SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-108
District Docket Nos. XIV-99-122E

IN THE MATTER OF	
DIANE K. MURRAY	
AN ATTORNEY AT LAW	

Decision

Argued: May 19, 2005

Decided: July 27, 2005

Nitza Blasini appeared on behalf of the Office of Attorney Ethics.

Edward DePascale appeared for respondent.

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

This matter was before us on a recommendation for discipline (six-month suspension) filed by the District VI Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1980. On October 6, 1997, she received an admonition for lack of diligence, failure to communicate with the client, and failure to utilize a retainer agreement in a litigated matter. In the Matter of Diane K. Murray, DRB 97-225 (October 6, 1997). On

September 26, 2000, respondent received an admonition for gross neglect, lack of diligence, failure to communicate with a client, and recordkeeping violations in a 1995 real estate closing; the funds for that transaction were stolen by respondent's secretary and went unnoticed for months. In the Matter of Diane K. Murray, DRB 98-342 (September 26, 2000).

On December 3, 2002, the Office of Attorney Ethics ("OAE") filed an amended complaint against respondent, charging her with violating RPC 1.1(a) (gross neglect), RPC 1.15 (negligent misappropriation), RPC 5.3(a) and (b) (failure to supervise employees), and R. 1:21-6 and RPC 1.15(d) (recordkeeping violations).[1]

On April 10, 1995, Kevin Worthan (also spelled "Wortham" in the record) was injured in a fall at a Pathmark supermarket.

Two years later, in April 1997, a complaint was filed out of respondent's office on Worthan's behalf. The complaint bore respondent's name as plaintiff's attorney.

On May 20, 1997, Pathmark's claim adjuster, Scott Pass, attempted to contact respondent in order to negotiate a possible settlement of the matter.

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[1] The original complaint alleged knowing misappropriation. However, that charge was withdrawn after the OAE determined that it could not be proven by clear and convincing evidence.

Between May 1997 and February 1998, Pass and Pathmark's in-house counsel, Conrad Mandel, communicated with respondent's office about a settlement. On February 4, 1998, Pathmark settled the matter for $6,500.

Pathmark's February 4, 1998 settlement check for $6,500, made out jointly to Worthan and respondent, was endorsed with Worthan's signature and respondent's signature stamp. On February 9, 1998, the funds were deposited into respondent's trust account, along with $1,000 in cash.

Thereafter, three trust account checks, each in the amount of $2,500, were issued to Margaret Colaneri, respondent's housekeeper.

Pass testified at the DEC hearing that Pathmark initiated a claim file immediately after receiving respondent's April 11, 1995 representation letter, which contained "the caption of Diane Murray of 2468 Kennedy Boulevard, Jersey City, New Jersey."

Pass recalled that he had been assigned the Worthan matter from its inception, and that he had personally negotiated a settlement with an individual in respondent's office, who identified himself as "Phil Castora." According to Pass, Castora had advised him that he was an associate of respondent and was authorized to negotiate a settlement.

Pass confirmed that Pathmark settled the case on February 4, 1998 for $6,500, just days before a scheduled arbitration hearing.

Worthan also testified at the DEC hearing. He stated that, after falling at the Pathmark store, he was treated at a local hospital and, several days later, contacted an attorney to represent him. Worthan recalled that the attorney was a blonde-haired female, with offices on Newark Avenue, Jersey City. He did not recall the attorney's name, but recalled that the attorney had subsequently been disbarred.[2]

Several months after the accident, Worthan moved to New York State and heard nothing more about the accident from his attorney. About two years later, a woman claiming to be respondent called him in New York to advise that she had a check for him, representing the proceeds from the settlement of his case.

According to Worthan, he had long thought the case to be over, and was surprised to find that it had been active and then settled in his favor. After that one telephone call, he never heard from the woman again.

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[2] Respondent would later testify that, in August 1995, she moved her law office from 2468 Kennedy Boulevard to 2474 Kennedy Boulevard, Jersey City.

Worthan denied that he had ever seen or signed any of the documents that bore his name, including the settlement check, a release, and a handwritten statement of facts signed by "Kevin Worthan".

Lastly, Worthan testified that he never retained respondent to represent him in the case – only the female attorney with the office on Newark Avenue. He claimed that he had met respondent for the first time at the ethics hearing.

Respondent's version of the events appears in several different documents, including her interview with the OAE, on August 3, 2000, regarding the audit, her December 17, 2002 verified answer to the amended complaint, and her testimony before the DEC.

In her answer, she denied representing Worthan in the slip-and-fall case, but acknowledged knowing that Worthan had fallen at a Pathmark store. Respondent also denied (1) that she knew anything about the $6,500 Pathmark check, including its receipt in her office; (2) that she endorsed the check or deposited it into her trust account; and (3) that she knew anything about the three Colaneri checks from her attorney trust account.

