SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-103

IN THE MATTER OF

WALTER D. LEVINE

AN ATTORNEY AT LAW

Decision

Argued: June 15, 2000

Decided: November 28, 2000

John McGill, III appeared on behalf of the Office of Attorney Ethics.

Samuel N. Reiken appeared on behalf of respondent.

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 X Ethics Committee ("DEC"). The complaint charged respondent with violations of *RPC* 1.8(a) (conflict of interest), *RPC* 1.15(a) (commingling) and *RPC* 8.1(b) (failure to

respond to a lawful demand for information from a disciplinary authority) (count one), *RPC* 1.15(a) (failure to safeguard client funds) and *RPC* 1.8(a) (count two) and *RPC* 1.15(d) and *R.* 1:21-6 (failure to maintain required records) (count three).

Respondent was admitted to the New Jersey bar in 1965. He has no disciplinary history. One pending matter alleges that he failed to place certain funds in an escrow account.

Respondent maintains a law office in Florham Park, Morris County, New Jersey.

* * *

Because the facts were not disputed, no hearing took place. The DEC panel issued a report, after reviewing the pleadings and exhibits. The facts were gleaned from the documents submitted to the DEC.

Count One - The Reppin Matter

On January 19, 1996 Midlantic Bank, N.A. ("Midlantic") notified the Office of Attorney Ethics ("OAE") of an overdraft in respondent's attorney trust account. This notification prompted a series of letters between respondent and the OAE. Because the complaint charges that respondent's explanation to the OAE lacked full candor, in violation of *RPC* 8.1(b), a detailed recitation of the information requested and supplied is necessary.

After Midlantic notified the OAE of the overdraft, on January 26, 1996 respondent submitted a letter to the OAE, stating, in part:

> In explanation of the confusion, please be advised as follows:
>
> 1. The check in question was actually issued against funds that had not cleared Midlantic Bank (Florham Park office), as they had been recently deposited into Midlantic from good funds held in another account of this office at Summit Bank, also located in Florham Park.
>
> 2. The check was honored by Midlantic who recognized that good funds had been deposited to cover same, but that the required clearance period had not yet expired.
>
> 3. Midlantic informed this office that, notwithstanding the clearance period, the check would be honored and would not be rejected upon its presentation.
>
> Perhaps the check should have been written from the account in which the funds were originally deposited, but at no time were checks written against funds that were not on deposit in our account.

On January 31, 1996, the OAE requested a further explanation for the overdraft, as follows:

> I will need your documented reply showing the following specific information with respect to each check which was presented as shown on the overdraft notice:
>
> - check number
> - date;
> - amount;
> - payee;
> - name of your client; and
> - maker of each check.

> With respect to each client matter on which checks were presented, I will need a copy of that client's ledger. Likewise, please send me a copy of your monthly trust account bank statements for the last three months. If funds have been deposited or transferred to cover the overdraft, please provide a copy of the dated deposit slip, credit memo, or bank statement, together with a full description of the funds comprising that deposit.

In his reply, dated February 16, 1996, respondent enclosed a copy of his January 31, 1996 letter, adding the following:

> We ask that you please note that the subject check was not actually an overdraft, as indicated in your letter, but was actually a check drawn against uncleared funds, as explained in our prior letter.
>
> We trust this explanation will explain the situation. Please feel free to call me if you have any further questions.

In turn, on February 23, 1996 the OAE requested that respondent produce by March 1, 1996 his January trust account bank statement and the client ledger card for the client affected by the transaction.

Respondent's March 12, 1996 reply stated as follows:

> As requested, per our recent conversation, enclosed is a copy of the client ledger card involved in the questioned transaction and a copy of my January, 1996 Bank Statement.
>
> Please note that this is my personal account maintained as a part of my trust account, which I maintain to cover such items as office safe deposit box fees (debited by the bank), personal funds to cover office matters such as client advances for filing and recording fees, and temporary funds of mine to cover times when collections are slow.

> I call your attention to the fact that two (2) checks were issued on the same date (#s 5487 and 5488), but cleared on different dates (January 4 and January 5, 1996. [sic].
>
> As explained in my letter of January 26, 1996, I had deposited these funds from another account at a local bank, when I realized that I had inadvertently issued the check in question from the wrong account. Yet, although both checks went to the same location on the same date, one cleared faster than the other.
>
> Please call me if you require any further information or documentation.

