

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 96-407

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IN THE MATTER OF :  
MANUEL R. DIAZ :  
AN ATTORNEY AT LAW :

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Decision

Argued: December 18, 1996

Decided: March 20, 1997

Nitza Blasini appeared on behalf of the Office of Attorney Ethics.

Respondent waived oral argument.

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 discipline filed by Special Master James F. Ryan. A five-count complaint charged respondent with violations of RPC 1.8(a)(1) and (a)(3)(conflict of interest in a business transaction with a client)(count one); RPC 1.8(a)(3)(count two); RPC 1.15(a)(negligent misappropriation of client funds)(counts three and four); and RPC 1.15(d) and R. 1:21-6(b)(recordkeeping violations)(count five).

Respondent was admitted to the New Jersey bar in 1980. He maintains a law office in Union City, New Jersey. Respondent was temporarily suspended on October 16, 1996 following the return of a trust account check for insufficient funds.

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The Dones Transactions (counts one and two)

This matter was referred to the Office of Attorney Ethics ("OAE") on October 10, 1990 by the Honorable Richard F. Connors, J.S.C. The judge reported respondent's conduct in a matter in which respondent was a defendant. The judge explained that respondent was being sued by his client, Maria O. Dones, who sought to recover \$50,000 that she had lent to respondent. Exhibit OAE-2. The judge believed that respondent was trying to take advantage of his client. According to the judge, respondent had asked him on that date to refrain from notifying the ethics authorities of his conduct.

In a letter to the OAE from Dones' attorney, Joseph A. Pojanowski, III, also dated October 10, 1990, the attorney summarized respondent's conduct that had prompted the lawsuit and confirmed that, while the attorney was in Judge Connors' chambers, the judge had a telephone conversation with respondent in which respondent had requested the judge not to contact the ethics authorities until respondent had had an opportunity to discuss the matter with the judge personally. Exhibit OAE-1. According to the attorney, the

judge declined to meet with respondent, terminated the conversation and immediately contacted the OAE.

Although Dones was interviewed about the matter, she was not called to testify at the DEC hearing. Therefore, there was no testimony in the record to dispute respondent's defenses.

While this matter was reported to the OAE in October 1990, it was held in abeyance pending resolution of the civil litigation, which occurred in April 1993.

The facts established by the record are as follows:

Respondent borrowed \$50,000 from Dones in January 1988 and agreed to repay her the following month. Respondent did not sign a promissory note at that time. On February 1, 1988, respondent issued a check to Dones, but then stopped payment on it. Thereafter, on February 10, 1988, he gave Dones a second check, which was returned for insufficient funds.

Dones unsuccessfully sought repayment from respondent on a number of occasions. She finally obtained a promissory note signed by respondent, dated January 2, 1989 (Exhibit OAE-3), in which he agreed to repay the \$50,000 by April 2, 1989. The note was silent about the payment of interest. Respondent failed to repay Dones on the due date, prompting her to file suit against him on August 8, 1990. The complaint demanded recovery of the \$50,000 loan together with interest and other costs related to the collection of the loan. The matter was eventually settled. Dones signed a release on April 20, 1993. Exhibit D-4.

The OAE investigation ensued. In an August 11, 1994 interview by the OAE, respondent admitted borrowing \$50,000 from Dones and

claimed that he had advised her of the desirability of retaining independent counsel. Respondent contended that Dones was offended by the suggestion because of their longterm friendship. He, therefore, failed to obtain a written waiver from her and never gave her a written explanation of the conflict of interest arising from the transaction.

Respondent did submit to the OAE, however, a certification purporting to be from Dones, dated August 10, 1994. The certification stated that Dones and respondent had been involved in various business transactions over the last few years and that, in all those transactions, she had declined the opportunity to secure independent counsel. The certification stated as follows:

Everytime [respondent] raised the issue, I advised him that I did not want one since I felt that to do so would be offensive to our friendship, this is evidenced by the fact that no legal fees were paid to [respondent] in connection with any of the transactions we were jointly involved in.

