

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-241

IN THE MATTER OF
JERROLD D. GOLDSTEIN,
AN ATTORNEY AT LAW

Decision of the
Disciplinary Review Board

Argued: November 15, 1995

Decided: July 15, 1996

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

David Paris 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 on a recommendation for admonition filed by the District XII Ethics Committee (DEC), which the Board determined to hear pursuant to R.1:20-15(f)(4). The first count of the complaint charged respondent with negligent misappropriation of client funds and recordkeeping violations, in violation of R.1:21-6 and RPC 1.15. The second count charged respondent with making a false statement of material fact to the disciplinary authorities, in violation of RPC 8.1(a) and RPC 8.4(c).

Respondent was admitted to the New Jersey bar in 1967. During the time relevant to the within matter, he maintained an office in

Mountainside, Union County. Respondent has no history of discipline.

On May 11, 1992, respondent experienced a \$664.33 overdraft in his attorney trust account. By letter dated May 21, 1992, the Office of Attorney Ethics (OAE), requested that respondent provide an explanation for the overdraft. Despite a series of communications between respondent and the OAE, respondent was unable to give a satisfactory explanation for the overdraft. Therefore, on October 26, 1992, a demand audit of respondent's attorney books and records was conducted by G. Nicholas Hall, Investigative Auditor for the OAE. A reconciliation of respondent's trust account as of September 30, 1992, prepared by Mr. Hall, revealed a \$1,691.41 shortage in the account. Additional reconciliations by the OAE as of February 28, March 31, September 30 and December 31, 1991 also disclosed shortages in the trust account.

Respondent was unable to explain the source of the \$664.33 overdraft, but stated to Mr. Hall that he had deposited approximately \$700 of personal funds into the account to cover the overdraft. Indeed, Mr. Hall's review showed a \$718.92 deposit on May 12, 1992. However, \$318.92 of that sum was allocated to a client ledger; the remaining \$400 was not assigned to any particular client matter.

During the audit, Mr. Hall noted several additional deficiencies in respondent's attorney books and records. Respondent admitted that he had never reconciled this trust

account, which he opened in January 1991. He stated that he was unaware of his recordkeeping obligations, including quarterly account reconciliations.

The OAE sent respondent a deficiency letter, dated October 28, 1992, setting forth the inadequacies in his recordkeeping procedures and directing him to confirm to the OAE, within fourteen days, that the deficiencies had been corrected. Respondent was also directed to advise the OAE whether he agreed or disagreed with the \$1,169.41 shortage determination and instructed to submit a written and documented explanation of any adjustment. He was also directed to "immediately deposit" the funds necessary to cover the shortage and supply documentation to the OAE that the deposit had been made.

By letter dated November 18, 1992, respondent assured the OAE that he had corrected the deficiencies in his recordkeeping practices. He further assured the OAE that he had made certain corrections to his trust account records, thereby reducing the shortage in his account to \$1,041. Respondent told the OAE that he would deposit funds in his account to cover that shortage. Mr. Hall reviewed the adjustments and, based on respondent's documentation, agreed that the shortage was \$1,041.

Respondent denied that he was told in October 1992 to make an immediate deposit to cover the shortage. He stated that, when he received the October 28, 1992 letter from the OAE, he contacted Mr. Hall, who instructed him to keep working on the deficiency figure.

Respondent believed that he was not permitted to have an

overage in his trust account and was to make the deposit only when he determined the actual amount of the shortage. At that time, he was still in contact with Mr. Hall to determine that figure, which, respondent believed, Mr. Hall would need to approve. At one point during the hearing, however, respondent stated that he really did not know why he had not made the deposit. He added that he did not think that there had been a shortage, but was accepting the premise that there had been.

On December 8, 1992, Mr. Hall telephoned respondent and asked for a copy of the slip for the \$1,041 deposit. Respondent did not forward the slip. Thereafter, by letter dated January 4, 1993, respondent was requested to immediately "fax" a copy of the deposit slip to the OAE. In the interim, on December 31, 1992, the OAE was notified of a second overdraft in respondent's trust account that occurred on December 23, 1992. By letter dated January 5, 1993, the OAE requested that respondent explain the December 23, 1992 overdraft. Respondent did not comply with the requests in the OAE's letters of January 4 and 5, 1993.

