

SUPREME COURT OR NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-443

IN THE MATTER OF :
S. MICHAEL NAMIAS :
AN ATTORNEY AT LAW :

Decision
Default [R. 1:20-4(f)]

Decided: August 18, 1999

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

Pursuant to R. 1:20-4(f), the Office of Attorney Ethics ("OAE") certified the record in this matter directly to the Board for the imposition of discipline, following respondent's failure to file an answer to the formal ethics complaint. On October 8, 1998, the OAE served a copy of the complaint on respondent by regular and certified mail sent to his home. The regular mail was not returned. The certified mail return receipt ("green card") indicates delivery on October 21, 1998. The signature appears to be that of respondent. The letter

accompanying the complaint stated that, if respondent did not file a timely answer, the allegations of the complaint would be deemed admitted and the record would be certified to the Board for the imposition of sanction.

On November 4, 1998, the OAE sent a second letter to respondent by regular and certified mail. The letter stated that, if respondent did not file an answer to the complaint within five days, the OAE would amend the complaint to include a charge of RPC 8.1(b) (failure to cooperate with disciplinary authorities). The regular mail was not returned. The signed green card indicates delivery on November 6, 1998. Respondent did not file an answer to the ethics complaint.

Respondent was admitted to the New Jersey bar in 1972. On January 27, 1999, he was reprimanded for lack of diligence, failure to communicate and practicing law while ineligible.

On September 30, 1996, respondent suffered a stroke. An attorney-trustee was appointed to take over respondent's files. Because of problems that the trustee had found with the records, the OAE conducted a demand audit in December 1996. The OAE determined that respondent had maintained one attorney business account and three attorney trust accounts. Respondent's original trust account ("original trust account") was used until approximately March 1992. The second trust account was used until the end of 1992 ("second trust account"). The third account ("active trust account") was, according to

respondent, his only active account from 1992 until 1996. However, respondent never closed out his original and second trust accounts. As of September 30, 1996, the original trust account had a balance of \$253.74, the second trust account \$8,817.75 and the active trust account \$6,045.44.

Count one of the complaint deals with respondent's active trust account. The complaint states that, as of September 30, 1996, respondent's active trust account had a balance of only \$6,045.44, when respondent should have been holding \$13,749.49 on behalf of seven clients. Although the complaint states that respondent was out of trust by \$9,804.05, subtracting the bank balance from the client balance yields \$7,704.05, not \$9,804.05. Furthermore, a \$3,900 check issued on behalf of clients, Alice and Monty Burgess had already cleared respondent's account by September 30, 1996. Therefore, the outstanding client balances totaled only \$9,849.49. Respondent was actually out of trust by \$3,804.05, not \$9,804.05, as alleged in the complaint.

The complaint states that respondent's conduct in connection with the active trust account constituted negligent misappropriation of client funds, in violation of RPC 1.15(a), and failure to safeguard client funds, in violation of RPC 1.15(b).

Count two of the complaint deals with respondent's recordkeeping violations. On October 22, 1991, the OAE had conducted a random audit of respondent's records. During the audit, respondent disclosed only the second trust account. He did not disclose the

original trust account. The audit revealed that respondent had committed numerous recordkeeping improprieties, which included keeping client funds in the trust account for extended periods of time. The OAE required respondent to identify the owners of the funds in the second account and to disburse the funds to them.

By letter dated March 4, 1992, respondent certified that he had implemented the practices recommended by the OAE. With regard to the second trust account, respondent claimed that he needed additional time to research the account, "that it is in compliance in substantial part and this account will be closed in the near future, of course, with your approval." During this time period, respondent opened the active trust account.

The OAE conducted a re-audit of respondent's records on September 21, 1992. The re-audit again found numerous recordkeeping violations. Respondent had continued to keep client trust funds in the second trust account for extended periods of time.

By letter dated October 15, 1992, respondent provided a reconciliation of the second trust account and identified the clients to whom the funds belonged. According to respondent, client funds totaled \$19,687.43, but his trust account balance was only \$19,543.44. Respondent stated that he deposited money into the account to cover the negative balance.

During the 1996 audit, the OAE discovered the existence of the original account and respondent's failure to close the second account. The OAE also found numerous

recordkeeping deficiencies.

On March 27, 1997, the OAE required that respondent provide the attorney-trustee with the names of the owners of the funds in the original and second trust accounts, so that the attorney-trustee could disburse the funds. Despite a subsequent meeting with respondent and four letters to his attorney, respondent failed to provide the requested information to the trustee. Finally, by letter dated January 15, 1998, respondent forwarded to the trustee a list of twenty-nine clients, who were owed a total of \$7,974.93 from the second account.

