SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-208

IN THE MATTER OF

EDWARD J. KELLEY,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 21, 1994

Decided: January 5, 1995

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

Mark Tarantino appeared on behalf of respondent.

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

This matter was before the Board based upon a stipulation between respondent and the Office of Attorney Ethics (OAE). Respondent stipulated that he violated RPC 1.15(b) (failure to safeguard client property).

Respondent was admitted to the practice of law in New Jersey in 1985. He is engaged in private practice with the law firm of Kelley, Tarleton & Winkler, in Franklin Lakes, Bergen County. He has no history of discipline.

In April 1989, respondent, then a sole practitioner, opened a trust account in connection with his law practice. In 1991, respondent formed a partnership with another attorney; in 1992, a second partner was added. In November 1992, during discussions

with his partners about closing their individual trust accounts, respondent learned that attorney trust accounts are traditionally non-interest-bearing. Respondent had his account converted to non-interest-bearing status later that month. A trust account in the name of Kelley, Tarleton & Winkler was opened in December 1992.

In November 1993, respondent learned, during further discussion with his partners, that he could not retain the interest earned on client trust account deposits. Respondent informed his partners of the fact that he had retained interest on deposits in his old trust account and that he was going to report his misconduct to the OAE. Thereafter, by letter dated January 14, 1994, respondent informed the OAE that, from March 1989 through December 1992, he had received interest in the amount of $2,912.17 on his attorney trust account. In his January 14, 1994 letter to the OAE, respondent explained that, prior to November 1993, he had been unaware of the prohibition on attorneys' retaining interest on trust funds. He explained that he had corrected his error by forwarding a check in the amount of $2,912.17 (the amount of the interest earned) to IOLTA. Respondent added in his letter that he had reported and paid taxes on the interest income. Respondent explained that his calculation and remittance of the interest to IOLTA was somewhat delayed by the birth of his son on December 7, 1993.

By letter dated February 15, 1994, the OAE asked respondent to provide his trust account records and explain how he had calculated the interest earned in the relevant time period. Respondent

replied by letter dated February 24, 1994. On March 22, 1994, the OAE reviewed respondent's old trust account books and records and ascertained that his computation of the interest earned on clients' deposits was correct. The OAE verified that respondent withdrew interest earned on the trust account. Contrary to respondent's belief, however, he had not retained all the interest earned on the account. In one real estate transaction in which the contract required the deposit to be placed in an interest-bearing account and divided at closing between the parties, respondent had delivered the interest earned to the parties. In other instances, the interest was offset against bookkeeping errors, ranging from a few cents to a few dollars. The interest that respondent had withdrawn was periodically disbursed to himself together with earned fees.

In addition, over a period of four and one-half years, from March 1989 to November 1993, respondent handled approximately two dozen real estate closings, one estate and a few miscellaneous matters in which funds were deposited to and disbursed from his trust account. Respondent had thirty-five client ledger cards, two of which represented his own transactions.

The OAE's review of respondent's books and records disclosed four minor recordkeeping deficiencies, which, by themselves, would not warrant discipline:

a) respondent deposited his own funds in the amount of $2,000 to the trust account on November 13, 1990;

b) respondent issued check # 1170, dated April 12, 1992, in the amount of $200 payable to cash;

c) respondent did not keep client ledger cards and trust receipts and disbursements journals contemporaneously from 1989 to 1992; he reconstructed them in or about November 1992; and

d) respondent issued check # 1206, dated February 16, 1993, payable to Interchange State Bank to pay a personal debt of $2,723.34.

The stipulation further noted that, as of the date of the OAE's review of respondent's current trust account books, no recordkeeping violations were evident.

Respondent admitted that his misconduct violated RPC 1.15(b) and In re Sorensen, 122 N.J. 589 (1991), In re Goldstein, 116 N.J. 1 (1989) and Opinion No. 362, 99 N.J.L.J. 298 (1976).

CONCLUSION AND RECOMMENDATION

Respondent stipulated the facts and the violations in this matter. Accordingly, the sole issue remaining is the appropriate quantum of discipline.

Respondent admitted that he retained $2,912.17 in interest earned on client trust account deposits from March 1989 to December 1992. Respondent claimed that he was not aware that such conduct was prohibited. Ignorance of the rules, however, is no excuse for unethical conduct. Opinion No. 326, supra, 99 N.J.L.J. 298 (1976), deals with investing client property. That Opinion states that "it must be clearly understood that any interest or accretion is the property of the client."

This issue is similar to that seen in In re Goldstein, supra, 116 N.J. 1 (1989). Goldstein maintained an interest-bearing trust

account. None of the interest was turned over to the clients. Instead, between 1982 and 1986, Goldstein withdrew the sum of $25,000 in interest monies and deposited it in either his business account or in a money-market account. For those clients who specifically requested that their funds earn interest, Goldstein opened separate interest-bearing accounts. He contended that he was unaware of Opinion No. 326. Following an audit by the OAE, he agreed to calculate the accrued interest and to make prompt restitution to his clients. The Court imposed a public reprimand, but issued a warning to the bar that, in the future, similar misconduct would be met with harsher discipline. See also In re Pressler, 132 N.J. 155 (1993) and In re Sorensen, supra, 122 N.J. 589 (1991).

Goldstein was decided by the Court on July 11, 1989. The majority of respondent's misconduct in this regard occurred after that date. Respondent should, therefore, be subject to discipline harsher than a public reprimand. Despite this fact, the disciplinary stipulation states that the OAE "feels constrained to recommend that respondent receive a PUBLIC REPRIMAND for his conduct in this matter." (original emphasis).

The Board is cognizant of the precedent set forth in Goldstein and of the OAE's recommendation. The Board, however, has taken a third factor into consideration: the extensive mitigation in this matter. As set forth in the disciplinary stipulation,

> 1. None of respondent's recordkeeping deficiencies resulted in any loss or temporary invasion of client funds.

2. Respondent has no disciplinary history.

3. Respondent voluntarily subjected himself to discipline in this matter by notifying the OAE of his misconduct.

4. Since his admission to the New Jersey bar in 1985, respondent never practiced law full time. Rather, he devotes approximately 5%-10% of his time to the practice of law, the remainder being spent on non-legal matters as a salaried employee of a reinsurance brokerage company.

5. Respondent advised that, in the reinsurance industry, it is common practice for a broker to withdraw and keep interest earned on fiduciary funds. During the time period in question, he believed the same to be true in the practice of law.

6. Respondent contended that his misconduct was the result of inexperience. He was cooperative with disciplinary authorities during the course of this matter.

In light of these factors, particularly respondent's prompt correction of his misconduct, his admission of wrongdoing to the OAE and the minimum amount of time respondent dedicates to the practice of law, a five-member majority of the Board recommends the imposition of an admonition. Four members were of the opinion that, although respondent committed an ethics transgression, in light of the attendant circumstances in this matter, no discipline should be imposed.

The Board further recommends that respondent be required to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 1/5/1995 By: Raymond R. Trombadore

Raymond R. Trombadore
Chair
Disciplinary Review Board