SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 94-441 and 95-196

IN THE MATTER OF JAMES J. REA, JR., AN ATTORNEY AT LAW	Decision of the Disciplinary Review Board

Argued: March 15, 1995 (DRB 94-441)
July 19, 1995 (DRB 95-196)

Decided: December 4, 1995

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics in the matter under Docket No. 94-441.

Respondent waived appearance for oral argument in the matter under Docket No. 94-441.

John McGill, III appeared on behalf of the Office of Attorney Ethics in the matter under Docket No. 95-196.

Stephanie E. Fox appeared on behalf of respondent in the matter under Docket No. 95-196.

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

These matters were before the Board based on a motion for final discipline filed by the Office of Attorney Ethics ("OAE") (DRB 94-441) and on a recommendation for discipline filed by Special Master Frank J. Dupignac, Jr. (DRB 95-196).

In DRB 95-196, respondent was originally charged with knowing misappropriation. However, the OAE subsequently abandoned that

claim and filed instead an amended and superseding complaint, charging respondent with violations of RPC 1.3 (lack of diligence) and RPC 1.15(b) and (c) (failure to account for estate funds).

Respondent was admitted to the New Jersey bar in 1965. On July 7, 1992, he was publicly reprimanded for engaging in a sexual relationship with an assigned pro bono client, whom he knew to have a history of mental health problems. Respondent was temporarily suspended on April 16, 1993 for failure to appear for a demand audit scheduled as a result of his own report to the "OAE" that he had misappropriated funds in one of the within matters (DRB 95-196). Respondent remains suspended to date.

I - Docket No. DRB 94-441

Pursuant to R. 1:20-6(c), the OAE filed a motion for final discipline based upon respondent's guilty plea to an indictment charging him with criminal mischief in the second degree, in violation of N.Y. Penal Law 145.10(McKinney 1988), and to an accusation charging him with hindering apprehension, in violation of N.J.S.A. 2C:29-3b(2), a fourth degree offense. Respondent was sentenced to five years' probation and 100 hours of community service on the New York conviction and three years' probation on the New Jersey conviction, to run concurrently with his New York sentence.

The events culminating in the criminal charges are as follows: On March 27, 1993, respondent passed a New Jersey state trooper after exiting the Hillsdale Toll Plaza on the Garden State Parkway.

A passenger in respondent's car opened the right door and yelled for police assistance. The trooper was then advised, by radio, of a possible kidnapping. Respondent's car matched the description of the suspect's car. The trooper followed respondent's car and pulled the vehicle over to the side of the road. The trooper ordered respondent to place his hands out of the car window. When respondent failed to obey, the trooper approached the car. Respondent then drove away and a pursuit ensued.

During the chase, respondent reached speeds up to 95 miles per hour, made unsafe lane changes, and ran a toll stop. When respondent crossed over into the State of New York, the New York state police continued pursuit. Respondent was taken into custody by the New York state police after his car collided with one of their patrol cars.

* * *

The OAE requested that respondent receive a term of suspension for his misconduct. However, because respondent had been temporarily suspended for more than nineteen months at the time of its motion, the OAE posed no objection to the imposition of a concurrent suspension.

II - Docket No. DRB 95-196

The facts were essentially stipulated by the parties. Respondent was the attorney for the estate of his uncle, Joseph

Kerr, who died testate at some unidentified point. Kerr's will also designated respondent as executor of the estate and, further, as a specific and residuary beneficiary. Exhibit C-G. Following Kerr's death, respondent retained William McLaughlin, Esq., to assist him in handling the administration of the estate. While the extent, scope and timing of McLaughlin's services were not specifically addressed, it is clear that he prepared the final accounting ultimately provided to the other beneficiaries under the will. Among those beneficiaries were respondent's brother and cousins.

