

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-323

IN THE MATTER OF :
BEVERLY K. THOMPSON :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: November 18, 1992

Decided: July 6, 1993

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

Francis J. Hartman appeared on behalf of respondent, who was not present.

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

This matter is before the Board on a Motion for Reciprocal Discipline filed by the Office of Attorney Ethics based on respondent's May 17, 1991 suspension from the practice of law in Pennsylvania for a period of two years.

Respondent was admitted to the Pennsylvania bar in 1978 and to the New Jersey bar in 1979. She previously maintained offices for the practice of law in Philadelphia, Pennsylvania, and Cherry Hill, New Jersey.

The Pennsylvania disciplinary matter began in 1987, when a four-count Petition for Discipline was filed by the Pennsylvania Office of Disciplinary Counsel. Respondent was charged with,

inter alia, misappropriation of client trust funds in three cases, (charges I through III), as well as with making a false statement in her response to Disciplinary Counsel's Letter of Inquiry. On December 22, 1987, respondent filed her answer to the petition. While she admitted failing to promptly pay out entrusted client funds, as well as writing personal checks against the account that held the client funds in question, she denied that she had either intentionally converted client funds or violated any disciplinary rules.

The complaints of three clients, Dowd, Alstrom, and Borwegen, were reviewed by the Pennsylvania disciplinary authorities. A summary of each follows:

Dowd Matter

Respondent was retained by Thomas Dowd, a New Jersey resident, to represent him in a personal injury action, which followed Dowd's New Jersey automobile accident. A contingent fee of one-third of the settlement was agreed upon. Respondent filed suit on March 29, 1982. On July 24, 1983, a settlement offer for \$15,000 was received and thereafter accepted by Dowd.

After a settlement release was executed, respondent received a draft, in the amount of \$15,000, payable to her and Dowd. She deposited the draft into her overdrawn attorney account, a non-trust account at Central Penn Bank, on August 2, 1983. Between August 2, 1983 and September 1, 1983, respondent then wrote checks for personal and professional purposes against the Dowd funds on

deposit -- without Dowd's knowledge or consent. As of September 1, 1983, respondent's account at Central Penn Bank was again overdrawn. Thus, within one month of receipt, all of Dowd's funds were misappropriated by respondent. The Central Penn Bank account was replaced by an account at Bell Savings and Loan in November 1983. On March 9, 1984, seven months after depositing Dowd's settlement proceeds, respondent withdrew \$10,015 from her Bell Savings and Loan account to pay Dowd his share of the settlement proceeds.

Alstrom Matter

Respondent was retained by Karen L. Alstrom, in July 1982, to represent her in a personal injury claim against the Southeastern Pennsylvania Transportation Authority (SEPTA). A contingent fee of forty percent was agreed upon. In December of 1983, Alstrom accepted a settlement offer for \$10,000.

Respondent deposited the Alstrom Settlement check into her attorney account at Bell Savings and Loan on December 22, 1983. At that time, the account had a balance of less than \$100. Following the \$10,000 deposit, and without Alstrom's knowledge or consent, respondent utilized the Alstrom proceeds for her personal and professional obligations. Alstrom ultimately hired an attorney to secure her money from respondent in March 1984, when her own numerous attempts proved unsuccessful. On March 9, 1984, Alstrom received a check from respondent for \$6,067.63, in settlement of her personal injury action.

Borwegan Matter

In September 1982, respondent was retained by Kenneth Borwegan both to serve as lead counsel in a civil action and to pursue a workers' compensation claim. A forty percent contingent fee was agreed upon. Borwegan agreed to accept a settlement offer of \$80,000 in February 1984.

Three settlement checks were endorsed by respondent and Borwegan on February 26, 1984. Those checks were immediately deposited into respondent's overdrawn bank account. Respondent wrote checks against the Borwegan funds on deposit -- without Borwegan's authorization or consent -- between February 27, 1984 and March 31, 1984. When respondent closed the account that held the Borwegan funds on May 11, 1984, the balance was reduced to \$25,144.19. Borwegan was finally paid the \$45,547.91 due him on June 22, 1984, when respondent used a combination of funds to obtain a bank treasurer's check.

Following ten days of hearing between October 1988 and May 1989, the hearing committee of the Disciplinary Board of the Supreme Court of Pennsylvania released its report on August 7, 1990.

That Committee found:

It is clear from the detailed record, and respondent herself candidly admits, that respondent on three separate occasions misappropriated client funds for personal use. All three instances involved the receipt of several checks in which clients had an interest, the proceeds of which were deposited into personal or business bank accounts by respondent. After the deposit of such funds, in each instance, respondent utilized funds

belonging to client [sic] to pay both personal and business bills, rather than pay those funds over promptly to the clients in question. Respondent also engaged in a pattern of deception to conceal her activities from each client.

Each of the three clients was ultimately repaid in full, with interest. It should be noted, however, that the first two clients were repaid only after the deposit of a substantial settlement check into respondent's account representing proceeds of settlements involving the third client. In addition, the third client was repaid only after being forced to institute litigation against respondent, although respondent had the advice of counsel on this matter and may have been counseled not to pay until certain issues were resolved relating to a co-counsel fee dispute. A tender of the undisputed amount due to this same client was made in March of 1984, but declined by the client because a release was required to obtain the funds.

