

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-167
District Docket No. XIV-03-0554E

IN THE MATTER OF :
 :
BARRY J. BERAN :
 :
AN ATTORNEY AT LAW :
 :

Decision

Argued: June 17, 2004

Decided: July 28, 2004

Michael J. Sweeney 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 on a disciplinary stipulation between the Office of Attorney Ethics ("OAE") and respondent. Respondent admitted that he violated RPC 1.15 presumably (d), and R.1:21-6 (recordkeeping) and RPC 1.8(e) (improperly advancing funds to clients), inadvertently cited in the stipulation as RPC 8.1(a).

Respondent was admitted to the New Jersey bar in 1980. He maintains an office for the practice of law in Cherry Hill, Camden County. He has no history of discipline.

Respondent failed to reconcile his trust account, resulting in the negligent misappropriation of trust funds, a violation of R. 1:21-6 and RPC 1.15(d). In addition, he failed to correct earlier recordkeeping deficiencies brought to his attention as a result of a 1987 random compliance audit, a violation of R. 1:21-6 and RPC 1.15(d). Finally, he improperly advanced funds to his clients, contrary to RPC 1.8(e).

The stipulation incorporates the investigative report of Mary E. Waldman, Assistant Chief, OAE Random Audit Program, which details the factual circumstances of respondent's misconduct. The report is Attachment A to the stipulation.

Respondent practices in the firm of Beran & Beran.¹ Although both attorneys are authorized signatories on the firm's bank accounts, respondent alone is responsible for maintaining the books and records relating to the firm's accounts and assumes full responsibility for the operations of the law firm. He deposits all funds to the bank and authorizes all disbursements. Respondent maintains all records manually. The records consist of checkbooks with stubs for the trust and

¹Respondent's partner is his wife, Gail R. Beran.

business accounts, receipt and disbursement journals for the trust account only, and individual client ledgers for the trust account. A running balance is not maintained in the trust account checkbook. Respondent does not reconcile the trust account.

On April 14, 2003, an overdraft occurred in the trust account of Beran & Beran. On April 23, 2003, Gerald J. Smith, OAE Chief of Investigations, sent a letter to Beran & Beran requesting an explanation for the overdraft, including supporting documentation. Smith received three reply letters from respondent dated June 9, June 11, and June 16, 2003. According to respondent, the overdraft was the result of his failure to deposit a settlement draft to the trust account. Respondent disbursed funds from the trust account under the assumption that the draft had been deposited. (See further discussion, infra).

On June 10, 2003, this matter was referred to the OAE Random Audit Compliance Program. By letter dated June 17, 2003, the OAE notified respondent that an audit of Beran & Beran's books and records would be conducted on July 9, 2003.

Negligent Misappropriation of Trust Funds

Respondent's failure to reconcile the trust account resulted in a negligent misappropriation of trust funds totaling \$100,000 during the period from November 8, 2002 to June 10, 2003. On November 7, 2002, respondent received a draft dated November 5, 2002 from Consolidated Rail Corporation, in the amount of \$100,000. This draft represented a settlement of the Michael Jones matter. On or about November 7, 2002, Jones and respondent endorsed the draft. According to respondent, the draft was then placed in the client file until he could deposit it later that day.

The deposit was recorded in the trust account checkbook, but the draft was not deposited. Respondent had no explanation other than "he forgot about it." The misappropriation occurred when respondent disbursed on the draft, which he thought had been deposited, as follows:

11/8/02 Ck.#2525	Transocean Maritime Services	\$ 31,000.00
11/8/02 Ck.#2526	Michael Jones	\$ 33,816.67
11/8/02 Ck.#2527	Michael Jones	\$ 1,000.00
01/2/03 Ck.#2572	Barry Beran	<u>\$ 34,183.33</u>
	TOTAL	\$100,000.00

Because respondent did not reconcile his trust account, he was unaware of any problems until the account became overdrawn on April 14, 2003. The bank returned check #2604 in the amount of \$52,074.09, payable to respondent, for insufficient funds.

This payment represented fees and advances due to respondent relating to the Webb matter. (See discussion, infra.) Respondent's failure to deposit the \$100,000 draft in November 2002 was the cause of the overdraft.

It was not until respondent investigated the overdraft that he found the check in the client file. On June 10, 2003, after respondent received assurances from the bank and the insurance company that the draft would be honored, he deposited the draft into his trust account. Respondent then removed his fees/advances in the Webb matter.

Prohibited Advances To Clients

Respondent routinely advanced loans to clients while representing them in personal injury matters. The funds were disbursed from the attorney business account, prior to settlements being reached. In March 2003, twenty-three advances were made to clients, totaling \$5,040; in April 2003, thirty advances were made to clients, totaling \$7,505; and in May 2003, twenty-four advances were made to clients totaling, \$5,160. In most cases, multiple disbursements were made to the same clients. For example, throughout this three-month period, clients Derrick Mitchell, Michael and Charlotte Carr, and

Kevin Brown received the following advances:

Derrick Mitchell	22 Advances	\$8,885
Michael&Charlotte Carr	10 Advances	\$1,805
Kevin Brown	8 Advances	\$ 975

Respondent recorded the advances from the business account on the client trust ledgers. As of the date of the OAE audit, these matters had not been settled. Once a case settled, the outstanding advances/loans were deducted from the client proceeds and added to respondent's proceeds.