Kerr's estate included his residence, which respondent sold in his capacity as executor. Shortly after the closing, which was held on October 4, 1990, the buyer's attorney (Cohen) notified respondent that the buyers had discovered a broken sewer line that would cost approximately $3,500 to repair. Cohen advised respondent that the purchasers would look to the estate for reimbursement. Although respondent advised Cohen that the estate would take the position that the closing finalized the transaction and, therefore, precluded recovery, he, nevertheless, withheld $4,000 of the sale proceeds to satisfy the buyers' claim, should that become necessary. (Those proceeds were referenced as "the contingency" during the DEC hearing). It was respondent's ultimate disposition of those funds that formed the basis of the formal ethics complaint.

Following the closing, on or about October 10, 1990, McLaughlin forwarded a final accounting to the various heirs under

the will, along with a check representing their shares of the balance of the sale proceeds. Exhibit C-6. The accounting, prepared by McLaughlin, did not contain a description of the $4,000 that respondent had withheld from the sale proceeds. According to McLaughlin, that $4,000 was not addressed in the final accounting, apparently either because McLaughlin did not know about the buyers' claim at that point or because the buyers had not yet filed an actual lawsuit. See Exhibit C-X at 14-16, Statement of William McLaughlin. He suggested, nevertheless, that the $3,500 federal tax escrow shown on Schedule C of the final accounting was available as a cushion for that purpose because federal estate taxes never became due (probably due to the somewhat small size of the estate). There is no evidence to suggest that McLaughlin intentionally misrepresented the nature of the withheld funds or that respondent directed the specific treatment of the funds in the final accounting.

The final accounting showed the balance remaining in the estate to be zero. Respondent did not recall even seeing the accounting until he met with OAE representatives in April 1993. He admitted that the zero balance was inaccurate.

Respondent testified that, in spite of the zero balance on the accounting, he believed that someone in his office — perhaps his secretary — had advised the heirs that $4,000 in estate funds remained to be distributed. However, he acknowledged that neither he nor anyone else in his behalf ever advised the heirs of the specific reason for withholding the $4,000 because respondent did

not wish to become the subject of criticism by his family members, who had been very critical of him in the past. The various heirs, however, denied knowledge of the existence of any funds withheld as potential compensation for the buyers' expenses with the repair or otherwise available in the future for distribution. See Exhibits C-1 through C-S.

On February 6, 1991 and February 11, 1991, respondent drew to himself two checks on the estate account, in the amounts of $500 and $510, respectively. Exhibits C-H. Respondent testified that he took those sums either as advancements on his distribution of the estate proceeds or as fees for the real estate closing four months earlier. While respondent had expected the buyers to institute a lawsuit on the sewer damage claim, suit in fact was never filed. Therefore, in both October and December 1992, respondent consulted with McLaughlin to determine whether he would be entitled to take the remainder of the $4,000 as fees for services he performed ancillary to the closing. According to respondent, those extra services included, for example, travelling to Trenton to personally obtain an inheritance tax waiver for the property so that closing could occur; policing the property on a regular basis while it remained vacant; arranging to secure simple homeowner's insurance, as opposed to vandalism insurance, and cleaning the property prior to closing.

Upon consultation, McLaughlin agreed with respondent that he was entitled to take the balance of the $4,000 as legal fees for these extraordinary services, despite the fact that respondent had

already received both an executor's commission and an attorney's fee totalling more than $23,500. McLaughlin provided respondent with a copy of a "memo" he had prepared on a similar issue in a matter that he had handled. See Exhibits C-T and C-U. Although McLaughlin saw no legal impediment to respondent's proposition to allocate the remainder of the $4,000 to his fees, he specifically advised respondent to notify the heirs of his intent to claim the funds as legal fees.

