respondent, they obtained a lien on his accounts. Each time respondent put money into his business account, the "IRS took it". 2T11. Respondent explained that he knew that the IRS could not levy on his trust account, and to avoid the IRS levy on his business account, he began depositing money into the trust account to pay for clients' costs as well as his firm's bills. He did not invade client funds. Respondent admitted that his main purpose in using his trust account was to "thwart the IRS in its attempt to levy" on his business funds.

Respondent readily admitted the following violations of R. 1:21-6 and, by reference, RPC 1.15(d): failure to keep a running cash balance in his trust account checkbook; the clients' trust ledger cards were not fully descriptive; a separate ledger card was not maintained detailing attorney funds held for bank charges; old outstanding checks were not resolved; the business bank account designation was improper; the trust bank account designation was improper; a trust receipts journal was not maintained; a business disbursements journal was not maintained; a schedule of clients' ledger accounts was not prepared and reconciled quarterly to the trust account bank statement; deposit slips lacked sufficient detail to identify each item of deposit; and the business receipts journal was not fully descriptive. Respondent claimed that these problems have been resolved and, because he now uses the One Right System, his records are maintained in compliance with R. 1:21-6.

As to respondent's failure to file an answer to the complaint, he explained that because of all of the other adverse situations in his life, he did not give it a second thought. Respondent claimed that he was trying to straighten out his life both financially and professionally. The April 1992 dissolution of his law partnership and resulting disagreements together with the 1993 IRS judgment and subsequent levy on his assets led him to file for bankruptcy protection in 1994 to try to resolve his financial obligations. As of the date of the DEC hearing, he claimed to be on the threshold of obtaining a discharge order, and his law practice has started to improve.

As to his personal life, respondent explained that beginning in 1991, he became embroiled in a custody battle with his ex-wife. He had been awarded primary custody of his daughter and the problems had been ongoing since that time. He noted that his ex-wife had filed a domestic violence action against him although respondent did not clarify when the action was filed or when he became divorced. In addition, his ex-girlfriend, with whom he had been living, had left him and afterwards obtained a restraining order against him under the stalking statute. Thereafter, he was arrested seven times for violations of the restraining order. Ultimately he was indicted for these violations and, as of the time of the DEC hearing, that indictment was still pending in Essex County.

Respondent testified that, for the four months preceding the DEC hearing, he had undergone psychiatric treatment three times a

week. Prior thereto, he had been treated by a psychologist for one and one-half years. Respondent explained that as a result of that treatment, he had become more aware of his responsibilities.

In his behalf, respondent asserted that he was not attempting to defraud anyone by commingling personal, client and trust funds: "I was not -- well, okay, I don't know if it's defraud the IRS, it's avoid them taking my money or what they believe was their money so that I could live." 2T14-15. He explained that he and his daughter needed "some money to live on, and they [the IRS] were actually taking it all." Respondent claimed that the IRS had levied on both his personal and business account. He believed he had taken care of the problem by filing for bankruptcy.

* * *

The DEC found clear and convincing evidence that respondent had violated RPC 1.15(a) and R. 1:21-6(a)(1) and (a)(2) by commingling his personal and business funds with client trust funds. The DEC also found violations of RPC 1.15(d) (recordkeeping violations) for failing to comply with R. 1:21-6. The DEC did not find failure to cooperate with the investigation (RPC 8.1(b)), as charged in count four.

The DEC found respondent's testimony sufficiently compelling to conclude that, "he was debilitated from fully appreciating his duty to cooperate under RPC 8.1(b)." The DEC further found that, while respondent did not file an answer to the original complaint,

he did timely answer the amended formal complaint, did appear at the DEC hearing and was cooperative at the hearing as well as during the OAE audit. As such, and in light of respondent's explanation that "by his intention not to deny the charges of the original complaint, he believed he did not have to file an answer," the DEC found that respondent had not demonstrated an indifference or disregard to disciplinary authorities, but merely held an erroneous belief that he did not have to file an answer.

The DEC further concluded that respondent's commingling of funds was "born from a sense of practicality and survival and from a functional ignorance and lack of appreciation of an attorney's business and trust account recordkeeping responsibilities" and did not result in either the invasion of client funds or injury to another.

In recommending an admonition, the DEC considered that respondent had amended his bookkeeping practices, was no longer commingling accounts, was undergoing psychiatric counselling and exhibited a "substantial sense of contrition."

* * *

Following a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is supported by clear and convincing evidence. The DEC properly found violations of RPC 1.15(a) and (d) and R. 1:21-6(c)(1) and (2) (count one) and RPC 1.15(d) and R. 1:21-6

(count two). Respondent's tale of woe regarding his failure to answer the initial complaint does not excuse him from his responsibility to file an answer. The Board agrees, however, with the DEC that, in light of his cooperation with the OAE auditor, his subsequent answer to the amended complaint and his attendance at the hearing, a finding of violation RPC 8.1(b) is not appropriate. Respondent's excuses for not giving the complaint his utmost attention raise serious questions about respondent's moral fiber: respondent claimed that his ex-wife filed an "unfounded" domestic violence complaint against him, and, he claims that his seven arrests for violations of a restraining order obtained by his girlfriend under the stalking law were improper. Most disturbing, however, is the admission by respondent that he attempted to avoid his tax responsibilities by commingling his personal and business funds with client trust funds because that trust account was safe from any IRS levy. While the DEC concluded that no third party was hurt by this conduct, in fact respondent was attempting to defraud the government to the detriment of the public, in violation of RPC 8.4(d). Given that this violation was charged only in count three, which was withdrawn, and then only in connection with withholding payroll taxes, the Board has not relied on that finding in assessing the level of discipline to be imposed. The Board, however, does find a separate violation based on respondent's admission not only that he commingled funds contrary to RPC 1.5(a), as charged in Count one, but that he did so to avoid levy by the IRS, a clear violation of RPC 8.4(c) (conduct involving dishonesty,

deceit or misrepresentation). The Board thus deems the complaint amended to conform to the proofs in accordance with In re Miller, 135 N.J. 342 (1994) and In re Frunzi, 131 N.J. 571 (1993).

Flagrant recordkeeping errors evidencing an apparent lack of comprehension of the proper operation of an attorney's accounts has in the past, resulted in a public reprimand. In re Fucetola, 101 N.J. 5 (1985). Here, however the additional finding that respondent intentionally, rather than out of ignorance, commingled client funds, business funds and personal funds to avoid levy by the IRS — thereby, in essence, defrauding the government — requires more severe discipline. See, e.g., In re Gassaro, 124 N.J. 395 (1991) Gassaro was suspended for two years following his conviction of conspiring to defraud the IRS and making false statements to the IRS. Gassaro submitted two letters to the IRS falsely stating that his father-in-law/client had not collected any portion of a bad debt, which had been claimed as a deduction, when, in fact, several thousand dollars had actually been collected.

The Board unanimously voted to impose a three-month suspension in this matter. Two members did not participate.

The Board further determined to require respondent to complete ten hours of ethics courses and ten hours of accounting courses within one year of his reinstatement to practice law.

In addition, the Board determined to require respondent to provide quarterly certifications to the Office of Attorney Ethics

confirming that his accounts are being kept in accordance with R. 1:21-6 for a period of one year following his reinstatement to practice law.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 12/9/96



LEE M. HYMERLING
Chair
Disciplinary Review Board