The complaint charges that respondent's failure to timely disburse trust funds to his clients and failure to correct the deficiencies noted in the 1991 and 1992 audits constituted violations of RPC 1.1(a), RPC 1.15(d) and R. 1:21-6. The complaint also charges that the recordkeeping deficiencies found in the 1996 audit constituted violations of RPC 1.15(d) and R. 1:21-6.

Count three of the complaint dealt with the second trust account. As previously stated, after the 1991 and 1992 audits, respondent was required to identify and to disburse the funds in the second trust account. By letter dated October 15, 1992, respondent identified the clients to whom the funds belonged. According to respondent, client funds totaled \$19,687.43, but his balance was only \$19,543.44. In the letter to the OAE, respondent stated that he had deposited money into the account to cover the negative balance, but that "any of the negatives are more than covered by fees still in the account that are not drawn as yet."

As of November 2, 1992, the second trust account had a balance of \$14,861.81. Respondent provided no documentation as to whom he disbursed the funds.

Between November 2, 1992 and September 30, 1996, the account balance was reduced to \$8,817.75. Respondent had not deposited any additional money in the account. In addition to payments to clients, he disbursed \$3,242.54 to himself during that time period.

The complaint charges that, "in disbursing inactive trust account balance remaining in his trust account in 1991 and 1992 in this fashion," respondent violated RPC 1.1(a), RPC 1.15(b) and RPC 1.15(c).

Count four of the complaint deals with respondent's representation of Garnet and Rosemary Hall at their October 25, 1995 house closing. Although respondent prepared four checks from the closing proceeds to pay for sewer and water adjustments, taxes and title insurance, he never sent the checks. The complaint charges that respondent's conduct in the Hall matter violated RPC 1.1(a) and RPC 1.3.

Count five of the complaint relates to respondent's representation of Susan Michaelson at her April 4, 1996 house closing. Respondent was to pay \$1,019 from the closing proceeds to the Middlesex County Clerk for recording and realty transfer fees. Although respondent wrote out a check for the fees on April 8, 1996, he never sent the check to the clerk's office. An unknown person mailed the check after respondent's stroke. It was deposited by the clerk's office on October 8, 1996. The complaint charges that respondent's

conduct in the Michaelson matter violated RPC 1.1(a) and RPC 1.3.

Count six of the complaint concerns respondent's representation of James Gabriel in a personal injury case. Following an automobile accident in July 1988, Gabriel retained respondent to represent him in a suit against the driver of the other car. In July 1990, respondent filed an action on behalf of Gabriel and his wife against the other driver, Chukwunez Okosi.

On December 21, 1990, Okosi's attorneys served interrogatories on respondent. Despite three reminders from Okosi's attorneys, respondent did not answer the interrogatories. Nor did he oppose the motion to dismiss the complaint. The complaint was dismissed without prejudice on May 20, 1991 and with prejudice on October 14, 1991. Respondent did not advise his client that the complaint had been dismissed.

Gabriel died on April 13, 1991. His wife was appointed administratrix of his estate. In April and May 1991, Mrs. Gabriel received bills from a chiropractor for services related to the injuries Gabriel had sustained in the accident. Each time Mrs. Gabriel received a bill, she contacted respondent, who told her that he was taking care of it. In or about September 1991, Mrs. Gabriel went to respondent's office to obtain an update on the status of the case. Respondent had Mrs. Gabriel sign blank releases. Later that month, Mrs. Gabriel returned to respondent's office and asked for the file. The office contacted respondent, who was at home and stated that the file was with him and that he would bring it to the office the next

day. Mrs. Gabriel never received the file, however.

Sometime in 1992, Mrs. Gabriel retained new counsel to take over the case. Both Mrs. Gabriel and the new attorney requested that the file be forwarded to the attorney, which respondent failed to do. The attorney eventually discovered that the case had been dismissed with prejudice. On December 17, 1993, he filed a malpractice action against respondent on behalf of Gabriel's estate and Mrs. Gabriel. On March 30, 1994, a default was entered against respondent because he failed to answer the malpractice complaint. Subsequently, a judgment was entered against him in the amount of \$12,500, plus costs. As of the date of the ethics complaint, the judgment had not been satisfied. The complaint alleges that respondent's conduct in the Gabriel matter violated RPC 1.1(a), RPC 1.16(d) and RPC 8.4(c).

