

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 89-300

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IN THE MATTER OF :  
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SIXTO L. MACIAS, :  
:   
AN ATTORNEY AT LAW :  
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Decision and Recommendation  
of the  
Disciplinary Review Board

Argued: February 21, 1990

Decided: May 25, 1990

William R. Wood appeared on behalf of the Office of Attorney Ethics.

Amarilis Albuermé-Díaz appeared on behalf of respondent, who also was present.

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

This matter is before the Board based upon a presentment filed by the District VI Ethics Committee. Respondent was admitted to the New Jersey bar in 1980 and maintains a sole practice in Union City.

This disciplinary proceeding arose out of a March 1988 audit of respondent's accounts conducted by the Random Audit Program of the Office of Attorney Ethics (OAE). On April 18, 1988, respondent was notified of thirteen specific deficiencies in his accounting procedures and was asked to provide a detailed response indicating

he had corrected each deficiency. The thirteen deficiencies with the corresponding rule violations are as follows:

1. Trust and business receipts books were not maintained. [R. 1:21-6(b)(1)]
2. Trust and business disbursements books were not maintained. [R. 1:21-6(b)(1)]
3. A running cash balance was not kept in the trust account checkbook. [R. 1:21-6(c)]
4. Clients' trust ledger sheets were not fully descriptive. [R. 1:21-6(b)(2)]
5. Clients' ledger cards were found with debit balances. [R. 1:21-6(c)]
6. A schedule of clients' ledger accounts was not prepared and reconciled to the bank statement. [R.1:21-6(c)]
7. Inactive trust ledger balances remained in the trust account for an extended period of time. [R. 1:21-6(c)]
8. A separate ledger sheet was not maintained for each trust client. [R.1:21-6(b)(2)]
9. The 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(c)]
10. Old outstanding checks were still to be resolved. [R.1:21-6(c)]
11. Checks were disbursed against uncollected funds. (See Opinion No. 454 issued by the Advisory Committee on Professional Ethics).
12. Business bank account designation was improper. [R.1:21-6(a)]
13. Trust bank account designation was improper. [R. 1:21-6(a)]

Additionally, respondent was directed to complete and return a certification form indicating that his trust books were reconciled with his current bank statement (Exhibit E in evidence).

Respondent received three letters from the Office of Attorney Ethics requesting a response, but did not reply for six months. When he finally wrote a letter on October 21, 1988, the response did not provide an adequate explanation of how he corrected the thirteen deficiencies, and his certification did not explain how he reconciled his trust ledger with the bank statement. Three more letters were then sent by the OAE asking respondent to elaborate on his correction of deficiencies and to provide a list of the outstanding checks mentioned in his certification. Respondent has never replied to any of these letters.

Normally, the Office of Attorney Ethics would not prosecute technical violations of R. 1:21-6 revealed by a random audit, inasmuch as the purpose of the random audit program is educational, not punitive. In this case, however, respondent's lack of cooperation triggered the filing of an ethics complaint.

On April 26, 1989, the Office of Attorney Ethics filed a formal complaint charging respondent with violating RPC 1.15(d), for not maintaining his records in accordance with R.1:21-6, and not submitting satisfactory proof of correcting the deficiencies noted in the April 1988 random audit; RPC 8.1(b), for failing to

respond to a lawful demand for information from a disciplinary authority; and RPC 8.4(c), for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, in submitting a false certification to the Office of Attorney Ethics, as explained below. Although charged with an inaccurate reconciliation and false certification, there has been no charge of misappropriation. The complaint was amended at the time of the committee hearing to include a charge of violating R. 1:20-3(1) for not filing a formal answer to the complaint.

One of the items that the OAE requested of respondent consisted of a list of the \$10,755.26 in outstanding checks claimed on his certification. Respondent never did provide this list of checks. Subsequently, the OAE subpoenaed respondent's bank records for the period of August 1988 through December 1988 to obtain a list of these outstanding checks. An analysis of these records indicated that outstanding checks at the time of the certification amounted to only \$601.21 (Exhibit I in evidence).

Respondent testified that, instead of independently establishing the amount of outstanding checks by examining his check register and then determining which checks had been paid by the bank, he added the amounts held for clients with bank charges

(\$539.00) and then assumed the rest of the bank balance was an outstanding check balance (T124).<sup>1</sup> Respondent then signed a certification, as follows:

I certify that the statements made by me in this certification and the schedules attached thereto are true and complete to the best of my knowledge.

[Exhibit E in evidence.]

The Office of Attorney Ethics claimed that respondent signed the certification not knowing whether the facts were true or not, that he failed to independently verify the amount of outstanding checks, and that such conduct constituted intentional misrepresentation, in violation of RPC 8.4(c).