\* \* \*

Inasmuch as [respondent] and I have amicably resolved [the lawsuit] I do not wish to proceed with any grievance proceeding against him.

[Exhibit D-5]

At the hearing before the special master, respondent contended that the promissory note had been executed after the fact. He recalled that the original loan from Dones had been for more than \$50,000 and, that, at the time he had executed the note, he had paid back all but \$50,000. Respondent also claimed that Dones reaped

financial benefits from their joint business ventures, while he suffered financial losses.

During its investigation, the OAE also learned of two other transactions in which Dones and respondent had been involved. Specifically, in early 1987 respondent and Dones had purchased a newspaper, "La Nación," which was transferred to a corporation called "Omanci Corporation," of which respondent was a one-third shareholder. Respondent and Dones, as equal shareholders, had also formed a real estate development company named the "49th Street Development Corporation." The company was created to develop two vacant lots owned by Dones. The project, however, ultimately fell through.

Respondent again claimed that he had advised Dones of the desirability of obtaining independent counsel. OAE investigator G. Nicholas Hall testified that, although respondent had informed him that he had obtained a waiver in the real estate deal, respondent was unable to produce the document.

The Miguel Matter (count three)

During a review and analysis of respondent's records and books, Hall discovered that, on January 31, 1994, respondent had represented Juan and Sara Miguel, the purchasers in a real estate transaction. Respondent failed to pay off the existing mortgage of \$148,595.39 until May 1994. By that time, interest and penalties in the amount of \$2,584.87 had accrued. T29. On May 11, 1994, respondent disbursed \$151,179.85 from his trust account to pay off the mortgage.

Hall's analysis revealed that respondent paid the additional amount by using \$1,415 of other clients' funds and \$1,169 of his own funds. Exhibit OAE-12.

Respondent admitted that he negligently misappropriated client funds. He explained in his answer that the deficiencies in his trust account were "highlighted" and "made easier to detect" because he maintained an "Accutrack" account and that that system maintains separate sub-accounts for individual clients with separate ledger cards. Respondent also cited bank errors in his trust account as a contributory factor to the problems with his account. Respondent did not offer any evidence to substantiate this claim.

The Gonzalez Matter (count four)

Respondent admitted the allegations in the fourth count of the complaint. Respondent had obtained \$11,700 from Gonzalez for a real estate transaction that was never consummated. Respondent informed OAE Investigator Hall that, two days before he had reimbursed Gonzalez the entire \$11,700, "someone in his office" had written a check for fees in the Gonzalez matter in the amount of \$1,700, creating a shortage in that account. On May 18, 1994, respondent deposited \$1,700 in his trust account to correct the deficiency.

Hall's reconciliation of respondent's trust account disclosed a \$2,481.94 shortage as of February 28, 1994. The shortage was caused by debit balances in six client matters. The bulk of the shortage was the unearned fee written on the Gonzalez account. According to Hall, in addition to respondent's failure to timely pay off the

mortgage in the Miguel matter, causing an increase in the pay-off figure, there were also a number of bookkeeping errors in respondent's trust account that resulted in the negligent misappropriation of \$2,010.58.

Recordkeeping Violations (count five)

Hall's review of respondent's records disclosed the following recordkeeping deficiencies:

(1) A running cash balance was not maintained in the trust account checkbook [R. 1:21-6(c)]; (2) client ledger cards included debit balances [R. 1:21-6(c)]; (3) a schedule of client ledger accounts was not prepared and reconciled quarterly to the trust account bank statement [R. 1:21-6(b)(8)]; (4) inactive trust ledger balances remained in the trust account for extended periods [R. 1:21-6(b)(8)]; (5) a separate ledger sheet was not maintained for each trust client [R. 1:21-6(b)(2)]; and (6) old outstanding checks were not negotiated [R. 1:21-6(c)], in violation of RPC 1.15(d) and R. 1:21-6(b).

\* \* \*

The special master found that respondent had engaged in unethical conduct. He also found unpersuasive respondent's claim that he believed that he had obtained a waiver from Dones. The special master based his determination on the fact that respondent had failed to produce the document in the five years that had passed

since he had become aware of the ethics investigation. The special master's conclusion was also influenced by the fact that respondent could have, but did not, produce Dones as a witness.