According to the auditor's investigative report, respondent claimed that he was unaware of the conflict of interest inherent in his actions. He stated that his clients were in need of money and that he felt sorry for them. Respondent represented to the OAE that he would discontinue advancing funds to clients.

Repeat Recordkeeping Violations

On October 15, 2003, a deficiency letter was sent to respondent setting forth the recordkeeping violations discovered during the audit. The following deficiencies, violations of R. 1:21-6 and RPC 1.15(d), were cited:

1. Clients' ledger sheets are not fully descriptive. [R.1:21-6(b)(2)].
2. Inactive balances remain in the attorney trust account for an extended period of time. [R.1:21-6(c)].

3. A schedule of clients' ledger account balances is not prepared and reconciled monthly to the attorney trust account bank statement. [R.1:21-6(b)(8)].
4. A running cash balance is not kept in the attorney trust account checkbook. [R.1:21-6(c)].
5. The attorney trust account bank reconciliation prepared by the auditor showed total trust funds on deposit were in excess of total trust obligations. [R.1:21-6(d)].
6. An attorney business receipts book is not maintained. [R.1:21-6(c)(1)(A)].
7. An attorney business account disbursements book is not maintained. [R.1:21-6(b)(1)].

[IREx.15.]²

As noted above, a random compliance audit of respondent's books and records had previously been conducted in 1987. As a result of the 1987 audit, respondent was cited for four of the above-noted deficiencies, specifically: failing to prepare quarterly trust account reconciliations; leaving inactive balances in the trust account for an extended period of time; and failing to maintain trust and/or business receipt and disbursement journals.

By letters dated December 12, 2003 and January 13, 2004, respondent certified to the OAE that his recordkeeping deficiencies had been corrected.

² IR refers to the investigative report prepared by Waldman.

Upon a de novo review of the record, we find that the stipulated facts sufficiently establish that respondent's conduct was unethical.

The OAE recommended that respondent receive a reprimand for his misconduct. In support of that recommendation, the OAE cited In re Powell, 142 N.J. 426 (1995), where the attorney was reprimanded for violating the recordkeeping rules, negligently misappropriating more than \$45,000, and advancing personal funds to clients in eight personal injury matters. We find that the OAE's reliance on Powell is well-placed.

Advancing funds to clients, without more, results in the imposition of an admonition. See In the Matter of James LaSala, DRB 93-119 (May 5, 1993) (admonition imposed where the attorney loaned \$3,000 to a client in a personal injury matter). When additional violations are present, a reprimand has been imposed. See In re Tutt, 170 N.J. 63 (2001) (reprimand imposed in a default matter where the attorney advanced funds to a client and failed to cooperate with disciplinary authorities); In re Rinaldo, 165 N.J. 579 (2000) (reprimand imposed where the attorney advanced funds to a client and acquired a proprietary interest in a litigated matter; Rinaldo had previously received a private reprimand, a public reprimand, and a three-month suspension); and In re Rubin, 153 N.J. 354 (1998) (reprimand

imposed where the attorney advanced funds to clients and failed to comply with recordkeeping requirements).

Because respondent had been previously warned about his prior recordkeeping deficiencies and failed to correct them, at least a reprimand is warranted for his deficient accounting practices. As to his advancing funds to clients, according to the OAE auditor's report, respondent was unaware of the prohibition against his conduct and has agreed to cease the practice. Since that violation, standing alone, would generally warrant an admonition, we determine that a reprimand is sufficient for the sum of respondent's misconduct.

Vice-Chair William J. O'Shaughnessy, Esq., did not participate.

We further determine to 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**

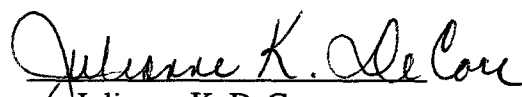
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Disposition: Reprimand

<i>Members</i>	<i>Disbar</i>	<i>Suspension</i>	<i>Reprimand</i>	<i>Admonition</i>	<i>Dismiss</i>	<i>Disqualified</i>	<i>Did not participate</i>
<i>Maudsley</i>			X				
<i>O'Shaughnessy</i>							X
<i>Boylan</i>			X				
<i>Holmes</i>			X				
<i>Lolla</i>			X				
<i>Pashman</i>			X				
<i>Schwartz</i>			X				
<i>Stanton</i>			X				
<i>Wissinger</i>			X				
Total:			8				1


Julianne K. DeCore
Chief Counsel