SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-020
District Docket No. XIV-02-006E

IN THE MATTER OF

CAROLYN E. ARCH

AN ATTORNEY AT LAW

Decision

Argued: May 20, 2004

Decided: June 22, 2004

Walton W. Kingsbery, III 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 based on a recommendation for discipline filed by the District VA Ethics Committee ("DEC"). The complaint charged respondent with violations of RPC 1.4(a)

(failure to keep a client reasonably informed about the status of the matter), RPC 1.5(b) (failure to communicate to a client the basis or rate of a fee in writing), RPC 1.15(b) (negligent misappropriation of client funds, more properly a violation of RPC 1.15(d) and Rule 1:21-6), and RPC 1.15(d) (failure to comply with the recordkeeping rules).

Respondent was admitted to the New Jersey bar in 1965. In 1991, she received a private reprimand for gross neglect, lack of diligence, failure to comply with a client's reasonable requests for information, and failure to withdraw from representation after the client requested the return of the file. On July 24, 2002, respondent received an admonition for failure to communicate with a client. In the Matter of Carolyn Arch, Docket No. DRB 02-188. Five days later, on July 29, 2002, she was admonished again for a lack of diligence and failure to keep her client informed of the status of the matter. In the Matter of Carolyn Arch, Docket No. DRB 01-322. Finally, effective February 5, 2004, she was suspended for three months in a default matter for a lack of diligence, negligent misappropriation of client funds, failure to maintain required records, and knowing misstatement of material fact to disciplinary authorities. In re Arch, 178 N.J. 263 (2004).

This is the second time that this matter was presented to us. It was originally presented at the same time as the matter in DRB 01-322, in which respondent received an admonition. On January 2, 2002, we remanded this matter to the Office of Attorney Ethics ("OAE") because the hearing panel report suggested that respondent had knowingly misappropriated client funds. Following the remand, the OAE concluded that "there is not a reasonable prospect of proving by clear and convincing evidence that respondent knowingly misappropriated client trust funds." No additional hearings were held and the OAE returned the matter to us based on the original record, as supplemented by the investigative report prepared after the remand.

In July 1992, three brothers, Samuel, Clio, and Cleo Graham retained respondent to represent their corporation, One Five and Zero Bar, Inc., to enforce a promissory note signed by James J. Carroll. The Grahams had sold to Carroll an apartment building and a tavern. As part of that transaction, Carroll had given the Grahams a $35,000 note dated February 12, 1987, requiring monthly payments of $334.47 until February 12, 1993. After Carroll defaulted on the payments, the Grahams retained respondent. Samuel, the grievant, testified that respondent had told the Grahams that the matter was an "open and shut case" and

that the note required Carroll to pay all costs of collection, including reasonable attorney fees.

On July 8, 1992, respondent sent to Samuel a letter memorializing the terms of her representation, that is, a fee of $125 per hour for court appearances and $85 per hour for non-court services, plus costs. In that letter, respondent cautioned Samuel that, although the promissory note provided that Carroll was required to pay reasonable attorney fees, the amount of those fees would be determined by a court upon the submission of an affidavit of services. Respondent, thus, required a retainer of $850. Although Samuel testified that he never received the letter of July 8, 1992, respondent introduced into evidence her handwritten memorandum dated the next day, July 9, 1992, stating that Samuel telephoned her to ask about the need for a retainer, in light of the attorney fee provision in the promissory note. Moreover, in the July 8, 1992 letter, respondent had asked Samuel to provide an amortization schedule for the note, which she subsequently received.

On July 27, 1992, Samuel submitted to respondent checks totaling $850. The first check, in the amount of $450, drawn on an account held by Cleo Cleo Sam Bar Inc., was honored. The second check, for $400, drawn on an account held by One Five &

Zero Bar, was returned for insufficient funds. Apparently, that checking account had been closed for two years at the time the check was issued. Although Samuel testified that he had given respondent $400 in cash and had received a receipt, respondent denied that Samuel had made the check good. Samuel did not produce a copy of the receipt.

In any event, on September 18, 1992, respondent filed a complaint in Superior Court, Essex County, on behalf of the Grahams against Carroll. In the complaint, respondent demanded judgment for principal of $28,595.34, interest of $2,287.62, and attorney fees of $3,088.49. According to respondent, promissory notes typically contain provisions entitling the creditor to attorney fees of ten percent of the principal and interest due. Although the note that Carroll had signed did not quantify the amount of attorney fees, respondent used the ten percent standard in requesting attorney fees in the complaint.

Respondent testified that the corporate charter for One Five and Zero Bar, Inc. had been revoked and the Grahams refused to expend the necessary funds to reinstate the charter. According to respondent, thus, the Grahams faced dismissal if they did not settle the litigation against Carroll. At a calendar call on May 31, 1994, respondent received an offer from

Carroll to pay the full amount of the principal, part of the interest, and no attorney fees. Respondent advised the Grahams to accept the offer, observing that the case was number 233 on the trial list and that, because she would be required to attend daily calendar calls, the attorney fees could become prohibitive. After the Grahams authorized respondent to accept the offer, respondent signed a stipulation of settlement. The stipulation required Carroll to pay $30,000 as follows: $1,000 by June 3, 1994, $1,500 by June 30, 1994, and the balance of $27,500 in monthly installments of $500 beginning July 31, 1994. The stipulation further provided that a default in payment would result in entry of judgment against Carroll.