The special master noted that Dones was not sufficiently aggrieved to appear in the matter and that she had executed a certification indicating that respondent had discussed the conflict issue with her. The OAE did not challenge the authenticity of the document.

The special master found a violation of RPC 1.8(a)(3) in counts one and two. The special master also found a violation of RPC 1.8(a)(1) in count one because there was no writing memorializing the loan until well after the transaction had occurred. The special master did not find by clear and convincing evidence that respondent had failed to disclose the conflict to Dones, concluding that respondent had recommended that Dones obtain other counsel. The special master found that respondent's conduct did not give rise to egregious circumstances or cause serious economic harm to his client. Finally, the special master found clear and convincing evidence of negligent, not intentional, misappropriation of client funds and of the recordkeeping violations set forth in count five.

In light of the fact that respondent had resolved his recordkeeping problems, the special master recommended a reprimand.

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Upon a de novo review of the record, the Board is satisfied that the conclusion of the special master that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

RPC 1.8(a) provides:

A lawyer shall not enter into a business transaction with a client . . . unless (1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms that should have been understood by the client, (2) the client is advised of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel . . . and (3) the client consents in writing thereto.

The special master properly found that, in count one, respondent failed to comply with RPC 1.8(a)(1), by failing to disclose and transmit, in writing, the terms of the transaction to Dones and that respondent violated RPC 1.8(a)(3) in counts one and two, by failing to obtain Dones' written consent to waive independent counsel.

The special master, however, did not find that respondent's misconduct caused serious economic harm to Dones, a conclusion with which the Board cannot agree. A significant period elapsed between the time Dones made the loan to respondent -- at least as early as January 1988 -- and the actual execution of the release acknowledging respondent's payment of \$40,000 in April 1993. Dones' made repeated unsuccessful attempts to secure repayment, including obtaining a check that was dishonored and another check on which respondent placed a stop-order. Dones was finally forced to retain an attorney to file suit against respondent and settled the suit for \$40,000,

\$10,000 less than the amount of the loan, exclusive of attorney's fees and interest. Under these circumstances, it is undeniable that respondent's conduct caused monetary injury to Dones. While respondent alleged that he, too, suffered losses as a result of his transactions with Dones, there was nothing in the record to substantiate this claim or to mitigate against Dones' proven financial loss.

Respondent's improprieties in this matter, standing alone, warrant more than a reprimand. See In re Guidone, 139 N.J. 272 (1994) (three-month suspension where attorney deliberately concealed his involvement in a partnership that was purchasing a parcel of property from a club that was selling property; the attorney represented the sellers in the transaction).


In the Board's view, respondent's added infractions — negligent misappropriation and recordkeeping deficiencies — do not increase the required quantum of discipline above a three-month suspension in this case. Generally, discipline limited to an admonition or reprimand has been imposed where nothing more than a negligent misappropriation occurred and the client did not sustain financial loss. See In the Matter of Joseph S. Caruso, Docket No. DRB 96-076 (May 21, 1996) (admonition where attorney negligently misappropriated client trust funds as a result of failure to maintain proper trust and business account records); In re Stephen Gilbert, 144 N.J. 583 (1996) and In re Harvey Gilbert, 144 N.J. 583 (1996) (reprimand where attorney negligently misappropriated more than \$10,000 in client funds, failed to comply with recordkeeping rules, including

commingling personal and trust funds and depositing earned fees in the trust account; and failed to properly supervise his firm's employees for the maintenance of business and trust accounts); and In re Klamo, 143 N.J. (387)(1996)(reprimand for negligent misappropriation of client trust funds where attorney improperly delegated his recordkeeping responsibilities to an employee that he never instructed or supervised).

Based on the foregoing, the Board unanimously determined to impose a three-month suspension. The Board also determined to require respondent to submit to the OAE, for a period of two years, semi-annual certified audits of his attorney records. Two members did not participate.

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

Dated: 3/20/97

  
LEE M. HYMERLING  
Chair  
Disciplinary Review Board