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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-388

IN THE MATTER OF :
: STUART M. WHITEFIELD:
: AN ATTORNEY AT LAW :

Decision of the
Disciplinary Review Board

Argued: November 15, 1995

Decided: May 20, 1996

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Respondent failed to appear, despite proper notice of the hearing.

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 the District VIII Ethics Committee ("DEC"). The Office of Attorney Ethics ("OAE") filed a four-count complaint charging respondent with violations of RPC 1.3 (lack of diligence); RPC 1.4 (failure to communicate); RPC 1.8(a) (entering into a prohibited business transaction with a client) and RPC 1.15 (commingling of funds, failure to keep required records and negligent misappropriation). Although respondent did not file an answer to the complaint, he did appear at the DEC hearing and admitted all of the allegations of the complaint.

Respondent was admitted to the New Jersey bar in 1979. On October 6, 1995, the Court entered an order suspending him from the practice of law for a period of one year, retroactive to the date of his temporary suspension on July 5, 1995. The temporary suspension resulted from respondent's failure to cooperate in various ethics investigations, although the extent of that failure is not entirely clear from a review of available records. The one-year suspension resulted from respondent's misconduct in three matters, including gross neglect, failure to communicate, lack of diligence, charging an unreasonable fee, unauthorized withdrawal of fees and conduct prejudicial to the administration of justice. The order further barred reinstatement until the resolution of all outstanding ethics matters filed against respondent and the production of proof of psychiatric fitness to practice law. Respondent remains suspended to date.

Respondent was charged with misconduct in three separate matters.

The Coleman Matter

In 1991, respondent was retained by Rudolph Coleman to represent him in a contract action against his disability insurance carrier, Mutual of Omaha Insurance Company ("Mutual"). On or about July 29, 1991, respondent received a \$1,000 proposed settlement draft from Mutual, which he promptly deposited into his trust account. However, respondent inadvertently credited the settlement

amount to the wrong client, Dawn Matthews. Respondent then proceeded to disburse all of the funds on the Dawn Matthews ledger, including the \$1,000 received from Mutual for Coleman. He did not discover his error until June 1993.

Coleman maintained that he had specifically rejected the settlement when proposed, but had not heard anything from respondent regarding his case until approximately July 1993. At that time, Coleman's daughter, also respondent's client, telephoned a Mutual representative and learned that Mutual had forwarded respondent a settlement check, which respondent had negotiated. (Although Coleman alleged that respondent had forged his name on the back of the settlement draft, the complaint did not charge respondent with such a violation. Although not verified by a handwriting expert, the signature on the back of the settlement draft appears to match Coleman's legitimate signature on another document).

Respondent replenished his trust account with \$1,000 in personal funds and, on July 1, 1993, paid Coleman the \$1,000 in exchange for a release in favor of Mutual.

Respondent offered no explanation for his conduct, other than to admit that he had engaged in poor recordkeeping practices.

The Matthews Matter

As of March 28, 1990, respondent had been representing Dawn Matthews in a personal injury matter. On that date, respondent

credited \$45,000 in settlement proceeds to the Dawn Matthews trust ledger. On March 29 and on April 18, 1990, respondent disbursed to Matthews her share of the settlement proceeds. However, he failed to disburse his fees and costs to himself in a timely fashion. Respondent waited approximately six months before disbursing any fee monies to himself and finally removed his total fees and costs by the end of November 1991, twenty months after he was required to do so.

The Elliott Matter

Respondent represented Richard Elliott in various legal matters from about 1986 to 1993. On December 5, 1988, respondent borrowed \$15,000 from Elliott. Respondent failed to obtain Elliott's written consent to the loan transaction and failed to advise Elliott to consult with independent counsel before consummating the loan. Furthermore, there was no documentation to evidence the loan.