Because respondent's reply disclosed that he had been commingling personal and trust funds,[1] on March 28, 1996 the OAE notified respondent of a demand audit of his books and records. The audit revealed that respondent maintained a trust account at Midlantic and another trust account at Summit Bank ("Summit"). On December 29, 1995 respondent issued two checks against personal funds in the Midlantic trust account to his brokerage account, Wortheim Schroeder. Both checks, number 5487 for $13,200 and number 5488 for $8,186.03, were written to finance respondent's investment in an initial stock offering. Midlantic received check number 5487 for $13,200 on January 4, 1996, when the balance in that account was only $7,241.96. Despite this shortage, Midlantic honored the check.

On January 5, 1996 a positive balance was restored when respondent transferred $25,000 from his Summit account. The $25,000 consisted of trust funds belonging to a client, Steve Reppin, a longtime friend of respondent. Reppin had given respondent blanket

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[1] Respondent admitted in his answer to the complaint that the commingling violated *RPC* 1.15(a).

authority to use for his own purposes any of Reppin's funds held by respondent, until such time as Reppin needed them. Respondent admitted, however, that he had not complied with the requirements of *RPC* 1.8(a), by entering into a business transaction with a client without (1) disclosing the terms of the transaction, (2) advising the client to seek independent counsel and (3) obtaining the client's written consent. He contended that, because of the forty-year relationship between his family and Reppin, he believed that step was not necessary. According to the report of OAE investigator G. Nicholas Hall, Reppin told Hall that, even if respondent had advised him to seek the advice of another attorney, Reppin would have declined. Respondent argued that the violation was "technical" and stated that he now understands the mandatory requirements of the rule.

As noted above, respondent admitted that he violated *RPC* 1.8(a) and *RPC* 1.15(a). He denied that he had failed to respond to a lawful demand for information from a disciplinary authority. The OAE argued that, in his January 26, 1996 and February 16, 1996 submissions, respondent failed to disclose that the "good funds" that respondent had on deposit were actually borrowed client trust funds. Moreover, when the OAE requested the client ledger card for the subject transaction, respondent produced a ledger of his personal funds maintained within his trust account. The personal ledger does not reveal that the source of the $25,000 deposit was a loan from Reppin's trust funds. Respondent did not produce the *Reppin* ledger. The OAE contended that respondent must have known that his failure to produce this information would create the misapprehension that client funds were not

involved and that respondent's less than candid explanations frustrated its lawful demand for information. The OAE suggested that respondent's lack of candor was designed to conceal his use of Reppin's funds without complying with the requirements of *RPC* 1.8(a).

For his part, respondent maintained that his replies to the OAE were truthful, candid and forthcoming and that he would have supplied any additional information requested of him. Respondent maintained that, although his submissions to the OAE "should have perhaps contained more information," the OAE's requests were non-specific. According to respondent, it was not until the demand audit that the OAE articulated its interest in the source of the funds used to make the Midlantic deposit. Respondent claimed that, until then, he did not understand that the OAE's request for a "full description" of that deposit was intended to obtain information about the source of the funds.

Count Two - The Reppin/Kaufman Matters

In February 1996 respondent, his brother Robert and a third person formed a partnership to acquire the international trademark rights to the phrase "refuse to lose." Robert agreed to advance $40,000 from his Smith Barney account for this investment. Although respondent expected Robert to wire the funds to respondent's Summit account, respondent's secretary mistakenly instructed Robert to wire the funds to respondent's Midlantic account.

On February 15, 1996 Smith Barney wired $40,000 from Robert's account to respondent's Midlantic account. Respondent confirmed with Smith Barney that the funds had

been transferred on that day. When respondent contacted Summit, however, he was informed that it had not received the funds. After respondent persisted that he had confirmation that the funds had been sent by wire to Summit, Summit representatives told respondent that it could not wire money not yet received and that respondent had to identify a source (sub-account) from which to disburse funds.

Despite Summit's representation that it had not received the wire transfer, respondent remitted $40,000 from the Summit account to fund the partnership investment. Respondent told Summit to use $37,000 from his client Reppin's account (the total balance in that account) and $3,000 from the account of another client, the *Kaufman* estate. On February 21, 1996, four business days later, respondent replenished the funds in the *Reppin* and *Kaufman* estate accounts with checks issued from his Midlantic account.

According to the OAE, respondent stated that he had to act quickly or he and his partners would have "lost the deal." He also explained to the OAE that he held a good faith, but erroneous, belief that Robert's funds were indeed at Summit and that the recordkeeping formalities would be straightened out at a subsequent date.

