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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-234

IN THE MATTER OF

CLIFFORD S. HINDS,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 8, 1993

Decided: July 1, 1994

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

Clifford S. Hinds appeared pro se.

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

This disciplinary matter was before the Board on a recommendation for public discipline filed by the District XI Ethics Committee ("DEC"). The four-count formal complaint charged respondent with violations of RPC 1.15 (negligent misappropriation of client funds and failure to comply with the recordkeeping provisions of R.1:21-6), RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence) and RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority). Allegations of violations of RPC 8.4(c) were withdrawn by the presenter at the hearing. Respondent filed an answer admitting all of the allegations of the complaint.

Respondent was admitted to the New Jersey bar in 1982. He has no prior disciplinary history.

Respondent was the subject of a demand audit by the Office of Attorney Ethics ("OAE") on January 24, 1992. That audit was prompted by respondent's failure to respond to the OAE's December 13 and December 27, 1991 letters, requesting a detailed explanation for two trust account overdraft notifications received from respondent's bank. The audit was further prompted by the OAE's receipt of a grievance from an attorney, alleging that respondent had failed to pay real estate taxes with funds entrusted for that purpose. Respondent did not provide all of the records requested by the OAE to be produced at the initial audit. Therefore, a subsequent audit date, March 23, 1992, was arranged. Respondent appeared at both scheduled audits with his accountant, whom he had hired to reconstruct his trust account records. The audits disclosed several improprieties, with an adverse impact upon client funds.

The Lewis Matter

Respondent represented Jasper Lewis in a real estate closing, which apparently occurred on or about August 14, 1991. In connection therewith, respondent received and deposited into his trust account the sum of $121,943.93. On or about August 16, 1991, respondent issued his trust account check in the amount of $703.00 to Main Street Title Company to satisfy the title insurance obligation. That check was subsequently returned by the bank for

insufficient funds. Apparently, when the check was presented for payment on November 12, 1991, respondent's trust account contained only $54.35. This was the first of two trust overdrafts, and prompted the OAE's December 13, 1991 trust overdraft letter.

Respondent was unable to explain the cause of this overdraft, or of the second overdraft, in the amount of $2.59, which generated the OAE's December 27, 1991 letter. His accountant, however, attributed the overdrafts to several factors. First, he found that respondent, in several instances, had overpaid on particular accounts, such as mortgage pay-offs. Second, he discovered instances of checks issued against uncollected funds, where the payees of the checks had immediately presented them for payment. Third, he found that respondent did not record the return of checks or the bank charges totalling approximately $500 for one year. Finally, the accountant found that respondent kept no running balances on either his client ledger cards or in his cash disbursements journals.

Ultimately, respondent satisfied the outstanding title insurance obligation by way of a personal money order, on or about March 12, 1992. That payment had apparently been urged by the OAE representatives at the January 24, 1992 audit.

The Whaley Matter

Respondent represented Jemma and Douglas Whaley in a real estate matter. The closing was held on July 20, 1990. A review of line 811 of the HUD-1 statement ("The RESPA Statement") discloses

that the sum of $939.13 was received from the Whaleys for the payment of the third quarter property taxes. In addition, respondent received the amount of $2,100, which represented monies held back from the sellers' proceeds for the payment of roof repairs to the property. The record is unclear as to whether the Whaleys requested that respondent hold those funds for them either as a courtesy, for that purpose, or whether the mortgagee required such an escrow as a condition to making the loan or, finally, whether the seller required those funds to be escrowed, anticipating a refund for any unused portion. In any event, according to respondent, due to some "last minute changes by the bank," the Whaleys came to the closing $438.29 short for the payment of the taxes. The parties then agreed to proceed with the closing, based upon the Whaleys' promise to make up the shortage the next day.

Respondent apparently spoke to Mrs. Whaley by telephone on at least one subsequent occasion and wrote to her on another to remind her that she had not yet satisfied her obligation. Nonetheless, the additional funds were never forthcoming. Subsequently, on October 8, 1990, respondent again wrote to Mrs. Whaley indicating that it was his intention to deduct the amount of $438.29 from the $2,100.00 he was holding in escrow for the roof repairs and to forward the remainder to her. Exhibit P-2. But See T56-57[1] and Exhibit P-1:H (Whaley ledger card).

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[1] "T" denotes the DEC hearing transcript of March 18, 1993.

