

2021

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 94-054

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IN THE MATTER OF :  
: SHIRLEY L. WATERS-CATO, :  
: AN ATTORNEY AT LAW :  
\_\_\_\_\_

Decision and Recommendation  
of the  
Disciplinary Review Board

Argued: May 18, 1994

Decided: October 31, 1994

John McGill, III appeared on behalf of the Office of Attorney Ethics.

Lorraine Posner appeared on behalf of respondent, who was not present.

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

This matter was before the Board based upon a recommendation for public discipline filed by the District VB Ethics Committee (DEC), arising out of a random compliance audit of respondent's attorney trust and business accounts.

Respondent was admitted to the practice of law in New Jersey in 1977. She currently maintains an office in Orange, Essex County. On October 29, 1991, respondent was privately reprimanded for ethics violations in connection with three real estate transactions. In one matter, she failed to prepare a written fee agreement, created a conflict of interest situation and communicated with a client represented by other counsel; in the second matter, she was found guilty of lack of diligence and, in

the third, gross neglect.

It was revealed, during the DEC hearing held on December 16, 1993, that respondent had been suspended from the practice of law for noncompliance with the IOLTA requirements, as noted in the New Jersey Law Journal published the week of the hearing. Respondent contended that she was unaware that she had been ineligible to practice (T22-23).

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Respondent was notified, by letter dated January 4, 1991, that she had been selected for a random compliance audit scheduled for January 25, 1991, at 10:00 a.m. The scheduling letter advised respondent to have her attorney records for 1989 and 1990 ready for review. Although the auditor from the Office of Attorney Ethics (OAE), Mimi Lakind, arrived at respondent's office at the pre-arranged time, respondent was not in the office. Her financial records, however, were left for Lakind's review. According to Lakind's memorandum, Exhibit P-8, the records provided were from calendar year 1989 only, and included business account checkbook stubs, business account bank statements and canceled checks, trust account checkbook stubs, trust account bank statements and canceled checks, as well as a computer printout of all transactions. According to Lakind, these documents were grossly deficient. As noted in the audit report,

[t]he computer printout is not in chronological order, nor in check number seriation. There is not any order that would permit an inference of accountability of all trust funds received by the attorney for her clients.

The attorney has written the names of the clients on the sheets, but the printout is unsatisfactory for

determining the amount of funds entrusted to the attorney's care for any specific period.

[Exhibit P-8]

In addition, no client files were provided for the audit and respondent's secretary was unable to provide files or a telephone number where she could be contacted.

By letter dated March 4, 1991, respondent was afforded forty-five days to obtain the services of a certified public accountant to prepare proper accounting records. Additionally, the letter listed the records that were to be made available. Specifically, the letter required respondent to provide:

- 1) Quarterly reconciliations of all funds in your trust account for all calendar quarters in 1989 and 1990. The reconciliation must include a copy of the pertinent bank statement and a schedule of the names and amounts held for clients at the end of each calendar quarter.
- 2) Client ledger sheets for all clients for whom funds were held at the end of each of the above calendar quarters.
- 3) Receipts and disbursement journals for the attorney trust and the attorney business accounts for calendar years 1989 and 1990; and for the period from January 1, 1991 to present.

[Exhibit P-2]

A second audit took place on April 26, 1991. Lakind's memo of that date, Exhibit P-9, recounts the grossly deficient condition of respondent's trust and business account records. Specifically, Lakind was provided with a printout of disbursements by client, but, given the absence of a disbursements journal, it was not possible to determine whether all checks written on the trust

account were included in this printout. Further, because there were no deposits listed by client, nor transactions listed for 1991, Lakind was unable to determine the trust amount that should have been on deposit for any client (T32-33).<sup>1</sup> When Lakind asked respondent for a list of clients' balances in the account as of March 31, 1991, respondent was unable to identify any client monies. Additionally, respondent wrote two checks from the trust account for a personal real estate transaction. She was unable to show for which client she had failed to disburse her fee in order to accumulate the \$6,000 in question. Respondent also failed to retain the services of an accountant, as directed in the OAE's March 4, 1991 letter. (Respondent attempted to have the audit postponed because the accounting work had not been done. T35, 68.) Respondent advised Lakind that the one printout provided for the audit had been prepared by a friend who was unfamiliar with the recordkeeping requirements. Lakind added that she spent considerable time with respondent explaining and demonstrating the required records (T71).

