

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-006
District Docket No. XIV-09-145E

IN THE MATTER OF
ARTHUR E. SWIDLER
AN ATTORNEY AT LAW

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Decision

Decided: May 12, 2010

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

This matter came before us on a certification of default filed by the Office of Attorney Ethics ("OAE"), pursuant to R. 1:20-4(f). The complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.15(a) (negligent misappropriation of trust funds), RPC 1.15(d) and R. 1:21-6 (recordkeeping violations), and RPC 8.1(b) (failure to cooperate with a disciplinary investigation).

For the reasons expressed below, we determine that a three-month suspension is the proper discipline for respondent.

Respondent was admitted to the New Jersey bar in 1985. He maintains a law office in Trenton, New Jersey.

In a 2007 default matter, respondent was reprimanded for gross neglect in a foreclosure proceeding. After the client paid his retainer, he took no action on her behalf, ultimately resulting in the client's loss of the property. He was also guilty of failure to cooperate with disciplinary authorities. The Court ordered respondent to refund the client's retainer. In re Swidler, 192 N.J. 80 (2007).

In 2009, respondent was temporarily suspended for less than a month for failure to comply with a fee arbitration determination, directing him to refund \$700 to another client.

Service of process was proper. On June 16, 2009, the OAE mailed copies of the ethics complaint to respondent by regular and certified mail to his last known office address listed in the New Jersey Lawyers' Diary and Manual: 222 South Broad Street, Trenton, New Jersey 08608. The certified mail receipt was returned with respondent's signature and indicating delivery on June 25, 2009. The regular mail was not returned.

On October 26, 2009, the OAE sent a second letter to respondent, by regular and certified mail, to the same address. The letter informed respondent that, if he did not file an answer within the time allotted, the allegations of the

complaint would be deemed admitted, the record would be certified to us for the imposition of discipline, and the complaint would be deemed amended to include a willful violation of RPC 8.1(b).

On December 21, 2009, after the OAE made several attempts to track the location of the certified mail, it learned that the post office had attempted to deliver the certified mail, on November 25, 2009, and had left a notice of it at the above address. As of the date of the certification of the record, December 30, 2009, the thirty days to claim the mail had expired. The regular and certified mail had not been returned and respondent had not filed an answer to the complaint.

Count one

On May 11, 2007, the OAE conducted a random compliance audit of respondent's books and records. Thereafter, on November 13, 2007, the OAE conducted an additional review of the records.

By letter dated December 13, 2007, the OAE informed respondent about specific actions that he was required to take with regard to several matters. Apparently, respondent took no action. On August 7, 2008, the Chief of the OAE's Random Audit Unit notified respondent about numerous deficiencies in his trust account, informed him that corrective measures had to be

taken, and instructed him to notify the OAE, within forty-five days, that he had corrected the noted deficiencies. Respondent failed to reply to the OAE's August 7, 2008 letter or to take the corrective actions.

On November 12, 2008, the OAE instructed respondent to reply to the prior deficiency letter and to prepare the certification form enclosed with that letter. The OAE further informed respondent that, if he did not submit a timely reply, the OAE would consider it a violation of RPC 1.15(d) and "inexcusable disregard of R. 1:21-6." Respondent did not comply with the OAE's instructions.

By letter dated January 13, 2009, the OAE notified respondent that, if he did not supply written confirmation, within ten days, that the deficiencies had been corrected, the OAE would file a formal ethics complaint against him. As of the date of the complaint, respondent had not submitted a reply to any of the OAE's letters.

The OAE's audit of respondent's books and records uncovered the following deficiencies:

- a. A trust receipts book was not maintained. [R. 1:21-6(c)(1)(a)].
- b. A trust disbursements book was not maintained. [R. 1:21-6(c)(1)(a)].
- c. Clients' trust ledger sheets were not fully descriptive. [R. 1:21-6(c)(1)(b)].
- d. Clients' ledger cards were found with debit balances. [R. 1:21-6(d)].

- e. A separate ledger sheet was not maintained detailing attorney funds held for bank charges. [R. 1:21-6(d)].
- f. A separate ledger sheet was not maintained for each trust client. [R.1:21-6(c)(1)(b)].
- g. A schedule of clients' ledger accounts was not prepared and reconciled monthly to the trust account bank statement. [R. 1:21-6(c)(1)(h)].
- h. A running cash balance was not kept in the trust account checkbook. [R. 1:21-6(c)(1)(g)].
- i. Deposit slips lacked sufficient detail to identify each item of deposit. [R. 1:21-6(c)(1)(a)].
- j. Trust account checks were made payable to cash. [R. 1:21-6(c)(1)(a)].
- k. Trust account was being used to account for funds unrelated to the legal practice. [R. 1:21-6(a)(1); RPC 1.15(a)].
- l. Prenumbered cancelled checks were not maintained for a period of seven years. [R. 1:21-6(c)(1)].
- m. The name and/or file number of the client on whose behalf the trust account disbursement was made was not properly identified in the memo portion of the trust check. [R. 1:21-6(b)(g)(7)].
- n. Business bank account designation improper. All business accounts must be specifically designated as "attorney business account," "attorney professional account" or "attorney office account" on the bank statement, checks and deposit slips. [R. 1:21-6(a)(2)].
- o. A business receipts book was not maintained. [R.:21-6(c)(1)(a)].
- p. A business disbursements book was not maintained. [R. 1:21-6(b)(1)(a)].
- q. Funds received for professional services were not deposited into the business account. [R. 1:21-6(a)(2)].
- r. Attorney business account bank statements were not maintained for a period of seven (7) years. [R. 1:21-6(c)(1)].