[Hearing Committee Report at 18 - 19.]

The Committee noted extensive mitigation proffered by respondent, including lengthy hospitalizations and a difficult pregnancy. The Committee further noted that respondent "testified that she recognizes that her conduct during the period in question was wrong, both legally and morally, and believes that she would not engage in such conduct again." Id. at 23. The report went on to say:

The hearing panel believes that respondent's behavior in the 1983 - 1985 time period was aberrational and can be attributed, in substantial part, to the psychological and physical problems she was experiencing at the time. In addition, the hearing committee believes that respondent, if adequately supervised, has the potential for returning to the competent and ethical practice of law.

[Hearing Committee Report at 23.]

The Committee then recommended that respondent be suspended from the practice of law, but that the suspension be suspended and that respondent be placed on probation for a period of three months.

Thereafter, the matter was reviewed by the Disciplinary Board of the Supreme Court of Pennsylvania. On April 15, 1991, the Board recommended that respondent be suspended from the practice of law for three years. An excerpt from the Board opinion follows:

The Disciplinary Board has carefully scrutinized the record, and we are satisfied that the triers of fact have properly evaluated the evidence. Accordingly, we have adopted the Hearing Committee's finding of fact....

The voluminous record, as well as respondent's testimony before Hearing Committee 1.01 and her Answer to the Petition for Discipline, all illustrate that in three separate instances respondent misappropriated client funds in order to satisfy professional and personal financial obligations....

Respondent's bank records show that she deposited the settlement checks she received on behalf of Dowd, Alstrom, and Borwegen into non-segregated bank accounts against which she subsequently wrote checks to cover personal and professional expenditures causing the account balances to fall below the amount of funds held in trust for her clients....

Respondent then made various misrepresentations to her clients in an effort to conceal her misappropriation of their settlement proceeds. (Citations omitted).

...

The petitioner has alleged by participating in the aforementioned conduct, respondent engaged in a dishonest fraudulent course of action which adversely reflects upon

her fitness to practice law in violation of DR 1-102(A)(3), DR 1-102(A)(4), and DR 1-102(A)(6). It is petitioner's contention that respondent failed to maintain a properly documented and inviolate, segregated bank account from which she could have promptly paid the settlement proceeds for clients who are entitled to receive, in violation of DR 9-102(A), DR 9-102(B)(3), and DR 9-102(B)(4).

The testimony of respondent's former clients and bank officials, and the bank records which were received into evidence, proved that respondent did in fact violate the disciplinary rules as alleged by petitioner.

We do note that all of respondent's clients were repaid with interest. However, mere restitution does not diminish the seriousness of respondent's conduct, nor does her claim that she did not intend to misappropriate clients' funds. As the Supreme Court noted in the Kanuck case, 'the unauthorized use of client funds is inexcusable even when accompanied by an intent to return them.' (Office of Disciplinary Counsel v. Kanuck, 535 A.2D, pages 69, 76 (PA 1987); In re Anonymous No. 16 DB 88 (1989)). Thus, the question of whether respondent intended to convert clients' settlement proceeds is not germane to the determination of discipline to be imposed for such a transgression.

The Board noted from the outset two critical factors which are important to consider when ascertaining the appropriate discipline in this matter. First, we acknowledge that prior to the instant proceedings, respondent had an unblemished disciplinary record in Pennsylvania. Second, we recognize that the misconduct occurred during the limited time frame of 1983 - 1984. It is therefore incumbent upon the Board to consider any possible mitigating factors which may have occurred in respondent's life during 1983 - 1984.

During the period in question, respondent experienced a physically stressful, debilitating pregnancy, two deaths in her family, chronic pain syndrome, which is defined as a 'medical problem or abnormality that leads to persistent and severe pain that is not well treated by mechanical or surgical means... usually of a degree that it interferes with normal daily functionings and limits physical activity (N.T. 10, May 22, 1989)' and personal involvement in extensive litigation. (Citations omitted).

Additionally, we note that respondent was the subject of an unsuccessful Rule 301 proceeding which, if successful, would have resulted in her being declared incompetent, and alternatively lends credence to the existence of serious problems in Respondent's life.

. . .

Although Respondent proffered testimony by two qualified experts that she has experienced both physical and psychological health problems, she has failed to sustain her burden of establishing the nexus of her ailments and her misconduct. We reached this conclusion by noting that Dr. Bruno, a neurosurgeon, did not examine Respondent until 1985, one year after her misconduct, while Dr. John R. Rushton, III, a psychiatrist, did not see Respondent until 1987. Furthermore, although Dr. Bruno diagnosed Respondent with "la belle indifference" and Dr. Rushton treated her for mild depression, both experts failed to testify as to a causal connection between Respondent's conduct and possibly diminished capacities. For this reason, the Board concludes that although Respondent has obviously suffered from various infirmities, we will not consider her psychiatric or medical problems as a mitigating factor when imposing discipline, since she has failed to prove the requisite causal connection between her infirmities and her professional misconduct.