By letter dated May 3, 1991, Exhibit P-3, respondent was informed that she was being afforded the months of May and June to obtain the services of a CPA and to bring her records into compliance with the rules. The letter informed that a third audit visit would take place on July 8, 1991. By way of that letter, respondent was again directed to have specific records available

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<sup>1</sup> T refers to the transcript of the hearing before the DEC on December 16, 1993.

for review. She was further advised that failure to have the requested records ready for inspection would result in an immediate petition to the Supreme Court seeking her temporary suspension.

When Lakind appeared at respondent's office on the designated date, she learned that respondent had retained the services of Thomas Einloth, CPA, to assist her with her recordkeeping. Both respondent and the CPA were present at the audit (T70). Lakind's memorandum of what transpired indicates, however, that, despite Einloth's input, respondent was still not in compliance. Lakind requested the quarterly reconciliations of the account and was informed that they were not ready. Apparently, although respondent had retained Einloth at the end of May, other commitments had kept him from completing the work. According to Lakind, Einloth could not have spent more than four or five days working on the account. In her memorandum of July 9, 1991, Lakind detailed the deficiencies found:

[Einloth] presented an 'Unidentified Transactions' ledger which contained 255 unidentified deposits and checks written from the trust account during 1989 and 1990. No transactions for 1991 had been recorded. Additionally, the accountant used a disbursements journal prepared by the attorney and typed on the computer which allocated the trust checks to clients. A test of those allocations by simply using the check stubs and clients [sic] case files showed numerous errors. All checks on the unidentified list which were not listed in chronologic nor check number order were identified by the same described method in one afternoon by the attorney and myself, indicating that the attorney had not used the checkstubs, the simplest and most accurate way to post the disbursements.

Clients' ledger cards were prepared for those clients whose transactions could be posted from the attorney's disbursements journals. The result was that the 'Unidentified Transactions' ledger had a shortage of

\$441,642.71. Other client ledger balances were equally inaccurate and incomplete.

The attorney had obtained the microfilm copies of items deposited to the trust account through March 31, 1991. Many of the deposits listed on the 'unidentified' ledger were discernible from the microfilm copies, yet the accountant had failed to identify them and post them to the proper ledgers, leading me to believe that he couldn't have spent more than the 4 to 5 days I originally believed he had spent. Neither the accountant nor the attorney seemed particularly concerned over the fact that almost 6 months had gone by since the first audit in January 1991 and the funds in the account still could not be identified. In many instances cash was deposited to the trust account without a single notation as to whose funds were deposited. In two cases, debit memos charged against the trust account for deposits that bounced, could not be identified with the original deposit into the trust account. These two items totalled \$2150.00. [original emphasis].

[Exhibit P-10. See also T43-44]

During that visit, Lakind spent a great deal of time explaining to respondent and Einloth the recordkeeping requirements in painstaking detail (T45, 48, 73).

A fourth audit was conducted on August 5, 1991. Lakind's memorandum, Exhibit P-4, reveals that respondent's attorney books and records were in substantially the same state of disarray in which Lakind had previously found them. Respondent's records had obvious inaccuracies and even recent transactions had not been properly recorded. Lakind testified that she went over the transactions step-by-step to demonstrate to respondent that she did not need the services of an accountant, which respondent had pointed out was quite expensive (T50-51, 84). As of the date of the fourth audit, over \$15,000 remained unidentified in respondent's trust account (T84).

A fifth audit was scheduled to take place on March 20, 1992.

Respondent was so notified by a letter from the OAE. The letter had been sent only via regular mail and was not returned to the OAE (T56-57). Lakind testified that she arrived at respondent's office to find no one there. During a subsequent telephone call, respondent stated that she had not received the letter and was unaware that an audit had been scheduled (T56).