Count seven of the complaint deals with respondent's representation of Bela and Marlene Kiraly in the purchase of their house. Prior to the November 3, 1995 closing, respondent received \$1,000 from the Kiralys to pay National Westminster Bank, a judgment-creditor of the Kiralys. Although respondent wrote a check to the bank on November 3, 1995 and prepared a letter forwarding the check to the attorney for the bank, respondent never sent the check. The bank was never paid. In April 1997, respondent's father repaid the funds to the Kiralys. In addition, although respondent retained \$510 from the proceeds of the Kiralys' 1995 closing to pay for the survey for the property, as of October 23, 1997, the

surveyor had not been paid. The complaint charges that respondent's conduct in the Kiraly matter violated RPC 1.1(a) and RPC 1.3.

Count eight of the complaint states that respondent's conduct in the Hall, Michaelson, Gabriel and Kiraly matters constituted a pattern of neglect, in violation of RPC 1.1(b).

Count nine states that, although respondent claimed during the 1996 audit that he had client ledger cards and cash receipts and disbursements journals, he failed to produce those records. The complaint charges that respondent's conduct violated RPC 8.1(b). Finally, by letter dated November 4, 1998, the OAE amended the complaint to charge a violation of RPC 8.1(b) for respondent's failure to answer the complaint.

* * *

Service of process was properly made in this matter. Following a review of the complaint, the Board found that the facts recited therein support a finding of unethical conduct. Because of respondent's failure to file an answer, the allegations of the complaint are deemed admitted. R. 1:20-4(f)(1).

Respondent's conduct in the Hall, Michaelson, Gabriel and Kiraly matters violated RPC 1.1(a) (gross neglect) and RPC 1.3 (lack of diligence). Respondent's neglect of those matters also constituted a violation of RPC 1.1(b) (pattern of neglect).

In the Gabriel matter, respondent misrepresented to his client that the case was proceeding after it had already been dismissed, thereby violating RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). He also failed to turn over the file to Mrs. Gabriel, in violation of RPC 1.16(d), despite her and her attorney's requests for the file.

Respondent also committed numerous recordkeeping violations. As early as October 1991, the OAE characterized respondent's records as in a "semi-disastrous" state. He was put on notice as to his recordkeeping deficiencies. However, he never corrected the problems. Respondent's continuing violations of RPC 1.15(d) were egregious.

Respondent also violated RPC 8.1(b) by failing to provide the requested records to the OAE and by failing to answer the complaint.

More problematic are the charges relating to respondent's disbursements from his trust accounts. The complaint charged that, as of September 30, 1996, respondent's active trust account was out of trust by \$9,804.05. However, as explained above, based upon the data set forth in the complaint, the account could only have been out of trust by \$3,804.05. The issue is whether respondent was guilty of knowing misappropriation, rather than negligent misappropriation, as charged in the complaint.

Furthermore, the complaint alleged that respondent took the \$109.75 interest earned on funds belonging to a client, Lois Horan, while the funds were deposited with the court.

According to the complaint, Horan did not give respondent permission to take the interest. Again, the issue is whether this amounted to knowing misappropriation, rather than failure to safeguard client funds, as charged in the complaint.

The Board determined that the facts do not support a finding of knowing misappropriation. Respondent's poor recordkeeping makes it more likely that he did not know his active account was out of trust. Also, most of the deficit in the account was caused by the checks that respondent wrote on behalf of clients, Alice and Monty Burgess. Respondent apparently believed that he had deposited the Burgesses' funds in the account prior to writing the checks. In fact, shortly after respondent's stroke and prior to the OAE audit, his father found \$1,250 in respondent's pocket. Those funds were mistakenly deposited into the second account, instead of the active account. Furthermore, respondent allegedly found an additional \$3,750 in some clothing, which sum he believed to be part of the cash received from the Burgesses. Therefore, it appears that the out-of-trust situation was caused by respondent's careless handling of trust funds and sloppy recordkeeping.

With respect to the \$109.75 interest on the Horan funds, the investigative report states that, according to respondent, Horan had given him permission to apply the interest to his outstanding fees.

In light of the foregoing, the Board was unable to find clear and convincing evidence that respondent knowingly misappropriated client funds from the active trust account.

Furthermore, the complaint did not charge knowing misappropriation. However, there are sufficient facts in the complaint to support the charges of negligent misappropriation and failure to safeguard client funds.

With regard to the second trust account, in respondent's August 31, 1992 reconciliation of the account, he represented to the OAE that, although the balance in the account was only \$19,543.33, client funds that should have been in the account totaled \$19,687.43. In respondent's October 15, 1992 cover letter to the OAE forwarding the reconciliation, he stated that he had deposited money into the account to cover the negative balance. However, that same letter also stated that "any of the negatives are more than covered by fees still in the account that are not drawn as yet." Although the OAE construed the letter as an admission that the second trust account was out of trust in the amount of \$158.52, it appears that respondent actually contended that he was not out of trust because the client balances in the reconciliation included fees that he had not yet taken.¹ Therefore, without further proofs, as of August 31, 1992, respondent could only have been guilty of commingling, in violation of RPC 1.15(a), a violation that was not charged in the complaint.