On December 18, 1992 and December 29, 1992, respondent issued two additional checks to himself in the amounts of $818.25 and $2,454.72 respectively, leaving a zero balance in the estate account. (As noted by the special master, the discrepancy between the $3,500 federal tax estimate shown on the final account, the $4,000 respondent claimed to have withheld from the closing proceeds and the $4,282.97 he ultimately took as fees was never explained). Despite McLaughlin's specific advice, respondent did not notify the other heirs of this action. In fact, respondent never notified the heirs that he ultimately took the balance of the $4,000 as fees, although he believed that his brother knew of it as result of this pending ethics matter. He offered no reason for his failure to so notify the heirs. He maintained, however, that he would have promptly disclosed his disposition of the money, had any one of the heirs specifically inquired. Respondent testified that, while he needed money at the time he took the balance of the $4,000 as fees, he had no doubt that he was entitled to it as legitimate fees.

Respondent himself brought this matter to light when he telephoned the Chair of the District IX Ethics Committee on March 22, 1993. At that time, he reported to Chair Richard Ansell that he had misused trust funds. Subsequently, on March 23, 1993, respondent spoke with an OAE attorney, Richard Engelhardt, Esq., and made a similar admission. As a result of that telephone conversation, an audit was scheduled for March 25, 1993. Respondent did not appear at that audit, allegedly due to emotional problems.

Respondent offered into evidence medical records, dating from April 29, 1993, that documented mental and emotional problems. In fact, respondent was hospitalized under psychiatric care from April 29, 1993 through May 8, 1993. Respondent offered these records not as a defense to excuse his conduct, but rather as an explanation as to why he had believed that he had misappropriated funds, resulting in his telephone call to disciplinary authorities. Both those medical records and respondent's testimony strongly suggest that respondent was suffering from severe depression, at least from the time when he reported himself to Ansell and Engelhardt.

Finally, although it is not entirely clear that the heirs currently know of respondent's use of the $4,000 as fees, there is also no claim by any of them that respondent was not entitled to those additional fees.

* * *

The special master found respondent guilty of a failure to account to the heirs for funds in which they had a potential interest, at least from the point after it was determined that the funds were not needed for either taxes or the sewer claim. The special master specifically declined to make a similar finding with regard to respondent's conduct before that point because of the "inconsistencies in the statement by Mr. McLaughlin as to the escrow for taxes, and respondent's that it was for the sewer claim." Report of the special master at 3. The special master recognized that respondent had already served a substantial period of suspension (twenty-three months as of the date of the DEC hearing), and nevertheless recommended the imposition of a reprimand.

* * *

As to Docket No. DRB 94-441, and upon review of the full record, the Board has determined to grant the OAE's motion for final discipline.

As to Docket No. DRB 95-196, upon de novo review, the Board is satisfied that the special master's finding that respondent was guilty of unethical conduct is clearly and convincingly supported by the record.

DRB 94-441 (Motion for Final Discipline)

A criminal conviction is conclusive evidence of a respondent's guilt in disciplinary proceedings. R. 1:20-13(c)(1); In re Rosen, 88 N.J. 1, 3 (1981). Once an attorney is convicted of a crime, the

sole question remaining is the measure of discipline to be imposed. now R. 1:20-13(c)(2); In re Infinito, 94 N.J. 50, 56 (1983).

The purpose of discipline is to protect the public from the attorney who does not meet the standards of responsibility of his profession. In re Barbour, 109 N.J. 143 (1988). Whenever an attorney commits a crime, he violates his professional duty to uphold and honor the law. In re Bricker, 90 N.J. 6, 11 (1982).

The fact that respondent's offense does not relate directly to the practice of law does not obviate the need for discipline. The Court has been clear on the reasons for disciplining attorneys whose illegal conduct was not related to the practice of law. "An attorney is bound even in the absence of the attorney-client relationship to a more rigid standard of conduct than required of laymen. To the public he is a lawyer whether he acts in a representative capacity or otherwise." In re Katz, 109 N.J. 17, 22-23 (1987), citing In re Gavel, 22 N.J. 248, 265 (1956).