On April 10, 1992, Lakind again reviewed respondent's records. Lakind testified that the impetus for returning for another audit was respondent's promise to Samuel I. Gerard, then Auditor-in-Charge of the Random Compliance Audit Program, that her books and records would be brought into compliance (T63). In fact, Einloth had completed more work on the files. However, Lakind found them to be similar to the prior year's - incomplete, inaccurate and unreliable. Nearly \$12,000 in the trust account remained unidentified (T52, 57, 85). Further, upon review, Lakind found numerous inaccuracies in the records. Specifically, in eight or nine cases, client balances reflected on the ledger cards were different from those on Einloth's reconciliation or were missing from the reconciliation (T58, Exhibit P-11).

There was some confusion in the record as to the approximately \$441,000 in unidentified funds revealed at the third audit and the \$12,000 still remaining unidentified as of the April 1992 audit. Lakind explained the distinction:

- A. It was a whole different thing, if I can clarify that so you will understand the distinction. Back at the first time I met the accountant he had very quickly dumped everything he didn't know where it went in a one, on a piece of paper, that's as simple as I can explain. He simply had to put it somewhere and he put it somewhere

and those lists of he didn't know who he went to totaled \$441,000 negative. You couldn't have a positive balance in the bank which this account always had if you were that short so I knew that that was so unreliable and that was the basis for nothing.

At this audit visitation, the accountant had, I remember asking the accountant, well didn't you use check stubs, insisting he begin with check stubs and deposit tickets and record a check whether it cleared or not, not to work off the bank statement so we had some control over every check available to be written. We could determine if the check wasn't here, then it was outstanding or it was replaced and it was a voided check. We had to be able to control and have accountability for every check and every deposit of funds.

At the second visitation at which the accountant was there he gave me what were, what looked like decent accounting records, that if I hadn't tested the records and simply looked at the records I may have said well, the account looks reconciled.

Q. Except for \$12,000.

A. Correct. But then as I went to match up his records that he summarized on these reconciliations to see where he took the figures from, they didn't match up with what he put on the reconciliation.

[T59-61]

Respondent testified that she was very upset to learn, after the sixth audit, that she was still not in compliance with the rules (T112). Lakind testified that, having spent a great deal of time explaining to respondent how to correct the deficiencies and finding her records still inadequate, she had a hard time believing respondent's claim (T86-87).

An unprecedented seventh and final audit was conducted on June 29, 1992 (T63). According to Lakind's memo of July 16, 1992, Exhibit P-6, respondent did not attend the audit due to illness. Respondent's husband delivered the records for Lakind's review. Respondent had not resolved the issue of the surplus funds because she had lost the original records and had spent considerable time



recreating duplicate records before locating the originals. Lakind noted that the "new" records were simply "recopies" of the records reviewed in April 1992; nothing new had been generated. A review of respondent's records revealed that, as of March 31, 1992, \$10,122.46 remained unidentified. Lakind did not receive any communication from respondent subsequent to the audit indicating when the missing records would be available.

Lakind set forth for the DEC which records were still lacking as of the date of the DEC hearing:

A. As of today we still cannot state with certainty that the identified balances are, in fact, correct and who the unidentified funds belong to. The first thing that we want to look at, of course, is the unidentified funds. We are concerned about clients whose funds could be in the account that we don't know about it [sic]. We are also concerned about the accuracy of the other balances that haven't been identified.

Q. How about ledger sheets? Did you ask the ledger sheets to be prepared?

A. We asked for ledger sheets to be prepared that reflected these transactions. We have not received a complete set that, in fact, we could audit in terms of receipts and disbursements journals and we haven't satisfied ourselves that the reconciliation provided are [sic] accurate.

[T91]

With regard to the approximately \$10,000 in unidentified funds in the trust account after the final audit, respondent testified as to her belief that much, if not all, of the money represents her fees left in the account (T101). She further stated that no clients have complained about not having received their funds (T111).

Little attention was paid to respondent's business account

records during these audits. Lakind explained that she, naturally, concentrated on the difficulties with the trust account. Further, there was some question in the record as to whether respondent had failed to reveal to Lakind that she had maintained two other offices for the practice of law (T41, Exhibit P-13). According to respondent, she never had more than one office at a time (T97).