In a letter of June 2, 1994 to the Grahams, respondent stated:

> Because the amount of the interest you would have been entitled to receive has been halved, and my attorney's fees were based on the principal amount with interest compounded, I have agreed to compromise my fees to the sum of $1,500.00.

In the letter, respondent indicated that Carroll would submit the installment payments to her in trust for the Grahams, that she would deduct ten percent as payment toward her attorney fees, and that she would send the balance to each of the Grahams in equal amounts. Although Samuel testified that he never

received a copy of the stipulation of settlement, he admitted that he had received respondent's June 2, 1994 letter in which the stipulation had been enclosed.

About one month later, respondent sent another letter to the Grahams, dated July 8, 1994, asking them to advise whether the payment arrangements were suitable. The next day, Samuel contacted respondent, complaining that he had understood that Carroll would be required to pay respondent's attorney fee. According to respondent, although Samuel agreed that she was entitled to be paid for her services, he disagreed that the Grahams should pay her fee. Samuel testified that, based on respondent's letter of June 2, 1994, he believed respondent's fee would be $1,500. Respondent testified that she informed the Grahams that (1) her offer to charge a $1,500 fee as outlined in her letter of June 2, 1994 was merely a proposal and (2) if they rejected her proposal, her fee would be calculated on an hourly basis, as recited in the retainer letter, resulting in a higher fee. According to respondent, she billed and collected a fee of $4,500 from the Grahams.

Samuel stated that, at some point, he stopped receiving the monthly payments from respondent on the Carroll note. Indeed, between July 21, 1995, when respondent disbursed $166.66 to each

brother, and April 1, 1996, when she disbursed $500 to each brother, she sent no payments. Although respondent's records were incomplete, she apparently received at least five payments of $500 each from Carroll during that time.

Samuel claimed that he tried to contact respondent about Carroll's default in payments. He stated that, although he left telephone messages for respondent, she failed to return his calls. On October 26, 1995, he sent a letter to respondent documenting his unsuccessful efforts to contact her by telephone and asking her to obtain a judgment against Carroll for defaulting on the stipulation of settlement. Samuel received the return receipt for the letter signed by respondent. On November 16, 1995, Samuel filed a grievance against respondent.

In turn, respondent denied that she had failed to return Samuel's telephone calls. She claimed that she communicated more with Cleo and Clio than she did with Samuel.

As to the charges that respondent failed to comply with the recordkeeping rules, she admitted that she did not maintain trust receipts journals or trust disbursements journals, only ledger sheets. Although she conceded that she did not maintain a running balance in her trust account checkbook, she denied that she failed to reconcile her trust account.

Much of the four days of hearings was devoted to reaching a consensus on the amount of funds that respondent collected from Carroll, disbursed to the Grahams, and disbursed to herself as fees. The OAE investigator had prepared a trust account reconstruction based on the records that respondent had submitted before the hearing. That reconstruction indicated that respondent's Graham trust account was frequently out of trust. At the hearing, however, respondent produced additional records, causing the reconstruction to be revised.

In addition, at the hearing, and at the pre-hearing OAE audit, respondent claimed that six checks payable to her had been erroneously labeled as "Graham" checks, when they actually represented fees received from another client, Delores Gresham. According to respondent, she had very little trust account activity and the similarity between her clients' names created confusion. The Gresham checks, issued on various dates from August 31, 1994 through December 21, 1995, totaled $1,955. The OAE investigator acknowledged that, during the investigation, respondent had indicated that she had confused the Graham and Gresham trust accounts.

When the matter was remanded to the OAE, a different investigator prepared another reconstruction, which indicated

that respondent's Graham trust account was not out of trust. According to this second reconstruction, respondent received $26,400 from Carroll and disbursed $26,074.84 – $23,529.84 to the Grahams and $2,545 to herself. The investigator also prepared a Gresham trust account reconstruction, deducting the $1,955 in attorney fees that respondent claimed had been attributed to Gresham, not Graham. According to the Gresham reconstruction, the deduction of the $1,955 attorney fees caused the Gresham trust account to be out of trust.

In addition, respondent admitted that, on either three or four occasions, she deposited payments from Carroll directly into her business account and disbursed fees to herself, without disbursing any of the funds to the Grahams. Respondent's time records indicated that she made such "direct deposits" of $500 each on February 7, 1995, September 6, 1995, December 19, 1995, and January 22, 1996, for a total of $2,000.

The DEC concluded that respondent failed to communicate with Samuel, failed to comply with the recordkeeping rules, and negligently misappropriated client funds. The DEC found that respondent took $6,600 as her fee in the Graham matter.

The DEC declined to find a violation of RPC 1.5(b), based on respondent's letter of July 8, 1992 to the Grahams, in which she outlined the basis of her fee.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is supported by clear and convincing evidence.