The Court previously dealt with a similar and potentially life-threatening crime in In re Braun, 118 N.J. 452 (1990). In that case, the attorney, Braun, pled nolo contendere to recklessly endangering another person in Pennsylvania, also a second-degree crime. While shutting off the range gas of a tenant in an apartment building owned by Braun, a gas company worker discovered that the main meter on the building was reversed, an action which allowed the gas to flow without being registered. The worker also found that, because the meter was reversed, it was leaking at a near-explosive rate. The worker disconnected the gas line and

meter. While making the disconnection, he noted that the water meter was also bypassed.

The gas company reinspected the property a few days later and discovered that the meter had been reconnected. The meter still leaked gas at a near-explosive level. Once again, the gas company disconnected the meter. After Braun refused to pay a bill for $7,700, the gas company filed criminal charges against him.

Because of these events, Braun was suspended in Pennsylvania for three months. He received the same discipline in New Jersey.

In light of the foregoing, the Board has unanimously determined to suspend respondent for three months prospectively, this suspension to be served concurrently with his present temporary suspension. Three members did not participate. The Board also determined to require respondent to reimburse the Disciplinary Oversight Committee for appropriate administrative costs.

* * *

DRB 95-196

In this matter, the record supports the conclusion, by clear and convincing evidence, that respondent intentionally failed to account to the heirs for estate funds. Indeed respondent admitted that he did not account to the heirs to know that he had withheld $4,000 because he feared their criticism. Respondent admittedly did not account to the heirs for those funds at any point and did not advise McLaughlin to do so. To the extent that particular factor is significant, the Board disagrees with the special

master's finding that the record does not clearly and convincingly establish a failure to account from the time that respondent initially withheld those funds as possible payment on the buyer's claim.

Regardless of the timing of the declaration of respondent's misconduct, respondent's admitted intentional failure to disclose the existence of the $4,000 can also be characterized as dishonest conduct, in violation of RPC 8.4(c). Although the amended complaint did not specifically charge such a violation, the original complaint did. Moreover, the facts charged in the amended complaint put respondent on sufficient notice in this regard. Finally, the issue of possible misrepresentation, by failure to disclose, was fully addressed and litigated before the special master. The Board thus finds a violation of RPC 8.4(c), and considers the amended complaint to be amended to conform to the proofs. In re Logan, 70 N.J. 222(1976).

Certainly, the most disturbing aspect of respondent's overall conduct was his ultimate appropriation of the $4,000 for an additional fee. While respondent's need for funds was admittedly a factor in his determination to allocate those funds to his fee, there is no claim either by the OAE or by any of the heirs that respondent was not entitled to that additional fee. However, his failure to notify the heirs of his intention to claim the funds as fees also puts his case into the category of taking an unauthorized fee (as opposed to a knowing misappropriation). The sole impediment to such a finding is McLaughlin's advice to respondent

that he was entitled to take that additional fee. If McLaughlin represented the estate at that point (the record is not clear), then the fee was not "unauthorized." Regardless of the characterization, however, respondent's conduct was violative of RPC 1.15(b) and (c).

This case most closely parallels that of In re Vaughn, 123 N.J. 576 (1991), where the Court publicly reprimanded an attorney for, among other things, failure to provide a formal accounting to his clients and for taking an unauthorized fee. Therefore, under a totality of the circumstances, including respondent's prior misconduct, the fact that respondent himself brought this matter to light by contacting the disciplinary authorities, and the fact that respondent has been temporarily suspended since April 1993, the Board has unanimously determined to reprimand respondent for his violations of RPC 8.4(c) and RPC 1.15(b) and (c). One member did not participate. Moreover, as previously stated, the Board has unanimously determined to grant OAE's Motion for Final Discipline and to impose upon respondent a three-month prospective suspension to be served concurrently with his present temporary suspension.

In both DRB 94-441 and DRB 95-196, the Board has determined to require respondent to reimburse the Disciplinary Oversight Committee for appropriate administrative costs.

Dated: 12/4/95

LEE M. HYMERLING
Chair
Disciplinary Review Board