On January 26, 1993, Mr. Hall telephoned respondent. During that conversation, respondent stated that he was waiting to receive his December 1992 bank statement and the check in question before forwarding an explanation for the overdraft. Respondent also stated during their conversation that he had only deposited \$500 to cover the \$1,041 trust account shortage because he did not have sufficient funds. Mr. Hall directed respondent to deposit funds to cover the remainder of the shortage, even if he needed to obtain a

bank loan. Mr. Hall did not recall respondent's reply to that instruction. Mr. Hall also requested that, by 4:00 P.M. that day, respondent "fax" proof of the \$500 deposit, together with an explanation for the December 1992 overdraft.

That day, respondent "faxed" Mr. Hall a letter, along with the client ledger card pertaining to the overdraft and a page from his trust account disbursements journal for the period November 23, 1992 through January 20, 1993. The documents showed negative balances in respondent's trust account of \$1,695.78 on November 30, 1992, prior to the overdraft, and \$1,195.78 on December 31, 1992. Respondent's letter did not explain the cause of the December overdraft.

Respondent did not forward the \$500 deposit slip Mr. Hall had requested. Respondent stated that his secretary had left for the day and that he was unable to locate the deposit slip. Respondent promised to contact Mr. Hall the next morning, but did not. Respondent testified that he did not follow up the next day and that subsequently it "slipped [his] mind." T12/14/94 84.¹ Thereafter, respondent was notified that he would be the subject of a second demand audit.

That second demand audit was held on March 2, 1993. At the audit, respondent stated that his secretary had been responsible for preparing the trust account reconciliations since the October 26, 1992 audit and that he believed that she had been preparing

¹ When asked if, after telling Mr. Hall that he had made the deposit, respondent did anything to satisfy himself that he had actually done so, respondent stated that he did not know the answer to that question.

them. Respondent, however, did not bring the reconciliations with him. At the OAE's request, respondent's secretary "faxed" a copy of the reconciliation as of November 30, 1992, the last one she had completed. That reconciliation was not in compliance with the rules. Specifically, there was no reconciliation of respondent's client ledger cards to the bank balance. (Respondent stated that he was unaware of that requirement until Mr. Hall explained it during the second audit). In addition, the audit revealed two remaining deficiencies in respondent's recordkeeping practices. Furthermore, on the day of the audit, respondent was still unable to explain the causes of the two overdrafts. (In fact, as of the date of the DEC hearing, respondent was unable to explain the shortages in his account).

With regard to the \$500 deposit, respondent believed that he had instructed his secretary to make the \$500 deposit and thought he had given her a check drawn on his business account. During the audit, however, he told Mr. Hall that he was unable to locate the deposit slip and believed that the deposit had never been made. When respondent was asked why he did not call Mr. Hall immediately with that information, he stated that it may have been because he knew that he would be seeing him soon thereafter. Respondent added that, at the time, he was involved in a large lawsuit and thought that he had given his secretary the check. He disavowed any intentions to deceive Mr. Hall.

During the second audit, Mr. Hall discovered two additional clients for whom respondent was holding funds. (Respondent

testified that, at the time of the October audit, he thought that the files had been closed and that, therefore, he did not need to produce the ledger cards). These monies, when added to the shortage revealed at the October 1992 audit and adjusted for money incorrectly attributed to the shortage, revealed that the shortage, as of the September 30, 1992 reconciliation, was \$1,879.25, not \$1,691.41, as Mr. Hall had originally believed - an increase of \$187.84.

Moreover, during the second audit, it was discovered that, beginning in December 1992, respondent had made a number of deposits totaling \$2,150 to cover the shortage in his trust account. In fact, the last deposit, \$1,000, was made on the morning of the audit. (Respondent informed Mr. Hall of the deposit during the audit). Respondent had not reported the other deposits to the OAE. He did not know why he had failed to do so. Although it is unclear, it appears that respondent did not inform Mr. Hall about the deposits because Mr. Hall had all of the bank records and presumably knew about the deposits.

It was respondent's belief that, on the day of the second audit, the account had an overage of approximately \$500. In fact, Mr. Hall calculated the overage to be 242.75.