The committee found respondent's certified reconciliation displayed a thoughtless disregard for his recordkeeping responsibilities, but did not indicate either an act of fraud or execution of a certification knowing the facts to be untrue. Therefore, the committee did not find a violation of RPC 8.4(c). However, it did find violations of RPC 1.15(d) (improper recordkeeping); R 1:20-3(1) (failure to file an answer); and RPC 8.1(b) (lack of cooperation with the ethics authorities). The failure to respond to the lawful demands of the OAE, as required

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<sup>1</sup>T refers to the transcript of the hearing of the District VI Ethics Committee on June 14, 1989.

by RPC 8.1(b), was seen as particularly egregious by the committee and led to a recommendation for public discipline.<sup>2</sup>

In mitigation, the committee found that, during all pertinent times, respondent was a sole practitioner with a busy office and not enough personnel, that respondent admitted he was guilty of bad accounting practices (T120), and that, because of his lack of basic accounting skills, he feared the outcome of the Office of Attorney Ethics review and was paralyzed by that fear. Furthermore, the committee saw no specific facts that supported any allegations of dishonest conduct by respondent.

#### CONCLUSION AND RECOMMENDATION

Upon a review of the full record, the Board is satisfied that the committee's findings of unethical conduct are fully supported by clear and convincing evidence. The Board disagrees, however, with the committee's conclusion that respondent violated RPC 1.15(d).

The Board agrees with the findings of unethical conduct demonstrated by respondent's lack of cooperation with the OAE, in violation of R.P.C. 8.1(b), and by his failure to file an answer,

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<sup>2</sup>The committee considered as an aggravating factor a pending recommendation for a private reprimand (DRB 90-013). However, that matter was ultimately dismissed by the Disciplinary Review Board on February 21, 1990, and has not been considered by the Board in its recommendation.

in violation of R. 1:20-3(i). The evidence does not support, however, a finding of unethical conduct based on the technical deficiencies found in respondent's records. Even the OAE acknowledged that the technical deficiencies found during the random audit normally would not be the basis for a complaint grounded on R.P.C. 1.15(d). The Board, therefore, recommends that discipline be based entirely upon respondent's lack of cooperation.

The Board also agrees with the committee that the evidence does not support a finding that respondent's preparation of his certification was unethical. The Board finds that respondent's signing of the certification misrepresenting the status of his attorney accounts was a reckless disregard of the facts, based upon his poor accounting knowledge, rather than knowing misrepresentation, in violation of R.P.C. 8.4(c).

Respondent's lack of cooperation, however, was extensive and merits discipline. He ignored six letters and numerous phone calls from the OAE. When he finally did provide information, it was inadequate and recklessly prepared. Even after the OAE filed the complaint, respondent never filed a formal answer, in violation of R. 1:20-3(i). On May 25, 1989, respondent was notified of a June 14, 1989 committee hearing and asked to notify the committee immediately if he would be represented by counsel. Respondent did

nothing until June 12, when he hired an attorney, and then requested an adjournment, which was denied. Clearly, respondent has been uncooperative and dilatory throughout this matter.

At the Board hearing, respondent's counsel indicated that respondent had failed to answer the OAE's demands for information because he was afraid he could not provide the accounting information required. While this initial reaction of fear on the part of an attorney chosen for a random audit is understandable, it cannot be allowed to control the attorney's response to lawful demands by the ethics system. An attorney has an obligation to cooperate fully with the Office of Attorney Ethics, the ethics committee, and its proceedings. Matter of Smith, 101 N.J. 568, 572 (1986); Matter of Winberry, 101 N.J. 557, 566 (1986); In re Gavel, 22 N.J. 248, 263 (1956).

In recommending public discipline, the Board is aware that this is the first time that it does so in a case where the sole violation is lack of cooperation with the ethics system. Nonetheless, respondent's lack of cooperation with the OAE, along with his failure to file an answer, constitutes disrespect to the Supreme Court. As noted by the Court in prior matters, "[d]isrespect to an ethics committee agent constitutes disrespect to this Court, as such a committee is an arm of the Court." In re Grinchis, 75 N.J. 495, 496 (1978).



Indeed, the Court has clearly warned that the failure to file an answer to an ethics complaint would be treated in the future with appropriate severity. In re Kern, 68 N.J. 325 (1975). The Board believes that respondent's lack of cooperation warrants the imposition of public discipline. The question that remains is its severity. In mitigation, the Board took into account the fact that respondent, a busy sole practitioner, was beset by problems related to the moving of his office and the temporary lack of a secretary. The Board also considered respondent's admission of wrongdoing. "Contrition and admission of wrongdoing are mitigating factors in respondent's favor." In re Rosenthal, 90 N.J. 12, 17 (1982). Accordingly, the Board majority recommends that respondent receive a public reprimand. Two members would recommend a private reprimand. One member did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for appropriate administrative costs.

Dated: \_\_\_\_\_

5/25/90



Raymond R. Trombadore  
Chair  
Disciplinary Review Board