After agreeing to represent the Grahams in a collection matter, respondent obtained a settlement providing for installment payments. According to Samuel, after a period of time had passed during which he did not receive any payments from Carroll, Samuel tried without success to contact respondent. Although respondent denied that she failed to return his telephone calls, Samuel's letter of October 26, 1995 documented his efforts to reach her. Respondent's failure to reply to Samuel in writing to dispute his claim supports the allegation that she failed to communicate with him, in violation of RPC 1.4(a).

It is unquestionable that respondent failed to comply with the recordkeeping rules. Both at the DEC hearing and during oral argument before us, she admitted that she did not maintain a running balance in her trust account checkbook and that she did

not maintain trust receipts or disbursements journals, in violation of RPC 1.15(d).

The most serious, and difficult, charge contained in the complaint was negligent misappropriation. Unfortunately, the record in this matter was dreadfully convoluted. Respondent is partly responsible, because she apparently failed to produce requested records until the hearing. Another difficulty stemmed from the fact that the hearing took place between February and September 2000, while the events comprising the allegations occurred primarily between 1992 and 1996. By the time of the hearing, the original investigator was no longer employed by the OAE and, although he testified, he was understandably not able to recall many details of the matter.

Although the original reconstruction indicated that respondent's Graham trust account was out of trust, the 2004 investigative report showed that, with the addition of the fees erroneously attributed from the Gresham matter, respondent had not invaded other client funds in the Graham matter. Respondent defended the Graham misappropriation charges by claiming that $1,955 in fees that she had attributed to Graham had actually been taken from the Gresham funds and that the checks had identified the wrong client. The 2004 investigative report

concluded that respondent had invaded other client funds in the Gresham matter. We, thus, find that respondent negligently misappropriated client funds in the Gresham matter. Respondent's recordkeeping was shoddy and was probably the reason that she disbursed more funds in Gresham than she had received.

While respondent's practice of depositing funds from Carroll directly into her business account was troubling, she claimed an entitlement to fees. Respondent's testimony that she had notified the Grahams that she intended to take her fees "up front" was corroborated by Samuel's testimony, although he added that he was not satisfied with the arrangement. There is, thus, no evidence that respondent misappropriated the Graham funds. However, she received the funds in trust for her clients and should have deposited them in her trust account before disbursement.

Respondent, thus, was guilty of failure to communicate with her client, failure to comply with the recordkeeping rules, and negligent misappropriation. The OAE urges us to suspend respondent for three to six months, based on her disciplinary history and her grossly deficient recordkeeping, which resulted in the negligent misappropriation of client funds.

Attorneys who have engaged in similar misconduct typically have received discipline ranging from an admonition to a suspension. See, e.g., In the Matter of Cassandra Corbett, Docket No. DRB 00-261 (2001) (admonition for negligent misappropriation and failure to maintain required records); In the Matter of Bette Grayson, Docket No. DRB 97-338 (1998) (admonition for negligent misappropriation of client trust funds in eleven instances, failure to prepare quarterly trust account reconciliations, and failure to maintain required records); In re Brooks, 169 N.J. 221 (2001) (reprimand imposed on an attorney who failed to maintain required records, failed to safeguard funds, and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; attorney had received a prior reprimand for failure to cooperate with disciplinary authorities); In re Ezor, 167 N.J. 594 (2001) (reprimand imposed on an attorney who failed to communicate with a client, negligently misappropriated client funds, failed to safeguard funds, and failed to promptly deliver funds to a client); In re Feintuch, 167 N.J. 590 (2001) (reprimand for negligent misappropriation of client trust funds, improper commingling of funds, and recordkeeping violations); In re Brandon-Perez, 131 N.J. 454 (1993) (three-month suspension for grossly negligent bookkeeping

resulting in negligent misappropriation); In re Gallo, 117 N.J. 365 (1989) (three-month suspension for deficient recordkeeping, commingling personal and client funds, and negligent misappropriation).

Here, we considered, in mitigation, that respondent was admitted to the bar almost forty years ago. She practiced from 1965 until 1991 without any ethics incidents. Since then, respondent has received a private reprimand in 1991, two admonitions in 2002, and a three-month suspension on February 5, 2004. Although her ethics history is an aggravating factor, we considered, in mitigation, the timing of the misconduct in this matter, which has been significantly delayed on several occasions. As a result, although we are reviewing this matter in 2004, the events under consideration occurred primarily between 1994 and 1995, nine to ten years ago.

Based on the foregoing, we determine that a three-month suspension, to be served concurrently with the suspension effective February 5, 2004, is the appropriate level of discipline. One member recused himself. One member did not participate.

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

Disciplinary Review Board
Mary J. Maudsley, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Carolyn E. Arch
Docket No. DRB 04-020

Argued: May 20, 2004

Decided: June 22, 2004

Disposition: Three-month suspension

Members	*Disbar*	*Three-month Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley		X					
O'Shaughnessy						X	
Boylan							X
Holmes		X					
Lolla		X					
Pashman		X					
Schwartz		X					
Stanton		X					
Wissinger		X					
Total:		7				1	1

Julianne K. DeCore
Chief Counsel