Although respondent had Reppin's blanket authority to use his trust funds, respondent did not have similar authority from the *Kaufman* estate. The OAE determined that, based on respondent's belief that Robert's funds had been transferred to the Summit account, respondent did not intend to use client funds during the transaction and, therefore, was not guilty of a "knowing misuse" of client funds. The OAE contended, however, that respondent

placed funds belonging to Reppin and the *Kaufman* estate at risk, when he designated their sub-accounts as sources of payment for his personal investment transaction. According to the OAE, knowingly placing both Reppin's and the *Kaufman* estate's funds at risk to secure a personal benefit constituted negligent failure to safeguard client funds, in violation of *RPC* 1.15(a).

The OAE also contended that, as in count one, respondent's use of Reppin's funds violated *RPC* 1.8(a).

Respondent again admitted that he committed a "technical" violation of *RPC* 1.8(a), by failing to comply with the safeguards contained in that *RPC*. He, however, vehemently protested the charge that he failed to safeguard client funds, in violation of *RPC* 1.15(a). Respondent claimed that his issuance of the $40,000 from the Summit account, rather than the Midlantic account, was the product of a misunderstanding by his secretary. In his written summation, respondent argued as follows:

> Knowing that his brother had completed the wire and knowing that the funds for [the partnership] had to be wired out that day, respondent telephoned to the wire department of Summit Bank several times seeking confirmation of receipt. Summit Bank continued its inability to give such confirmation.
>
> At a loss to explain why Summit Bank could not confirm, respondent made the assumption that it was simply a product of backroom traffic at the bank and that the funds had been received that very morning by the bank but not yet posted. Thus, fully believing that $40,000 was in the account, respondent wired out the $40,000 for [the partnership] with the intention of making appropriate bookkeeping adjustments upon receipt of Summit's confirmation.

Since the Summit account was an IOLTA account with subaccounts, and since respondent had authority to utilize the funds of Steve Reppin then in the account, respondent designated Steve Reppin's subaccount to comply with Summit's procedures for allocation of the funds disbursed. That account had $37,000 in it. The other $3,000 was designated to the subaccount of the Estate of Kaufman as to which respondent had no authority to utilize the funds. Respondent believed, however, that he was not utilizing those funds as they were in the bank and would be adjusted by a simple bookkeeping error.

* * *

In hindsight, Mr. LeVine should not have designated the Kaufman subaccount for the $3,000 that was not in the Reppin account. He did so in a good faith, but mistaken, belief that covering funds in like amount were somewhere in Summit Bank's possession awaiting confirmation. The moment he learned that this was not so, he straightened it out.

The OAE charges respondent with a violation of R.P.C. 1.15(a) requiring that a client's property in a trust account 'shall be appropriately safeguarded.' Respondent never believed that Kaufman's funds were ever at risk. The entire transaction was fraught with confusion because respondent should have designated the Midlantic account for receipt of the funds, but instead designated the Summit account, whereupon the secretary should have given wiring instructions for the Summit account, but instead gave wiring instructions for the Midlantic account.

In fact, respondent was correct. The money was always there. It simply was in the wrong place.

Recordkeeping Violations

At the demand audit of respondent's books and records, the OAE noted the following recordkeeping deficiencies: (1) three-way reconciliations were not performed on the Midlantic or Summit accounts, (2) a schedule of clients' ledger accounts was not prepared

and reconciled quarterly to the Midlantic and Summit bank statements, and (3) no required records were maintained for the Summit account.

Although respondent admitted that the reconciliations of clients' ledger accounts with the bank statements may not have always been performed quarterly, he denied the remaining recordkeeping allegations.

* * *

In addition to his written summation, respondent submitted two "character" letters from an attorney and a certified public accountant, attesting to respondent's honesty, integrity and unquestioned reputation.

* * *

The DEC found that respondent committed all of the violations charged in the complaint, except for the charge that he failed to safeguard client funds. Specifically, the DEC found that respondent admitted that he engaged in a conflict of interest, commingled personal and trust funds and was guilty of recordkeeping deficiencies. The DEC concluded that respondent's failure to candidly present all pertinent information to the OAE, specifically his failure to disclose the nature of the use of client funds for personal reasons, violated *RPC* 8.1(b). The DEC declined to find that respondent failed to safeguard client

funds, determining that respondent had sufficient funds in his trust account (albeit the wrong account) to cover the $40,000 disbursement for his personal investment.