Respondent testified that, when she first learned of the audit, she read the applicable rule, but relied primarily on the suggestions of a friend who had previously been the subject of an audit (T123-124). Respondent also testified that she had been unaware of the recordkeeping requirements until Lakind provided her with a copy of the rules (T98). She added that, once the audits began, she took steps to comply with the rules, spending many hours preparing disbursements and receipts journals and ledger cards and ultimately hiring Einloth (T99). Respondent contended that she had reviewed Einloth's work and that they appeared to be in compliance with the recordkeeping rules (T100). She further testified that, after Einloth, she hired Martin Green to work on her records. Lakind testified that she had requested a letter of engagement stating Green had been hired. Exhibit P-11. She never received such a letter, or a telephone number or first name for Green or the town in which he worked (T88). Respondent currently employs Lenny Wilson, a public accountant who is not a CPA (T113). (Respondent was specifically directed by the OAE to hire a CPA.) Respondent maintained that, although she now understands that she is still not in compliance with the recordkeeping requirements, she believed

then that she had done all that was needed (T114, 117).

Respondent testified about two occasions when her records were lost - once during an office break-in in 1987 or 1988 and later when items were stolen from her car in 1990. She explained that she attempted to reconstruct her files by obtaining copies of bank records (T102-105). It is unclear from the record, however, how much was actually missing from respondent's records as a result of these events. Furthermore, respondent never mentioned them to Lakind (T121).

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The complaint charged respondent with violations of R.1:21-6, RPC 1.15(d) and RPC 8.1(b). The panel found respondent guilty of each of the charged violations. The panel was split, however, on its recommended discipline. Two members, the Chair and the public member, deemed a public reprimand to be sufficient discipline. The third member, however, strongly urged a period of suspension.

#### CONCLUSION AND RECOMMENDATION

Upon 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 fully supported by clear and convincing evidence.

Factually, there is no dispute regarding the charges. Respondent conceded that she did not comply with the bookkeeping requirements of R.1:21-6. Audits conducted on seven occasions from

January 1991 through June 1992 established her improper recordkeeping practices.

A public reprimand was imposed where an attorney was grossly negligent in failing to maintain the trust and business accounting records required by R.1:21-6 and further failed to cooperate with the OAE. In re Fieschko, 131 N.J. 436 (1993). The attorney had been previously publicly reprimanded.

Similarly, in In re Barker, 115 N.J. 30 (1989), the attorney was found guilty of grossly negligent accounting procedures, which, in turn, caused the negligent misappropriation of client funds. The Court noted that Barker's problems resulted primarily from a very inadequate bookkeeping system, the combination of an incompetent part-time bookkeeper and Barker's failure to supervise her work. After taking into account several mitigating factors, including the lack of harm to any client, the Court publicly reprimanded Barker.

Respondent's misconduct, however, is more egregious than that of Fieschko and Barker. Indeed, this case is extraordinary. As noted above, no attorney has required this unprecedented number of audits, which consumed an exorbitant number of hours by Lakind. Further, unlike respondent, the attorney in Barker corrected his problems as soon as they were brought to his attention. In Fieschko, the attorney stated that he was in compliance with the rules as of the date of the DEC hearing. Contrarily, as of the date of the Board hearing, although respondent's records were improved, she was still not in compliance with the recordkeeping

requirements.

In addition to her violations of the recordkeeping requirements, respondent failed, on numerous occasions, to comply with the directives of the OAE. She failed to promptly hire a CPA, when directed to do so by the OAE. Also, by letter dated July 16, 1992, sent via certified mail after the final audit, respondent was informed that she was in violation of R.1:21-6 and RPC 1.15. She was further informed that corrected trust account records had to be submitted to the OAE by September 8, 1992 and that failure to comply could result in disciplinary action against her (Exhibit P-7). The records were never turned over to the OAE. Asked why she had not complied with the directives of the OAE's letter, respondent answered that she had not read it. Respondent attempted to explain her inability to reply to or even read correspondence from the OAE:

A. I can't open it because it will ruin my day. I can't do it. It is difficult for me as it is without hearing anything from the Ethics Committee. I mean, I completely freeze. There have been times, and I'm telling you this although I know the psychologist might think I shouldn't say certain things but I can't even work. I have to stay home. I can't even get out of my bed. I'm unable to go to the office. It is really difficult. I really can't focus and I know that and I've told him. We are trying to work out ways that I can deal with these things that are plaguing me. When I say these things I'm talking about the ethics and what we are dealing with now. This is difficult for me.