As to the charges of gross neglect and failure to safeguard funds in the second trust account, the record shows that, as of November 2, 1992, the balance in the account had been reduced to \$14,861.81. Respondent provided no documentation as to whom the funds were

¹ Furthermore, the OAE did not take into consideration that the original account had a balance of \$253.74.

disbursed. Between November 2, 1992 and September 30, 1996, the balance in the account was further reduced by \$6,044.06 to \$8,817.75. According to respondent, there were no deposits into the account during that time period. During the 1996 audit, the OAE was able to identify from bank statements and canceled checks the payees on checks totaling \$4,699.03, of which \$3,242.54 was paid to respondent. In 1997, respondent identified all but approximately \$100 remaining in the second account as belonging to his clients.

The complaint charged that respondent's "conduct in disbursing inactive trust account balances remaining in his trust account in 1991 and 1992 in this fashion" violated RPC 1.1(a) (gross neglect), RPC 1.15(b) (failure to promptly deliver funds to a client or third person) and RPC 1.15(c) (failure to safeguard funds in which the attorney and a third party claim an interest). However, the OAE had told respondent to identify and disburse the funds to his clients. The complaint does not allege that respondent was to consult the OAE prior to the disbursements. Nor does the complaint allege that respondent wrongfully disbursed the funds to himself or to the wrong clients. Certainly, respondent failed to promptly deliver funds to his clients. However, in connection with the second trust account, there are not sufficient facts alleged in the complaint to support the charges of gross neglect and failure to safeguard client funds.

In summary, the facts alleged in the complaint support findings of violations of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC

1.15(a) (commingling and negligent misappropriation of client funds), RPC 1.15(b) (failure to promptly deliver funds to a client or third person), RPC 1.15(d) (recordkeeping violations), RPC 1.16(d) (failure to return the client's file upon termination of representation), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

The purpose of discipline is not to punish the attorney, but to protect the public from an attorney "who cannot or will not measure up to the high standard of responsibility required of every member of the profession." In re Rosenthal, 118 N.J. 454, 464 (1990) (citing In re Stout, 75 N.J. 321, 325 (1978)). It is clear that respondent has not measured up to this standard and that the public is at risk.

Misconduct similar to that of respondent has resulted in six-month to one-year suspensions. See In re Pollan, 143 N.J. 305 (1996) (six-month suspension where the attorney failed to maintain proper records for an estate trust and engaged in misconduct in six other matters, including gross neglect, pattern of neglect, misrepresentation, failure to communicate with clients, failure to deliver a client's file and failure to cooperate with disciplinary authorities); In re Marlowe, 152 N.J. 20 (1997) (one-year suspension where the attorney failed to maintain adequate trust funds, failed to put the assets of two separate estates into separate estate accounts, exhibited gross neglect and lack of diligence, failed to abide by his client's wishes, failed to communicate with his client and failed to cooperate with disciplinary authorities); In re Malfitano, 121 N.J. 194 (1990) (one-year suspension

where the attorney failed to return a fee to a client, misrepresented facts to a client, failed to communicate with clients, failed to cooperate with disciplinary authorities and exhibited gross neglect and lack of diligence).

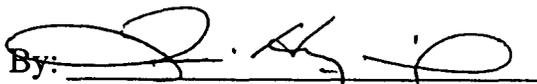
Because, however, respondent was on notice of his recordkeeping deficiencies in 1991 and failed to correct them, despite the OAE's instructions, and because respondent did not answer the complaint in this matter, allowing it to proceed on a default basis, the Board unanimously determined to suspend respondent for one year. Two members did not participate. Respondent's reinstatement is to be conditioned upon his practicing under the supervision of a proctor for a period of two years. In addition, respondent is to retake the skills and methods program offered by the Institute for Continuing Legal Education. Respondent is also to provide a certified annual audit to the OAE for a two-year period, following reinstatement.

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

Dated: _____

8/18/95

By: _____



LEE M. HYMERLING

Chair

Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

**DISCIPLINARY REVIEW BOARD
VOTING RECORD**

**In the Matter of S. Michael Namias
Docket No. DRB 98-443**

Decided: August 18, 1999

Disposition: One-Year Suspension

Members	Disbar	One-Year Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		x					
Zazzali		x					
Brody		x					
Cole		x					
Lolla							x
Maudsley		x					
Peterson		x					
Schwartz		x					
Thompson							x
Total:		7					2


Robyn M. Hill
Chief Counsel