RMH

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 88-282 and
88-283

IN THE MATTER OF	:
SALVATORE J. BATE AND RONALD C. GOLDFARB,	:
ATTORNEYS AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 19, 1989

Decided: February 5, 1990

Thomas J. McCormick appeared on behalf of the Office of Attorney Ethics.

Frank J. Cuccio appeared on behalf of respondents, who were also present.

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

This matter is before the Board based upon a presentment filed by the District XIV Ethics Committee.

Respondents Bate and Goldfarb were admitted to the New Jersey bar in 1977 and 1976, respectively. They became law partners in 1977. As of the time of the district ethics committee hearing, December 1987, eighty percent of their practice consisted of real estate matters. It was not until 1985, however, that their real estate practice began to flourish. Before then, they handled "a half-dozen transactions a year."

On December 4, 1987, one of the respondents attended a closing of title on behalf of the sellers, S.R. and R.R. All closing checks were drawn on that day. For reasons irrelevant to this proceeding, the closing was postponed to December 11, 1987. A different partner handled the closing on the postponed date.[1]

One of the checks disbursed at closing consisted of the broker's commission in the amount of $8,940. Inadvertently, however, the respondent-closing attorney failed to collect corresponding funds from his clients. Curiously, the clients did not call this fact to respondents' attention. No notation of this disbursement was made on the client ledger card.

One year later, on December 29, 1986, respondents were notified by telephone that their trust account was overdrawn by $3,822.46. The partner assigned to the details of the firm's recordkeeping practices, respondent Goldfarb, "within thirty minutes" transferred equivalent funds from their business account to the trust account. He was unable to determine, however, the reason for the overdraft inasmuch as the firm's books and records were not being properly maintained.

On January 13, 1987, March 4, 1987, and March 10, 1987, the bank again notified respondents of three trust account overdrafts

---

[1] The record is not clear whether Bate or Goldfarb attended the first closing. A statement was made, at the district ethics committee hearing, that Bate was supposed to handle the closing on December 4, 1985, and that Goldfarb attended the closing on December 11, 1985. The panel report, however, states that Bate closed title on December 11, 1985. At the Board hearing, respondents' counsel confirmed this latter assertion.

in the respective amounts of $190.59, $125.77, and $511.38. In each instance, respondents took immediate action to deposit like amounts in their trust account. They were still unaware, however, of the source of the overdrafts. As respondent Goldfarb explained at the ethics hearing,

> I was aware that there were rules as to what we had to do. We had been doing just maybe a half dozen transactions a year up until maybe 1985. By just having a file folder with a ledger statement, it was virtually impossible not to know what was in the account, what was supposed to be in the account.
>
> When we started getting more active, I sort of just did the same thing. The only other check I had was to always make sure that deposits were credited to the account. I was always afraid that the check was going to get lost in the mail. That was my biggest fear, that that was going to happen. And, I would make sure that checks that were written were, [sic] cleared the bank.
>
> And, up until that point I really just always knew what was in the account and I didn't follow the rule and I didn't adopt [sic] to the accelerated practice.
> [T60-23 to 61-16.][2]

As a result of the above overdrafts, of which the Office of Attorney Ethics ("OAE") was notified, the OAE demanded the production of respondents' books and records for the purpose of conducting an audit. Just before the audit, respondent Goldfarb was able to ascertain the reason for the overdrafts. He testified that, upon being apprised of the first overdraft, on December 4, 1985, he set out to determine the source of the deficiency:

---

[2] 2T denotes the transcript of the district ethics committee hearing on December 14, 1987.

> The first thing we did was try to determine whether or not there were any checks that had, that were, during the period from the previous statement to the date of the overdraft which was December 30th, 1986, that we weren't aware of that perhaps there were checks missing from the checkbook and we followed that route. That turned up nothing.
>
> At that point I was in touch with First Fidelity Bank where I had the trust account, tried to get a balance of what was in the account at that point and then just tried checking everything that I knew of, going through every ledger card for active and inactive accounts through that period; and, the methods that I was using I just didn't come up with the reason for several months, it wasn't until I think it was either the latter part of March or the beginning of April when I came up with it. I started going back about three years through every file that we had in the office or in the archives that involved trust account matters and finally went beyond the trust account, the trust ledger card rather because that proved fruitless and went back to every individual check that was written.
>
> And, as [the auditor] mentioned I prepared a schedule of every matter that we had handled for the previous two or three years and then finally by just pulling out, physically pulling out every single check and comparing it to the amounts that went in, came up with the problem in the [R.] account.
>
> . . .
>
> [We found out] that we had, in fact, written a check for $8,940 more than we had deposited in the trust account for that matter.
>
> [T44-22 to 46-7.]