Although respondent admitted all of the allegations of the complaint, he explained that, at the time of the loan and for a long time thereafter, Elliott was his best friend. In the past, the two of them had freely lent one another money without formal arrangements. Respondent maintained that, in fact, he had previously lent Elliott thousands of dollars, most of which had never been repaid. Respondent claimed that he had repaid Elliott in full, either by cash payments or by reducing Elliott's

outstanding legal bills, with Elliott's authorization - a claim disputed by Elliott. Finally, respondent contended that Elliott filed the ethics grievance only after respondent refused to continue to handle legal matters for him free of charge or to lend him any additional money.

Respondent argued that, while he did not offer this testimony as an excuse, his conduct constituted only a technical violation of RPC 1.8(a), given the particular circumstances.

Recordkeeping violations

The OAE conducted a demand audit of respondent's books and records on August 30 and November 15, 1993. The audit disclosed that respondent maintained deficient records, as follows:

- a. failure to maintain a trust receipts book;
- b. failure to maintain a trust disbursements book;
- c. failure to maintain a running balance in his trust checkbook;
- d. failure to reconcile his client ledger balances to his trust account bank balance quarterly;
- e. failure to maintain fully descriptive client ledgers; and
- f. failure to deposit checks for fees into his business account.

* * *

The DEC found respondent guilty of all violations charged in the complaint. Concluding that respondent's conduct in the Elliott matter was the most serious of the violations charged, the DEC recommended that he receive a three-month suspension from the

practice of law. The DEC was not aware of any prior discipline against respondent, inasmuch as the Board's decision suspending respondent for one year was transmitted to the Court two months after the DEC hearing.

* * *

Upon a de novo review, the Board is satisfied that the DEC's findings of unethical conduct are clearly and convincingly supported by the record. Respondent admitted all of the allegations of the complaint. Not only did he fail in his recordkeeping responsibilities, resulting in one instance of negligent misappropriation, but he also engaged in a completely undocumented and unsecured business transaction with his client without first advising him to consult with independent counsel. That Elliott was also his friend did not relieve him of his obligations to instruct Elliott to obtain separate counsel. Indeed, the friendship between the two undoubtedly created a sense of trust and security on Elliott's part, making the advice of independent counsel all the more important. See, e.g., In re Shelly, 140 N.J. 501, 517 (1995). Independent counsel would most likely have insisted on security for the loan, at a minimum.

Respondent's conduct in this matter is analogous to that in In re Hughes, 114 N.J. 612 (1989). There, the attorney was publicly reprimanded for extracting a \$22,500 loan from a client with whom

he shared an intimate personal relationship. The attorney did not disclose to the client that he was not personally guaranteeing the loan. Furthermore, he did not advise her to consult with independent counsel. In imposing only a reprimand, the Court took notice of several mitigating circumstances, such as a lengthy unblemished legal career, remoteness of the conduct in question and complete reimbursement to his client.

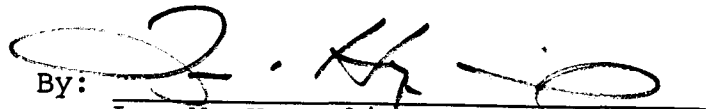
In In re Pascoe, 113 N.J. 229 (1988), an attorney was suspended for one year, and until reparation was made, for obtaining a loan (cloaked as a business investment) from his clients without advising them to consult with independent counsel. The clients had placed particular trust in the attorney on the basis of his past stellar and almost miraculous negotiations in their behalf in an unrelated business transaction. When the attorney's fortune took a turn for the worse, he defaulted on the loan, for which he had failed to provide any kind of security.

Respondent's misconduct in this matter is distinguishable from that in Pascoe, as respondent did not misrepresent the character of the transaction to his client. As noted earlier, his actions more closely resemble those in Hughes. However, there were several mitigating factors in that case not present in this matter. Respondent offered no clear and convincing proof that he had made his client whole and has been the subject of prior discipline. Accordingly, under a totality of the circumstances, the Board unanimously determined to suspend respondent from the practice of

law for a three-month period, to run consecutive to his current suspension.

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

Dated: 5/20/96

By: 
Lee M. Hymerling
Chair
Disciplinary Review Board