At the DEC hearing, respondent tried to clarify several inconsistencies contained in her verified answer and in her statements made at the demand audit.

First, respondent had told the OAE at the demand audit that Worthan had been involved in "an accident with Pathmark." At the time, she knew who he was, his skin tone, and also recalled having seen him "around town" in or about 1999.

Yet, later on, in her verified answer, respondent admitted that she had (at an undisclosed time and place) also spoken to Worthan about representing him against Pathmark. Respondent had declined Worthan's representation, and had never met with Worthan again after the initial consultation. Respondent's answer is not clear whether they ever met face-to-face.

At the DEC hearing, the OAE sought to determine if respondent and Worthan had ever met face-to-face. In terse fashion, respondent denied ever having "met" Worthan, and reiterated her denial that she had represented him in the slip-and-fall case.

On cross-examination, respondent was asked:

> Q. Is it still your testimony that you never met with him and you never saw him?
> A. As a client I didn't.
>
> (1T60-15 to 18.)[3]

That left the presenter with the notion that respondent might have met Worthan in a context other than as a client. In a long line of questions designed to clarify that issue,

[3] 1T refers to the December 2, 2003 hearing transcript.

respondent just repeated her position that she had no contact of any kind with Worthan after declining to represent him in 1995.

Respondent testified, too, that she had not prepared any of the pleadings in the case, drafted any of the correspondence on her letterhead, signed any correspondence bearing her name, or spoken to any of Pathmark's representatives during the pendency of the suit. Respondent steadfastly denied that she had personally received Pathmark's settlement check in the Worthan matter.

Respondent was also questioned about the Colaneri checks, which had been drafted on her trust account. Respondent again denied knowing anything about them, and stated that she kept her trust account checks locked in a secret desk drawer. Respondent acknowledged, however, that Colaneri had been her housekeeper and that she was owed thousands of dollars for cleaning services at the time the checks were written.

Under cross-examination, respondent was asked a series of questions about her office practices during the time that the Worthan matter was pending. She explained that she had maintained an active, almost daily presence in her office during the years 1995 through early 1998. During that time she also maintained her living quarters there. As a result, she was almost always present. Respondent had two employees working for

her in 1998, when the Pathmark check was negotiated and the Colaneri checks written.

According to respondent, Jane Dobesh Lipari, the bookkeeper, was in charge of the administrative duties and data entry in the office, but was not allowed to prepare legal documents or write trust account checks. Lipari died in 1998.

Respondent was asked why she had told ethics investigators during the 2000 audit, that Lipari had written the three Colaneri checks in question, as well as eleven others to Colaneri, totaling another $33,000. Respondent had told the OAE that Lipari had erroneously done so, having deposited legal fees into the trust account, instead of the business account, as she had been instructed to do. Yet, in her DEC testimony, respondent could not recall what role Lipari had played with respect to those checks.

At the DEC hearing, respondent asserted that a second person had some access to her office during 1995 to 1998 – her driver, Peter Antico:

> Q. Who was that?
> A. That was Peter Antico. He did not do any legal work for me. He simply drove me.
> Q. He was a disbarred attorney?
> A. Yes. That's why I didn't let him touch a thing.

The presenter then asked respondent:

Q. Could you explain to us then how someone could simply have taken [over] your office, was answering your phone, negotiating settlements, sending out correspondence on your letterhead, drafting pleadings on your letterhead, using your signature stamp and all without your knowledge?

A. I would like to explain it to myself. It was behind my back and without my knowledge. It was done with an intent to deceive, defraud and steal my identity and it was done successfully. When anyone is defrauded of something they feel embarrassed.

(2T47-22 to 2T48-3.)[4]

Respondent denied knowing anyone named Castora, or that such a person had access to her office at any time. Specifically, she had no idea how anyone by that name could have accessed her office to use her telephone during the negotiation phase of Worthan's suit.

Respondent did not implicate Lipari or Antico in the fraud upon Worthan.

With regard to the allegations of poor recordkeeping, OAE auditor Hall testified that respondent's trust account records were virtually nonexistent, and that many of her records were obtained not from her, but from her bank.

The records revealed that Pathmark's settlement check was made payable to Worthan and respondent. It was deposited into

[4] 2T refers to the August 25, 2004 hearing transcript.

respondent's trust account, along with $1,000 in cash, on February 9, 1998. Hall verified that those funds were never disbursed to Worthan. Rather, they were used to fund the three Colaneri checks totaling $7,500.