Q. One other question.

Aside from the administrative tasks such as record keeping that you are not performing as well as you should, are you managing the rest of your practice in a way that is satisfactory to your clients?

A. Well, I know that I would do a lot better, I know that, if I could just end this, anything with the ethics,

these ethics matters because they completely, I feel bombarded and it is like what else. I can't handle it. I think I'm doing the best that I can. I can go to court and I can do that kind of thing because it doesn't require an awful lot of concentration or anything like that, the kind of matters that I do handle. I can take care of phone calls. I'm very good as far as consoling others, but when it comes to me and these problems that I'm dealing with her [sic] I can't.

[T115-116]

In addition, although given several opportunities to do so, and being made aware that she was in violation of the rules, respondent failed to file an answer to the formal ethics complaint. Respondent's answer was ultimately filed on December 14, 1993, two days before the DEC hearing. Respondent testified that she did not open the envelope containing the complaint when she received it (T127).

Respondent testified about her continuing psychological difficulties, both during the period of the audits and as of the date of the DEC hearing. Respondent explained the presence of several stressors in her life, including the death of her father after a long illness, requiring respondent to make several trips out of state in 1991 and 1992 - respondent mentioned her father's death to Lakind during one of the audits - the homicide of an uncle in 1992, the deaths of several friends, a \$50,000 judgment against her that resulted in a foreclosure proceeding, and her poor marital relationship (T106-108, 111). She testified that it had been hard for her to concentrate on her work and difficult to keep up with her practice and recordkeeping (T109-110). Although the timing of each of these difficulties is not apparent from the record, it is not clear how they would have affected records that should have

been kept prior to the onset of each of them.

The only medical proof of respondent's problems submitted was Exhibit R-1, an extremely brief letter from respondent's treating psychologist, who did not testify before the DEC. In pertinent part, that letter states:

[respondent] was initially diagnosed as suffering from a major depression secondary to a number of stressors in her life. This left her with impaired concentration, confusion and some disorientation that limited the tasks that she was able to perform. Since that time many of those symptoms have remitted but she is still depressed and needy of continued treatment.

[Exhibit R-1]

This letter does not provide any information as to the specifics of respondent's treatment. Further, it does not state with the necessary specificity how respondent's condition has affected her law practice. Neither respondent's testimony on this issue nor her psychologist's letter provide sufficient evidence to enable the Board to consider respondent's alleged psychological difficulties as a mitigating factor.

As stated above, respondent was privately reprimanded in October 1991, during the time period that these audits were being conducted. Despite the fact that she was under scrutiny for other misconduct, respondent still did not grasp the import of these matters and her recordkeeping responsibilities.

Respondent is completely unable to understand the gravity of this issue and to comply with what is required of her. In light of respondent's refusal or inability to comply with the mandates of R.1:21-6, even after seven visits by the OAE auditor, her failure to cooperate with the OAE, her prior discipline and the lack of

competent evidence of mitigation or an explanation for her conduct, the Board unanimously recommends that she be suspended for a period of three months. See In re Gallo, 117 N.J., 365 (1989) (three-month suspension where an attorney, for five years, was seriously inattentive to proper accounting and bookkeeping procedures) and In re James, 112 N.J. 580 (1988) (three-month suspension where an attorney was found guilty of several bookkeeping irregularities for a period of twenty-four years).

The Board further recommends that respondent's reinstatement be contingent upon her certification that she is in compliance with the recordkeeping requirements. In addition, upon reinstatement, respondent is to provide a psychiatric report demonstrating her fitness to practice law. Moreover, the Board recommends that respondent be required to file a certified annual audit with the OAE for a period of three years. Finally, upon reinstatement, respondent should practice under the supervision of a proctor for 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:

10/31/94

By:

Elizabeth L. Buff  
Elizabeth L. Buff  
Vice-Chair  
Disciplinary Review Board