Upon this discovery, respondents contacted Mr. R. who, after reviewing his records and consulting with another attorney, acknowledged owing respondents $8,940. Mr. R. remitted that sum to respondents, who deposited it into their trust account on May 1, 1987.

Thus, between the closing date, December 11, 1985, and May 1, 1987, the date of the deposit of the R. funds, other client funds

were invaded. Although respondents replenished the trust account with corresponding amounts, totalling $4,650.20, immediately upon discovery of the four overdrafts, it was not until seventeen months after the closing of title that the balance of the missing funds was finally deposited into the trust account, thereby remedying the deficiency created by the inadvertent overdisbursement in the R. matter.

The auditor who examined respondents' books and records for the period March 1, 1985, to May 1, 1987, concurred that the cause of the overdrafts had been the failure to collect $8,940 from the respondents at closing. The auditor observed that, had respondents performed quarterly reconciliations of the trust account records, the source of the problem would have been detected sooner. The audit report disclosed that respondents had not maintained their books and records in accordance with R. 1:20-6. Specifically, the following recordkeeping deficiencies were found:

1. A cash receipts books was not maintained;

2. A cash disbursements book was not maintained;

3. A running cash balance was not kept in the trust account checkbook;

4. Clients' ledger sheets were incomplete;

5. A schedule of clients' ledger accounts was not prepared and reconciled to the bank statement;

6. A separate ledger sheet was not maintained detailing attorney funds held for bank charges.

At the district ethics committee hearing, respondents candidly admitted their failure to comply with the rule requirements. They

testified that, since the date of the audit, they have implemented a system to ensure full compliance with the recordkeeping provisions. The committee concluded that respondents' conduct violated RPC 1.15(a) and (d).

At the Board hearing, respondents' counsel informed that respondents had dissolved their law partnership in May 1988.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the full record, the Board is satisfied that the conclusion of the committee in finding respondents guilty of unethical conduct is fully supported by clear and convincing evidence.

There is no factual dispute regarding the charges. Respondents conceded that they had not complied with the recordkeeping mandates of R. 1:21-6. During the entire period of the audit, March 1, 1985 to May 1, 1987, serious recordkeeping deficiencies were found: there were no cash receipts and cash disbursements books; clients' ledger cards were not maintained; the trust account checkbook did not show a running balance; and no quarterly reconciliations were performed.

As a result, when one of the respondents inadvertently issued a trust account check in excess of the available funds credited to the client, for a period of five months -- from the date of the first overdraft, December 29, 1986, to the date of the deposit of the R. funds on May 1, 1987, respondents were unable to pinpoint the cause for the trust account shortfall. As the auditor

accurately remarked, the reason for the trust account shortage could have been discovered immediately following the first overdraft had respondents properly maintained the trust account books and records.

Instead, other client funds were invaded when respondents issued a check for $8,940 without having sufficient funds on deposit. The extent of the invasion of other client funds is not entirely clear from the record. The auditor admitted that he did not undertake an actual "out-of-trust calculation."

To respondents' credit, they took immediate and appropriate action to replenish the trust account funds upon being notified of each overdraft; no client complained or sustained monetary injury as a result of their inadequate recordkeeping practices; the negligent misappropriation of other client funds did not redound to respondents' personal benefit; respondents candidly admitted their wrongdoing; and they have straightened out their bookkeeping practices.

Inadequate recordkeeping, nevertheless, is a serious act of misconduct. Matter of Fucetola, 101 N.J. 5, 9 (1985) (attorney received a public reprimand for improper recordkeeping practices). The Court recently imposed a public reprimand on an attorney who was grossly negligent in his accounting procedures, but who did not display a pattern of failure to safeguard client funds. The Court considered, in mitigation, that no client had been financially injured; that the attorney immediately covered the shortage with his personal funds; that the bookkeeping error was an isolated

event; that the attorney had engaged an experienced full-time bookkeeper; and that the attorney had put into place a new bookkeeping system recommended by the auditor. Matter of Barker, 115 N.J. 30 (1989).

The Board is mindful that, in setting the appropriate discipline for attorney misconduct, the Supreme Court's interest is not in punishing the attorney, but in protecting the public against members of the bar who are unworthy of the trust and confidence essential between attorney and client. Matter of Addonizio, 95 N.J. 121 (1984).

Upon consideration of the relevant facts, the requisite majority of the Board recommends that respondents individually receive a public reprimand. One member would impose a private reprimand, believing that respondents' improprieties do not rise to the level of public discipline. Two members did not participate.

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

Dated: 2/5/1990

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