In light of: the limited time period during which Respondent's misconduct occurred; her acknowledgment of the factual basis on

which these proceedings were based; the unusual and extremely stressful circumstances which occurred in Respondent's life at the time of her misconduct; and the highly favorable testimony of three practicing attorneys who told the Hearing Committee that it was their opinion that Respondent's disciplinary rule violations were an aberration which had not precluded their subsequent working with her, (Citations omitted), the Board concludes that Respondent's suspension from the practice of law for a period of three years will satisfactorily acknowledge the seriousness of her misconduct, and protect the interests of the public, and uphold the integrity of the Bar.

Following review of the file in this matter, the Supreme Court of Pennsylvania suspended respondent for two years, on May 7, 1991, without comment or explanation.

CONCLUSION AND RECOMMENDATION

Upon a review of the full record, the Board recommends that the Office of Attorney Ethics' Motion be granted, and adopts the factual findings articulated by the Disciplinary Board of the Supreme Court of Pennsylvania. In re Pavilonis, 98 N.J. 36, 40 (1984); In re Tumini, 95 N.J. 18, 21 (1979); In re Kaufman, 81 N.J. 300, 302 (1979).

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-7(d). That rule directs that:

The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record upon which the discipline in another jurisdiction was predicated that it clearly appears that:

(1) the disciplinary order of the foreign jurisdiction was not entered;

(2) the disciplinary order of the foreign jurisdiction does not apply to respondent;

(3) the disciplinary order of the foreign jurisdiction does not remain in full force and effect as the result of an appellate proceedings;

(4) the procedure followed in the foreign matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(5) the misconduct established warrants substantially different discipline.

...The Director may argue that the law of this State or the facts of the case do or should warrant the imposition of greater discipline than that imposed in other jurisdictions, but in such event the Director shall bear the burden of establishing such contentions by clear and convincing evidence.

In analyzing this case, the Office of Attorney Ethics noted that exceptions one through four are not applicable to this case. The Board agrees. The Office of Attorney Ethics further stated, "as to exception five, although it is likely that a knowing misappropriation occurred, which would warrant disbarment in New Jersey, no specific finding that Respondent acted knowingly was made in the Pennsylvania proceeding. In light of the difficulty in proving knowing misappropriation, we are therefore not arguing that the misconduct established in Pennsylvania warrants greater discipline in New Jersey." Reciprocal discipline of a two-year suspension was, therefore, requested.

The Board has independently reviewed the record, and agrees that it was, indeed, "likely" that knowing misappropriation occurred in this case. Rule 1:20-7(d) requires, however, that the Director "bear the burden of establishing such contentions by clear and convincing evidence." No such attempt has been made. Nor does the record, on its face, clearly and convincingly demonstrate knowing misappropriations. Thus, a recommendation for disbarment cannot be made on this record alone.

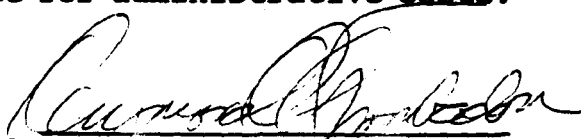
The Board noted that, contrary to her Pennsylvania disciplinary history, respondent's New Jersey ethics record is not unblemished. In particular, a recommendation for a three-month suspension was filed with the Court in Docket No. DRB 86-313 (Holliday) in December 1987. Additionally, a recommendation for respondent's temporary suspension and for a \$500 sanction for failure to pay a fee arbitration award was filed with the Court on December 21, 1987 (DRB 87-284). Thereafter, in response to an order to show cause on DRB 86-313, respondent was initially placed on disability inactive status (DIS), and was subsequently transferred from DIS to a temporary suspension, by Order dated July 8, 1988. That suspension was based, inter alia, on the Court's determination "that the complaints against respondent disclose a pattern of neglect and the inattention that may be affected by her physical condition" and "that there are disciplinary matters in another jurisdiction (Pennsylvania) whose bearing on Respondent's fitness to practice law in this State remain unexplained." In re Thompson, 111 N.J. 657 (1988). The

order followed respondent's refusal to provide requested information regarding the Pennsylvania matter to the Supreme Court. Final discipline has, therefore, never been imposed in the Holliday matter (DRB 86-313), nor has proof of compliance with the fee arbitration award been filed.

Thus, while the Board agrees that respondent's numerous problems in the recent past, both medical and familial, may serve as mitigation, her disciplinary history is not insignificant. Under the facts of this case, as argued by the Office of Attorney Ethics, the Board has determined to grant this Motion for Reciprocal Discipline. Accordingly, the Board unanimously recommends that respondent be suspended for a period of two years, retroactive to the date of her suspension in Pennsylvania. Her suspension is to continue unless and until she is reinstated to the practice of law in Pennsylvania. In addition, respondent's reinstatement is to be conditioned upon satisfactory proof of medical responsibility and fitness. Following the reinstatement, annual audits on respondent's trust account are to be provided to the Office of Attorney Ethics for a period of three years. One member recused himself. One member did not participate.

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

Dated: 7/6/93

By: 
Raymond R. Trombaore
Chair
Disciplinary Review Board