- s. Attorney business account imaged processed checks exceeded two per page limit. [R. 1:21-6(b)].
- t. Each electronic transfer out of an attorney trust account (including on-line banking transfers) were made without signed written instructions from respondent to the financial institution and were not confirmed in writing by the financial institution.
- u. Attorney business account bank statements were frequently overdrawn. [R. 1:21-6(d)].
- v. Inactive trust ledger balances remained in the trust account for an extended period of time. [R. 1:21-6(d)].

[C3-C418.]¹

The complaint charged respondent with violating RPC 1.15(d) and R. 1:21-6, as well as RPC 8.1(b).

Count Two

As a result of the random audit, the OAE determined that respondent negligently misappropriated trust funds, when his trust account was debited seven times for returned deposits. From February 23, 2004 to November 13, 2006, the balance in the account ranged from -\$200 to -\$2,546. The amounts of the returned checks ranged from \$200 to \$900. Exhibit 1 to the certification of the record, the OAE's December 13, 2007 letter, informed respondent that the checks had been made payable to respondent and that he must have either deposited the checks

¹ C refers to the ethics complaint, dated June 11, 2009.

into his attorney business account or cashed them. However, when he endorsed the checks, he wrote the number of his trust account. When the items were returned for insufficient funds, the bank debited respondent's trust account. When the above checks were returned, respondent did not have sufficient personal funds in his trust account to cover the checks. Each of the debited items invaded other client funds.

Respondent also failed to collect funds in two real estate transactions. In the Edwab to Kelly transaction, respondent was required to collect \$1,500 from his client, Alfonso Kelly. The OAE's review of respondent's bank records showed that he had failed to collect the \$1,500. In addition, respondent did not "resolve the \$200 water and sewer escrow . . . or pay the \$600 collected for title insurance." In the Bromer to Singh real estate transaction, respondent was required to collect a \$1,000 deposit from Singh. However, the OAE's review of respondent's bank records revealed that respondent had not collected the deposit. Finally, respondent failed to submit to the OAE proof that he had corrected the above problems.

The complaint charged respondent with violating RPC 1.1(a), RPC 1.15(a), and RPC 8.1(b).

We find that the facts recited in the complaint support the charges of unethical conduct. We deem respondent's failure to

file an answer an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

Respondent is guilty of all of the charged violations. He negligently misappropriated client trust funds, had numerous recordkeeping deficiencies, failed to collect funds required in two separate closings, failed to make payments after one of the closings, and failed to cooperate with the OAE during its investigation, thereby violating RPC 1.15(a), RPC 1.15(d) and R. 1:21-6, RPC 1.1(a), and RPC 8.1(b). The OAE did not find that respondent's improprieties had been committed knowingly, inasmuch as there is no such charge in the complaint.

The only issue left for our determination is the proper quantum of discipline.

Generally, a reprimand is imposed for recordkeeping deficiencies and negligent misappropriation of client funds. See, e.g., In re Dias, 201 N.J. 8 (2010) (an overdisbursement from the attorney's trust account caused the negligent misappropriation of other clients' funds; the attorney's recordkeeping deficiencies were responsible for the misappropriation; the attorney also failed to promptly comply with the Office of Attorney Ethics' requests for her attorney records; prior admonition for practicing while ineligible; in

mitigation, it was considered that the attorney, a single mother working on a per diem basis with little access to funds, was committed to and had been replenishing the trust account shortfall in installments); In re Seradzky, 200 N.J. 230 (2009) (due to poor recordkeeping practices, attorney negligently misappropriated \$50,000 of other clients' funds by twice paying settlement charges in the same real estate matter; prior private reprimand); In re Weinberg, 198 N.J. 380 (2009) (attorney negligently misappropriated client funds as a result of an unrecorded wire transfer out of his trust account; because he did not regularly reconcile his trust account records, his mistake went undetected until an overdraft occurred); In re Philpitt, 193 N.J. 597 (2008) (attorney negligently misappropriated \$103,750.61 of trust funds as a result of his failure to reconcile his trust account; the attorney was also found guilty of recordkeeping violations); In re Conner, 193 N.J. 25 (2007) (in two matters, the attorney inadvertently deposited client funds into his business account, instead of his trust account, an error that led to his negligent misappropriation of clients' funds; the attorney also failed to promptly disburse funds to which both clients were entitled); and In re Winkler, 175 N.J. 438 (2003) (attorney commingled personal and trust funds, negligently invaded clients' funds, and did not comply

with the recordkeeping rules; the attorney withdrew from his trust account \$4,100 in legal fees before the deposit of corresponding settlement funds, believing that he was withdrawing against a "cushion" of his own funds left in the trust account).

