

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-324
Phillip J. Simms

IN THE MATTER OF :
:
PHILLIP J. SIMMS :
:
AN ATTORNEY AT LAW :
:
:

Decision

Argued: December 21, 2000

Decided: May 29, 2001

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

Respondent waived appearance for oral argument.

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

This matter was before us based on a stipulation signed by the Office of Attorney Ethics (“OAE”) and respondent. Respondent stipulated that he violated *RPC* 1.15(a) (negligent misappropriation of client funds) and *RPC* 1.15(d) and *R.1:21-6* (recordkeeping violations).

Respondent was admitted to the New Jersey bar in 1974. He has no disciplinary history. At all relevant times, he maintained a law office in Whitehouse, Hunterdon County, New Jersey.

* * *

On September 21, 1999 and January 19, 2000 the OAE conducted a select compliance audit of respondent's books and records. The audit, prompted by a July 1999 overdraft in respondent's trust account, revealed that he had negligently misappropriated \$73,637.89 in client trust funds from August 1, 1997 through July 31, 1999. The misappropriations were caused by the following circumstances: (1) respondent erroneously deposited \$51,406.15 in his business, rather than his trust, account; (2) the bank made a \$16,264.10 error and (3) respondent maintained eighteen negative client balances, creating a trust account shortage of \$5,967.64. In addition, the OAE auditor identified seven recordkeeping deficiencies, some of which had contributed to the errors and to respondent's failure to discover them.

On October 22, 1998 respondent mistakenly deposited into his business account \$56,642.61 in trust funds for a real estate matter he was handling for Michele Carden. On that same day, respondent made other disbursements from the trust account, creating a negative trust account balance of \$56,642.61 for Carden. This error was slightly offset by a

\$5,236.46 mistaken deposit into respondent's trust account, leaving a net shortage of \$51,406.15. The \$5,262.46 sum represented attorneys' fees from unrelated matters.

Respondent was notified of the overdraft in July 1999. He then made two transfers from his business account to his trust account: \$50,000 on July 21, 1999 and \$6,642.61 on September 9, 1999. Although the misdeposited funds remained intact in the business account during the entire nine-month period, there was an invasion of other client's funds that should have remained intact in respondent's trust account.

The audit also revealed that, on April 28, 1999, First Union National Bank erroneously debited respondent's trust account by \$16,264.10, thereby creating a trust account shortage that the bank corrected six months later, October 26, 1999.

In addition, the audit identified a \$5,967.64 trust account shortage as of December 31, 1999, resulting from respondent's maintenance of eighteen negative client balances, ranging from \$.06 to more than \$2,000. Although the individual negative balances totaled \$7,689.67, respondent's legal fees kept in the trust account reduced the shortage to \$5,967.64. The negative balances were caused by "overdisbursements" on behalf of clients. On February 1, 2000 respondent cured the shortage by transferring \$5,967.64 from his business account to his trust account.

The audit also disclosed several recordkeeping violations. Respondent was the subject of a 1992 random audit and thereafter corrected all of the deficiencies noted at that time, with

one exception: funds from old outstanding checks that remained in his trust account. In addition to this previously-found recordkeeping impropriety, several others were identified at the later audit:

- Clients' ledger cards had debit balances.
- A schedule of clients' ledger accounts was not prepared and reconciled quarterly to the trust account bank statement.
- Inactive trust ledger balances remained in the trust account for an extended period of time.
- Clients' trust ledger sheets were not fully descriptive.
- Receipts and disbursements journals for trust account were not fully descriptive.

Until May 1998, respondent's bookkeeper/paralegal had maintained and reconciled monthly his accounting records. After she left the firm, respondent, another secretary and respondent's daughter assumed the recordkeeping responsibilities. According to respondent, the trust account had not been reconciled since early 1998, the business account was not reconciled at all and the business account bank statements were not reviewed.

On February 1, 2000 respondent notified the OAE that he had taken appropriate action to correct the above deficiencies.