Upon receiving respondent's October 8, 1990 letter, Mrs. Whaley again promised to send respondent the deficiency and specifically instructed him to "make sure he [kept] that money for [her]" because she had someone working on the roof. T53. When the Whaleys failed to forward the deficiency, on or about March 16, 1991, respondent deducted the $438.29 from the amount he was holding for the roof repairs and sent the balance to Mrs. Whaley. See Exhibit P1:H (reconstructed client ledger card). Respondent testified that, up to that point, he had not paid the real estate taxes on the property because he did not have enough funds to both pay the taxes and cover the roof repairs. While, theoretically, respondent should have had enough monies to do so, he still did not then satisfy the outstanding tax obligation. In fact, according to the OAE auditor, the money initially deposited to cover the tax obligation ($939.19) just "kind of disappeared." T39. Respondent's trust account balance fell below the amount he should have been holding for the roof repairs alone on at least five occasions before the release of the balance of the funds to the Whaleys. See Exhibits P-1:H1 and P-1:H2. It should be further noted that both the Whaley ledger card and the RESPA statement show that respondent took a counsel fee of $500 on the date of closing — an amount that would have more than covered the client's deficiency.

The outstanding taxes were finally paid by the mortgagee (Midlantic Home Mortgage Corporation), after having been notified by the tax collector that they remained unpaid and after several apparent attempts on the mortgagee's part to either contact

respondent or to obtain reimbursement from him. On one occasion, respondent apparently advised Midlantic that the reimbursement check had been mailed previously, on September 21, 1991. When Midlantic did not receive that payment, it continued to demand it from respondent. In fact, it was not until the ethics investigation was well under way — at least some four months after respondent represented to Midlantic that a check had been forwarded — that respondent finally reimbursed Midlantic for its payment of the taxes. Respondent was not charged with misrepresentation to Midlantic nor was any question of possible misrepresentation explored during the DEC hearing.

Respondent was charged with, and admitted to, several recordkeeping violations. Specifically, during the audit period (July 1, 1990 through January 24, 1992), respondent did not maintain a cash receipts journal, did not keep a fully descriptive disbursements journal, did not keep running balances in either the disbursements journal or the client ledger cards, did not perform quarterly reconciliations of his trust account and, finally, maintained inactive balances on several client ledger cards. In short, respondent himself admitted that he could not identify to whom the funds in his attorney trust account belonged. Respondent attributed his poor recordkeeping to his lack of training in the proper trust accounting procedures. He indicated that he intended to re-take the ICLE trust accounting course and that he has since "taken steps to improve [his] recordkeeping." T67. In addition, he asserted that he plans to keep his accountant involved in his

attorney recordkeeping. The record, however, is devoid of any specifics in this regard. In fact, as of the date of the DEC hearing, respondent still had not supplied the OAE with a completed reconstruction of the trust account. Thus, there is no indication of the current state of respondent's records and recordkeeping procedures.

Finally, respondent was charged with and admitted to knowingly failing to cooperate with the OAE's investigation. This charge apparently stemmed from respondent's failure to provide the OAE with his business account records as well as quarterly reconciliations of his trust account, at least from 1991. In addition, respondent did not reply to the OAE's two trust overdraft letters. While respondent had no explanation for his failure to produce his business account records, both he and his accountant testified that the trust account reconciliations for 1991 were not provided because respondent's accountant was unable to complete the task due to his own schedule demands.

* * *

The DEC found respondent guilty of violations of RPC 1.15, RPC 1.1(a), RPC 1.3, RPC 8.1(b) and R.1:21-6. The DEC did not set forth any factual bases for its findings. The DEC further found, however, that respondent did not benefit from his poor recordkeeping, that he did not intentionally mismanage his trust account, that he supplied to the OAE (although not expeditiously)

the requested information, and that there was no evidence of any fraudulent action or dishonesty on respondent's part. The DEC further noted that, "although respondent has admitted to gross negligence in his handling of the matters questioned, the Panel finds that there is a very close question as to whether or not the conduct of the respondent constitutes 'gross negligence.' Hearing Panel Report at 3.

The DEC recommended public discipline for respondent's misconduct. It did, however, urge leniency, given respondent's lack of intent to misappropriate trust funds and lack of personal gain. The DEC further recommended that respondent be required to take anew either the Skills Training Courses or some other training in the proper operation and maintenance of his trust account. Finally, the DEC recommended that consideration be given to the appointment of a proctor "to monitor the respondent for a short period of time and see that he disburses his clients' monies properly." (Hearing Panel Report at 3).

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's finding of unethical conduct is supported by clear and convincing evidence.

In both the Whaley and the Lewis matters, respondent negligently misappropriated funds either held for the benefit of

clients or for a third party. In both cases, the balance in respondent's trust account fell below that amount he should have been holding to meet those client obligations. Respondent, therefore, was duty-bound to safeguard those funds as he would any trust funds. He neglected to do so. That respondent's negligent misappropriations were occasioned by his failure to keep proper records does not excuse his misconduct. Every attorney has a non-delegable obligation to learn and to follow those rules designed to ensure the sanctity of client funds.

