

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 05-275  
District Docket Nos. XIV-05-396E

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

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Decision

Argued: November 17, 2005

Decided: December 22, 2005

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us on a disciplinary stipulation entered into between respondent and the Office of Attorney Ethics ("OAE").

Respondent was admitted to the New Jersey bar in 1974. On December 4, 2001, he was reprimanded for negligently misappropriating \$73,000 in client trust account funds and failing to maintain attorney books and records. In re Simms, 170 N.J. 191 (2001).

In this matter, respondent stipulated that, as a result of poor recordkeeping practices, he negligently misappropriated \$5,651.19 of clients' funds. The facts giving rise to the stipulation are set out in the OAE investigator's July 27, 2005 report, which is incorporated into the stipulation by reference.

On April 28, 2005, the OAE conducted a random audit of respondent's attorney books and records. Respondent was found to be out-of-trust by \$5,551.19, after having disbursed funds in excess of the proper amount in real estate closings for two different clients.

In the first matter, the Kraditor closing, which took place on December 5, 2002, respondent inadvertently collected \$5,024.69 too little on account of the settlement of title. Not realizing his error, respondent disbursed that amount from the funds of other clients on hand in the trust account.

In the Sumner matter, which closed on August 14, 2003, respondent disbursed an extra \$526.50 due to a miscalculation. Respondent stipulated that, as a result of the excess disbursements in Kraditor and Sumner, other client trust funds were negligently misappropriated. Since making those mistakes, respondent has reclaimed the missing funds from the parties.

The OAE audit also turned up three recordkeeping violations: 1) client ledger cards contained debit balances; 2) the trust account contained inactive balances over extended periods of time; and 3) old outstanding checks remained unresolved in the trust account. The stipulation noted that, although respondent had retained the services of a part-time bookkeeper to assist him with his records, the same recordkeeping deficiencies had been uncovered in both a 1992 audit and a 1999 audit that resulted in respondent's 2001 reprimand.

Respondent stipulated that his misconduct constituted the negligent misappropriation of \$5,551.19 of client trust account funds, a violation of RPC 1.15(a)(property of clients or third persons must be kept separate from the lawyer's own property). In addition, respondent stipulated that his failure to maintain proper trust and business account records for the period of time covered by the OAE audit violated RPC 1.15(d) and R. 1:21-6.

The OAE recommended the imposition of either a reprimand or censure.

After an independent review of the record, we are satisfied that the stipulation contains clear and convincing evidence that respondent violated the charged RPCs.

Respondent stipulated that his conduct violated the charged RPCs.

First and foremost, respondent negligently misappropriated over \$5,000 in client funds in two real estate transactions, a violation of RPC 1.15(a). Sloppy recordkeeping affected his ability to account for funds in his trust and business accounts. To respondent's credit, he took action thereafter to recover the funds and deposit them into his trust account.

In addition, respondent violated RPC 1.15(d) and R. 1:21-6, by failing, in ten different respects, to maintain proper records of his trust and business accounts.

Ordinarily, a reprimand is imposed for negligent misappropriation of client's funds and recordkeeping violations. See, e.g., In re Blazsek, 154 N.J. 137 (1998); In re Imperiale, 140 N.J. 75 (1995); In re Harrison, 139 N.J. 609 (1995); In re Mitchell, 139 N.J. 608 (1995); and In re Zavodnick, 139 N.J. 607 (1995). Mitigating circumstances may lower the discipline to an admonition. See, e.g., In the Matter of Philip J. Matsikoudis, Docket No. DRB 00-189 (September 25, 2000) (admonition imposed where attorney miscalculated fees in his favor, thereby negligently misappropriating client funds, and failed to pay a physician's lien, as a result of poor recordkeeping;

mitigation included steps taken to overcome deficiencies, and respondent's use of his own personal funds to pay the physician's lien); and In the Matter of Bette R. Grayson, Docket No. DRB 97-338 (May 27, 1998) (admonition imposed for negligent misappropriation and recordkeeping deficiencies; mitigation included attorney's full cooperation with ethics authorities, steps taken to correct deficiencies, and lack of prior discipline).

In aggravation, respondent was previously reprimanded for nearly identical misconduct in 2001.

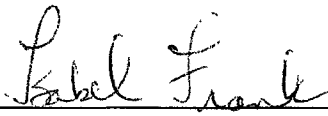
In mitigation, respondent fully cooperated with ethics authorities, promptly replenished his trust account, and stipulated his misconduct.

Finding that the aggravating factor that respondent learned nothing from his prior identical ethics misbehavior outweighs the mitigation, we determine that a censure is the appropriate degree of discipline for respondent's ethics infractions. We also require respondent to submit to the OAE, for a period of two years, quarterly reconciliations of his trust account.

Member Boylan voted for a reprimand, with the additional reconciliation requirement. Chair Maudsley and Vice-Chair O'Shaughnessy did not participate.

We also require respondent to reimburse the  
Disciplinary Oversight Committee for administrative  
expenses.

Disciplinary Review Board  
Mary J. Maudsley, Chair

By:   
Julianne K. DeCore  
Chief Counsel

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SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

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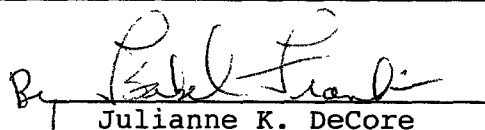
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Argued: November 17, 2005

Decided: December 22, 2005

Disposition: Censure

Members	Disbar	Censure	Reprimand	Dismiss	Disqualified	Did not participate
Maudsley						X
O'Shaughnessy						X
Boylan			X			
Holmes		X				
Lolla		X				
Neuwirth		X				
Pashman		X				
Stanton		X				
Wissinger		X				
Total:		6	1			2

By   
Julianne K. DeCore  
Chief Counsel