The audit disclosed numerous recordkeeping violations, the most serious of which was respondent's failure to reconcile her trust account for the years in question. Hall pointed out that, had respondent performed the required quarterly reconciliations of her trust account, she would have discovered the Pathmark deposit, Worthan's funds, and the checks to Colaneri.

Hall also found that respondent did not maintain client ledgers or receipts and disbursements journals. She failed to retain required bank statements from her accounts, deposit tickets, and cancelled checks for the trust account. In fact, the audit revealed that, for two significant periods of time, October to December 1998 and March to December 1999, respondent did not have an active trust account with a banking institution.

Respondent alleged, as an affirmative defense, that between 1995 and 1998, the time period in question, she suffered from advanced diabetes. She produced a number of receipts for diabetes medication from 1998 through 2000, and evidence of doctor appointments during that time. Due to her infirmity, respondent had allowed Lipari to manage the office during that time.

Finally, respondent asserted that she "can't be responsible for things [she didn't] know about" because she was the victim of a fraud.

The DEC found that respondent was guilty of numerous recordkeeping violations, in contravention of R. 1:21-6 and RPC 1.15(d), and that she failed to supervise employees, as evidenced by a lack of "control over non-lawyers," in violation of RPC 5.3(a).

The DEC considered, as mitigation, that respondent suffered from advanced diabetes. In aggravation, however, the DEC found that respondent made no effort to return Worthan's $6,500, which had been used to pay down respondent's debt to her housekeeper.

The DEC recommended a six-month suspension.

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

The events in respondent's office are mystifying, at best. Apparently, a scheme was set in motion as early as April 10, 1995, when someone in respondent's office sent Pathmark a letter, on respondent's letterhead, bearing respondent's "signature" and announcing her representation of Worthan for his slip-and-fall injuries.

From April 1995 on, this person or persons had uninterrupted, total access to respondent's office. Letters were

drafted and signed with respondent's name, pleadings were prepared and signed with respondent's name, telephone calls were made by someone claiming to be respondent, and someone calling himself Phil Castora negotiated a settlement from respondent's office.

At the same time, someone pretended to be Worthan, writing fact statements for him, and signing documents in his name.

Thereafter, Castora negotiated a settlement with Pathmark's claims adjuster, Pass, and conversed with Pathmark's in-house counsel, Mandel, both of whom communicated with Castora at respondent's office telephone number.

Thereafter, the perpetrator or perpetrators accessed respondent's incoming mail and intercepted the Pathmark settlement check. Next, they found respondent's trust account deposit slips, which she claimed had been locked away in a secret drawer, and deposited Pathmark's check into her trust account.

Next, the perpetrator wrote three checks to respondent's housekeeper, using respondent's trust account checks, which had also allegedly been locked away. The Worthan funds were, thereafter, used to pay down respondent's personal debt to Colaneri.

Respondent asserted that, from April 1995, the inception of the Worthan matter in her office, to early 1998, when the

Colaneri checks were written on the trust account, she had complete control over her law office. She was a sole practitioner with only a few employees.

Respondent's claimed control over the office during those years is belied by the facts. She exercised no control over at least the following: incoming and outgoing mail; office letterhead; her signature stamp; the use of the office telephone for incoming calls from Pathmark's claims agent and in-house counsel; blank trust account checks; and blank trust account deposit slips. Respondent did not keep records of transactions that would have raised red flags about the Worthan matter. All of these bits and pieces are the core tools of an attorney. Their protection against misuse is at the heart of a license to practice law. Respondent's assertion to the contrary -- that she is a victim and cannot be held responsible for things she did not know -- is ill-conceived.

Unquestionably, respondent must be held responsible for what happened in her office in this matter. It strains credulity that someone in respondent's office, for a period of three years, acted as Worthan's attorney, without respondent's detection. That the record does not reveal who perpetrated the fraud on Worthan and Pathmark is irrelevant to a finding of unethical conduct. Respondent allowed this misconduct to occur

right "under her nose;" she failed to "mind the store," thereby violating RPC 5.3(a) and (b).

So, too, respondent failed to maintain books and records that would have turned up the scheme. The DEC rightly concluded that respondent 1) failed to maintain client ledgers; 2) failed to maintain receipts and disbursements journals; 3) failed to retain trust and business account bank statements and deposit slips; 4) failed to retain cancelled checks and/or check stubs for the trust account; 5) failed to perform quarterly reconciliations of her trust account; and 6) failed to maintain an active trust account from October 22 to December 21, 1998, and again from March 31 to December 28, 1999.

In aggravation, this is the second time that respondent has ignored employees who were bent on doing her harm. In 2000, she received an admonition for failure to maintain proper books and records. Specifically, in 1995, her then-secretary, Kim Russell, stole two checks belonging to a client in a real estate closing. Respondent's failure to timely reconcile her trust account records in that matter caused a delay in uncovering the theft.