Respondent admitted that his recordkeeping violations were as stated in Mr. Hall's report. Although recognizing that ignorance of the recordkeeping rules is not a defense to an ethics violation, respondent explained that, prior to the time that he opened his trust account, January 1991, he had not practiced law as a sole

practitioner. He had never had responsibility for recordkeeping before, had been unaware of what it entailed and has since attempted to bring his records into compliance. Respondent also testified that he has hired a bookkeeper.

* * *

The DEC determined that respondent's recordkeeping practices violated R.1:21-6 and RPC 1.15(a).

With regard to the allegation that respondent made a false statement of material fact to the OAE, the DEC determined that respondent did inform Mr. Hall that he made the \$500 deposit as a partial payment of the shortfall:

The Panel is not convinced however, by clear and convincing evidence that that statement was knowingly made to the disciplinary authorities. It is clear that the Respondent did not know or was not aware specifically of what deposits were going into his trust account or what the status of his trust account was during the period of these allegations. He made no effort to verify the presence of the deposit however, it has not been established that his representation that he had directed his secretary to make the deposit and believed it to have been made was knowingly false. Therefore, we find that that count is not sustained.

* * *

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

There is no question that respondent is guilty of recordkeeping infractions. By his own admission, respondent was unaware of his accounting obligations. Less clear, however, is respondent's alleged misrepresentation to the OAE that he brought his records into compliance and deposited funds into his account to cover the shortfall, at least in part. The DEC did not find clear and convincing evidence of a misrepresentation.

The OAE argued that the DEC's conclusion about respondent's alleged misrepresentation and its recommendation for an admonition were in error. With regard to respondent's alleged misrepresentation, the OAE pointed to respondent's statements in his November 18, 1992 letter to the OAE that he would monitor his accounts and deposit funds into his trust account to cover the shortage. The OAE also pointed to respondent's later statement that he had deposited \$500. In fact, those statements were not true. Respondent's defense, however, was that he had told his secretary to make the deposit and had not followed up on that instruction. In the opinion of the OAE, respondent's representations were false and in violation of RPC 8.1 and RPC 8.4(c), whether respondent knew they were false or whether he recklessly made the statements without having reviewed his records. The OAE urged the imposition of a reprimand.

The Board agrees with the DEC. Although there are some questions raised in this regard, the Board is not convinced by the requisite standard of clear and convincing evidence that respondent made his statements knowing that they were false. The Board also

agreed with respondent's testimony before the DEC that "[t]here would be no reason at that point to put [his] career on the line for \$500.00." T12/14/94 75.

In his testimony and in his brief, respondent set forth a number of mitigating factors: 1. he admitted his misconduct; 2. he has taken steps to rectify his recordkeeping problems; 3. he had been unaware of the recordkeeping requirements; 4. there was no financial harm to any client; 5. he has an otherwise unblemished twenty-seven years at the bar; and 6. he has been active in a number of community organizations and in service to the bar.

The Board recognized all but respondent's alleged lack of awareness of recordkeeping requirements as factors in mitigation: all attorneys are obliged to educate themselves regarding the requirements of R.1:21-6, and failure to do so cannot be considered in respondent's favor. The Board also recognized in aggravation, however, that respondent was less than diligent in making the necessary deposit to compensate for the shortage in his account. Furthermore, even if respondent believed that his secretary had made the \$500 deposit, he should have followed up and confirmed his belief.

Based on the totality of the circumstances, the Board unanimously determined to impose a reprimand. See In re Imperiale, 140 N.J. 75 (1995) (attorney reprimanded for negligent misappropriation of \$9,632 as a result of grossly deficient recordkeeping); In re Mitchell, 139 N.J. 608 (1995) (reprimand imposed for negligent misappropriation of client funds; trust

account shortages ranged from \$1,300 to \$11,000 for a period of three years); In re Zavodnick, 139 N.J. 607 (1995) (attorney received a reprimand after his trust account showed a shortage of \$6,280 and after he failed to correct previously discovered recordkeeping deficiencies).

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

Dated: 7/15/96

By: 
Lee M Hymerling
Chair
Disciplinary Review Board