Concomitant with his obligation to safeguard client or escrow funds is respondent's duty to properly and promptly disburse those funds. Again, in both the Lewis and Whaley matters, respondent failed to do so. In the Lewis matter, respondent finally paid the title company seven months after the closing — and then only after he was urged to do so by the OAE auditor. While the record is devoid of any factual detail regarding respondent's delay in satisfying this obligation, his admission to violations of RPC 1.1(a) and RPC 1.3, coupled with the lengthy delay in the ultimate satisfaction of the obligation, without explanation, certainly supports findings of gross neglect and lack of diligence on respondent's part.

Similarly, in the Whaley matter, respondent finally satisfied the tax obligation approximately one year and eight months after the closing. This delay ensued despite the mortgage company's persistent attempts to have respondent first make the payment and

then reimburse it for the payment. Again, in this matter, respondent admitted to violations of both RPC 1.1(a) and RPC 1.3.

Finally, while respondent has apparently attempted to comply with the OAE's requests with regard to his trust account records, he clearly has not done so fully. Nor has he complied, to any extent, with the OAE's requests in connection with his business account records. The importance of the business account records cannot be minimized, as they frequently provide a sense of "the big picture" of an attorney's financial situation, which may have a substantial impact upon the evaluation and interpretation of the trust account records. Respondent, therefore, has failed to fully cooperate with the OAE's investigation, in violation of RPC 8.1(b).

There remains, thus, the issue of the appropriate discipline for respondent's recordkeeping violations, which resulted in the negligent misappropriation of client funds, as well as for his instances of gross neglect, lack of diligence and failure to fully respond to the OAE's requests for records and to its requests for explanations of the trust overdrafts.

In In re Lazzaro, 127 N.J. 390 (1992), the Court publicly reprimanded an attorney for several instances of negligent misappropriation, which resulted from inadequate recordkeeping. The recordkeeping violations in that case were almost identical to those in this matter. Mitigating factors included respondent's unblemished record and absence of harm to any client. See also In re Fucetola, 101 N.J. 5 (1985), (attorney publicly reprimanded

for "flagrant recordkeeping errors combined with an apparent lack of comprehension of the proper operation of an attorney's accounts." Id. at 9, citing In re Hennessey, 93 N.J. 358, 360 (1983). The attorney's prior disciplinary history in that case was viewed as an aggravating factor). See also In re Lewinson, 126 N.J. 515 (1992) (attorney publicly reprimanded for several instances of negligent misappropriation, which were the result of reckless recordkeeping and an apparent lack of knowledge of or experience with the proper accounting procedures. Mitigating factors included, most significantly, the attorney's apparent compliance with the relevant rules for several years after the discovery of the misconduct).

All of the above cases should be contrasted to cases where the recordkeeping deficiencies were caused not by ignorance of the rules but, instead, by the attorney's busy schedule, In re Librizzi, 117 N.J. 481 (1990), or by the attorney's dislike of accounting, In re Ichel, 126 N.J. 217 (1991).

The Board recognizes that the purpose of discipline is not the punishment of the offender, but "the protection of the public against an attorney who cannot or will not measure up to the high standard of responsibility required of every member of the profession." In re Getchius, 88 N.J. 269, 276 (1982), citing In re Stout, 76 N.J. 321, 325 (1978). The severity of the discipline to be imposed must comport with the seriousness of the ethics infraction in light of all the relevant circumstances. In re Nigohosian, 86 N.J. 308, 315 (1982). Mitigating factors as well as

aggravating factors are, therefore, relevant and may be considered.

The Board has considered several mitigating factors in this matter. Specifically, respondent has accepted full responsibility for his wrongdoing and has taken measures to improve both his records and his procedures. No client was harmed and, in fact, respondent satisfied his client's obligation, at least in the Whaley matter, from his own personal funds. Finally, respondent has an unblemished ethics history.

Based on the totality of the circumstances, an eight-member majority of the Board is of the opinion that respondent should receive a public reprimand for his misconduct. The Board also recommends that respondent re-take the Trust and Business Accounting section of the Skills Training Courses and that he provide to the OAE full reconciliations of his attorney trust and business accounts on a quarterly basis, for a period of two years. These reconciliations should be prepared by a Certified Public Accountant retained by respondent and approved by the OAE. Prior thereto, however, and within thirty days of respondent's receipt of the Board's Decision and Recommendation, respondent should complete and submit to the OAE all pending and outstanding accountings, if any. Failure to comply with this requirement should subject respondent to immediate temporary suspension.

One member dissented, voting to either remand the matter for further investigation or to adjourn it in order to obtain complete records from respondent.

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

Dated: 7/1/94

By: Raymond Trombadore
Raymond R. Trombadore, Esq.
Chair
Disciplinary Review Board