With regard to the allegations of negligent misappropriation, RPC 1.15(a) requires an attorney to protect the funds of clients and third parties alike. An attorney/client relationship is not required. Undoubtedly, the Worthan funds were not protected. Rather, they were used to pay respondent's

housekeeper. Worthan never received his monies. Therefore, by failing to safeguard Worthan's funds, respondent violated RPC 1.15(a).

The DEC was correct to dismiss the charge of a violation of RPC 1.1(a), since respondent did not represent Worthan.

Generally, an admonition or a reprimand is imposed for recordkeeping deficiencies and negligent misappropriation. See, e.g., In the Matter of Bette R. Grayson, Docket No. DRB 97-338 (May 27, 1998) (admonition imposed where the attorney had deficient recordkeeping practices and failed to prepare quarterly reconciliations of client ledger accounts, resulting in the negligent misappropriation of client trust funds in eleven instances); In the Matter of Joseph S. Caruso, Docket No. DRB 96-076 (May 21, 1996) (admonition imposed where the misrecording of a deposit led to a trust account shortage and the attorney committed a number of violations in the maintenance of his trust account); In re Blazsek, 154 N.J. 137 (1998) (reprimand where the attorney negligently misappropriated client funds and failed to comply with recordkeeping requirements); In re Goldstein, 147 N.J. 286 (1997) (reprimand where the attorney negligently misappropriated client funds as a result of recordkeeping deficiencies); In re Liotta-Neff, 147 N.J. 283 (1997) (reprimand where the attorney negligently misappropriated client funds after commingling personal and client funds); In re

Gilbert, 144 N.J. 581 (1996) (reprimand where the attorney negligently misappropriated in excess of $10,000 in client funds and violated the recordkeeping rules, including commingling personal and trust funds and depositing earned fees into the trust account; the attorney also failed to properly supervise his firm's employees with regard to the maintenance of the business and trust accounts); and In re Marcus, 140 N.J. 518 (1995) (reprimand where the attorney negligently misappropriated client funds as a result of numerous recordkeeping violations and commingled his and his clients' funds; the attorney had received a prior reprimand; the attorney's lack of awareness that the account was out of trust, later adoption of proper recordkeeping procedures, successful completion of a proctorship following his previous reprimand, and the absence of loss to any client were considered as mitigating factors).

For failure to supervise employees, attorneys have typically received admonitions or reprimands. See, e.g., In the Matter of Samuel L. Sachs, DRB 01-429 (February 14, 2002) (admonition imposed where the attorney failed to properly supervise his secretary, resulting in the dismissal of three cases for various deficiencies and the client's termination of the attorney's representation in a fourth matter); In re Tighe, 143 N.J. 304 (1996) (reprimand imposed where the attorney failed to properly supervise her staff, resulting in the negligent

misappropriation of clients' trust funds); In re Weiner, 140 N.J. 621 (1995) (reprimand where the attorney failed to supervise non-lawyer staff by condoning staff's signing clients' names to documents).

In aggravation, respondent's misconduct in the Worthan matter was committed over a period of years, and was compounded by numerous, chronic, recordkeeping violations that, had respondent maintained proper records, could have prevented much of the fraud committed here.

In addition, this is the second time that respondent has been duped by someone in her own office. She received her second of two admonitions in 2000, for failure to discover the theft of several checks by her then-secretary, largely due to respondent's own shoddy recordkeeping practices.

We find that the above aggravating factors are somewhat offset by respondent's constant bout with diabetes during the years in question. We therefore, are persuaded that a reprimand is sufficient discipline for her ethics offenses. Because of the deplorable state of respondent's legal practice, however, we require her to practice law under a proctor, to be approved by the OAE, for a period of three years. During the first year of the proctorship, the proctor must meet with respondent on a weekly basis at her office. We also require the preparation of monthly reconciliations of her attorney trust accounts, by an

OAE-approved accountant, for review by the OAE on a quarterly basis, for a period of three years. In addition, respondent is prohibited from using a signature stamp, and required to destroy all existing signature stamps to prevent their future misuse. Finally, respondent must demonstrate proof of fitness to practice law, as attested to by a mental health professional approved by the OAE, within thirty days of receipt of this decision. Member Matthew Boylan, Esq. 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
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Diane K. Murray
Docket No. DRB 05-108

Argued: May 19, 2005

Decided: July 27, 2005

Disposition: Reprimand

Members	***Disbar***	***Suspension***	***Reprimand***	***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:			8			1

Julianne K. DeCore
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Chief Counsel