Respondent stipulated that he violated *RPC* 1.15(d) and *R.1:21-6* and that his recordkeeping deficiencies, particularly his failure to perform the required reconciliations,

caused the negligent misappropriation of \$73,637.89 in client trust funds, in violation of *RPC*

1.15(a).

According to the stipulation, the following mitigating factors should be considered:

- \$51,400 of the \$73,600 negligently misappropriated funds remained intact in respondent's business account;
- a bank error was the cause of another \$16,200 shortage, which was replaced once the bank was notified of the problem;
- respondent promptly replaced the remaining \$5,900 shortage;
- respondent was cooperative throughout the audit;
- respondent immediately retained a bookkeeper to reconstruct his records;
- respondent currently maintains his records on a computerized system and has retained a bookkeeper to reconcile his trust account monthly; and
- respondent has no prior disciplinary history.

The stipulation listed the following aggravating factors:

- respondent should have been alerted to his recordkeeping responsibilities by the 1992 random audit;
- the amount of negligently misappropriated funds, \$73,600, was considerable and the time span – six months to more than two years – was substantial; and
- respondent's failure to make quarterly reconciliations caused client funds to be invaded and unnecessarily subjected to risk.

The OAE recommended the imposition of a reprimand, relying on *In re Powell*, 142

N.J. 426 (1995).

* * *

Respondent acknowledged that he violated *RPC* 1.15(a) and (d) and *R.1:21-6*. The stipulation provides ample basis to support those violations. Of the three factors causing the negligent misappropriation respondent was responsible for two: he misdeposited \$51,406.15 in his business account, instead of his trust account and maintained eighteen negative client balances totaling \$5,967.64. The third factor was the bank's fault; First Union erroneously debited \$16,264.10 from respondent's trust account. The error was reversed when the bank was notified six months later. We note, however, that, if respondent had maintained his records and performed the reconciliations required by *R.1:21-6*, the errors would have been discovered much earlier.

Generally, in cases involving negligent misappropriation, either alone or in conjunction with the failure to maintain the records required by *R.1:21-6*, admonitions or reprimands are imposed. *See, e.g., In the Matter of Bette R. Grayson*, DRB No. 97-338 (1998) (admonition); *In the Matter of Katina Sytlianou*, DRB No. 97-024 (1997) (admonition); *In the Matter of Joseph S. Caruso*, DRB No. 96-076 (1996) (admonition); *In the Matter of William E. Agrait*, DRB No. 94-374 (1995) (admonition); *In re Moras*, 151 *N.J.*

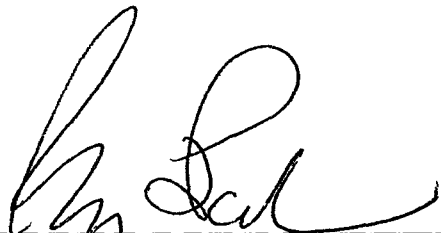
500 (1997) (reprimand); *In re Fucetola*, 147 N.J. 255 (1997) (reprimand); *In re Powell*, 142 N.J. 426 (1995) (reprimand); *In re Imperiale*, 140 N.J. 75 (1995) (reprimand); and *In re Mitchell*, 139 N.J. 608 (1995) (reprimand).

Although respondent has no disciplinary history, as the subject of a prior random audit, he should have been aware of his recordkeeping responsibilities. Moreover, he failed to correct one of the deficiencies uncovered by the 1992 random audit. For these reasons, we unanimously determined that a reprimand is the appropriate discipline for his ethics transgressions.

Two members did not participate.

We further required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: May 29 2001

By: 
ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

**DISCIPLINARY REVIEW BOARD
VOTING RECORD**

**In the Matter of Phillip J. Simms
Docket No. DRB 00-324**

Argued: December 21, 2000

Decided: May 29, 2001

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hyerling			X				
Peterson			X				
Boylan			X				
Brody			X				
Lolla			X				
Maudsley							X
O'Shaughnessy			X				
Schwartz							X
Wissinger			X				
Total:			7				2

Robyn M. Hill 7/25/01
Robyn M. Hill
Chief Counsel