A reprimand may still result even if the attorney's disciplinary record includes either a prior recordkeeping violation or other ethics transgressions. See, e.g., In re Toronto, 185 N.J. 399 (2005) (attorney negligently misappropriated \$59,000 in client funds and had recordkeeping violations; prior three-month suspension for a conviction of simple assault, arising out of a domestic violence incident, and reprimand for a misrepresentation to ethics authorities about his sexual relationship with a former student; mitigating factors taken into account); In re Regojo, 185 N.J. 395 (2005) (attorney negligently misappropriated \$13,000 in client funds as a result of his failure to properly reconcile his trust account records; the attorney also committed several recordkeeping improprieties, commingled personal and trust funds in his trust account, and failed to timely disburse funds to clients or third parties; the attorney had two prior reprimands, one of which stemmed from negligent misappropriation and recordkeeping deficiencies; mitigating factors considered); In re Rosenberg,

170 N.J. 402 (2002) (reprimand imposed on attorney who negligently misappropriated client trust funds in amounts ranging from \$400 to \$12,000 during an eighteen-month period; the misappropriations occurred because the attorney routinely deposited large retainers in his trust account and then withdrew his fees from the account as he needed funds without determining whether he had sufficient fees from a particular client to cover the withdrawals; prior private reprimand for unrelated violations); and In re Marcus, 140 N.J. 518 (1995) (attorney reprimanded for negligently misappropriating client funds as a result of numerous recordkeeping violations and commingling personal and clients' funds; the attorney had received a prior reprimand).

Harsher discipline has been imposed on attorneys with serious ethics histories or who have allowed their matters to proceed on a default basis. See, e.g., In re Kasdan, 195 N.J. 181 (2008) (censure for attorney who negligently misappropriated client trust funds in one matter, improperly issued trust account checks made payable to cash, and committed a number of recordkeeping violations; the negligent misappropriation was the result of a mistake on the attorney's part due to her recordkeeping deficiencies; prior three-month suspension (for, among other things, recordkeeping improprieties) and three-year

suspension); In re LeBlanc, 193 N.J. (2008) (three-month suspension in the attorney's third default matter for negligent misappropriation of clients' funds, failure to promptly disburse funds to third parties, lack of diligence, and failure to cooperate with the OAE; prior censure and reprimand); In re Giamanco, 188 N.J. 494 (2006) (three-month suspension in a default matter for negligent misappropriation of clients' trust funds as a result of the attorney's failure to maintain proper trust account records and failure to prepare routine reconciliations of that account; prior reprimand and censure); In re De La Carrera, 181 N.J. 296 (2004) (three-month suspension in a default matter where, in two real estate matters, the attorney disbursed funds prior to receiving wire transfers, resulting in the negligent invasion of other clients' trust funds; in another real estate matter, the attorney failed to disclose to the lender or on the RESPA statement that the sellers in the transaction took back a second mortgage from the buyers); and In re Sabella, 165 N.J. 26 (2000) (three-month suspension for attorney who negligently misappropriated clients' trust funds in connection with a mortgage refinancing, failed to maintain required trust and business account records, and engaged in gross neglect, lack of diligence, and failure to communicate with a client).

Respondent's misconduct and circumstances appear to be most similar to LeBlanc's and Giamanco's, both of whom received three-month suspensions. All of their matters proceeded as defaults. This is respondent's second default. It was LeBlanc's third default. LeBlanc was also guilty of lack of diligence, while respondent was guilty of gross neglect. All three had ethics histories: respondent had a reprimand and a temporary suspension; LeBlanc had a prior censure and a reprimand; and Giamanco had a prior reprimand and a censure.

We find that, like LeBlanc and Giamanco, respondent also deserves a three-month suspension.

We also determine to require respondent, prior to reinstatement, to (1) provide to the OAE the certification that it previously sought; (2) retain an OAE-approved accountant to bring his records into compliance with R. 1:21-6; and (3) submit to the OAE, on a quarterly basis and for a two-year period, monthly reconciliations prepared by an OAE-approved accountant.

Members Wissinger and Zmirich did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of these matters, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Arthur E. Swidler
Docket No. DRB 10-006

Decided: May 12, 2010

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh		X				
Clark		X				
Doremus		X				
Stanton		X				
Wissinger						X
Yamner		X				
Zmirich						X
Total:		7				2


Julianne K. DeCore
Chief Counsel