The DEC recommended that respondent receive a reprimand and that he attend such courses, as directed by the OAE, on the subject of trust and business accounting.

* * *

Following a *de novo* review, we are satisfied that the DEC's finding that respondent committed ethics violations is supported by clear and convincing evidence. Indeed, respondent admitted that he (1) engaged in a conflict of interest, in violation of *RPC* 1.8(a), when he borrowed money from his client Reppin without following the required safeguards; (2) commingled personal and trust funds, in violation of *RPC* 1.15(a), and (3) failed to comply with recordkeeping requirements, in violation of *RPC* 1.15(d) and *R.* 1:21-6.

The issues left to be determined are whether respondent failed to comply with a lawful demand for information from a disciplinary authority, when he replied to the OAE's requests for information, and whether he failed to safeguard clients' funds, when he issued a $40,000 check from his trust account without receiving positive confirmation that the funds had been wired into that account.

Respondent communicated with the OAE about the overdraft in the *Reppin* matter before the OAE questioned him. Midlantic notified the OAE on January 19, 1996 (Midlantic

sent a copy of the notification to respondent as well), respondent wrote to the OAE on January 26, 1996 and the OAE sent an inquiry to respondent on January 31, 1996. Moreover, with each request for information respondent submitted a timely reply. While respondent may have been less than completely thorough in his replies, he did reply to the requests for information, which, incidentally, did not give respondent notice that he needed to be specific about the funds, when replying. We, therefore, dismissed the charge of a violation of *RPC* 8.1(b).

With respect to the charge of failure to safeguard funds, respondent did place the *Reppin* and *Kaufman* estate funds at risk, in violation of *RPC* 1.15(a). Respondent received confirmation that $40,000 had been wired from his brother's Smith Barney account. Under the assumption that the funds had been wired into his Summit account, respondent disbursed $40,000 from that account, designating the *Reppin* and *Kaufman* estate sub-accounts as the source of the payment. As it turned out, the funds had been wired into respondent's Midlantic account. Although Smith Barney representatives had assured respondent that the funds had been wired, Summit bank staff informed respondent that it had not received the funds. Without confirmation from Summit that the funds were on hand and available, respondent issued a $40,000 check.

Respondent's conduct was similar to that of attorneys who place client funds at risk by issuing checks against uncollected funds. In those cases, attorneys issue trust account checks against uncertified funds, such as a personal check, without waiting for those funds

to clear. If the check does not clear, the attorney will have invaded other clients' funds. Similarly, here, any number of events could have placed respondent's clients' funds at risk. For example, as the OAE argued, the funds could have been lost in transit or stolen by a computer hacker. While analogous, and in violation of *RPC* 1.15(a), respondent's actions here were not as serious as issuing checks against uncollected funds because Smith Barney did confirm that the funds had been wired. Respondent, thus, knew that the funds should have been available. They were simply in the wrong bank.

The remaining issue is the quantum of discipline. Respondent borrowed client funds without making the required disclosures or obtaining the necessary consents, commingled personal and trust funds, failed to comply with recordkeeping requirements and failed to safeguard client funds. In *In re Daniels*, 157 *N.J.* 61 (1999), the attorney received a reprimand after he stipulated that he had improperly lent money to clients, in violation of *RPC* 1.8(a) and (e); negligently misappropriated client funds, in violation of *RPC* 1.15(a) and committed numerous banking and recordkeeping deficiencies, in violation of *RPC* 1.15(d). Absent egregious circumstances or serious economic injury to a client, a reprimand is generally the appropriate discipline for conflict of interest violations. *See In re Guidone*, 139 *N.J.* 272 (1994); *In re Berkowitz*, 136 *N.J.* 134 (1994). Here, there were neither egregious circumstances or economic injury to a client. Moreover, in mitigation, respondent has a previously unblemished career spanning thirty-five years.

Following consideration of all of the above factors, we unanimously vote to impose a reprimand for respondent's actions. In addition, respondent must complete a course in trust and business accounting for lawyers.

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

Dated: 11/28/00

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Walter D. Levine
Docket No. DRB 00-103

Argued: **June 15, 2000**

Decided: **November 28, 2000**

Disposition: **Reprimand**

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			X				
Peterson			X				
Boylan			X				
Brody			X				
Lolla			X				
Maudsley			X				
O'Shaughnessy			X				
Schwartz			X				
Wissinger			X				
Total:			9				

Robyn M. Hill 4/4/01

Robyn M. Hill
Chief Counsel