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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-341

IN THE MATTER OF

MICHAEL H. KESSLER

AN ATTORNEY AT LAW

Decision

Argued: November 20, 1997

Decided: September 28, 1998

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

Respondent appeared *pro se*.

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 discipline filed by the District XII Ethics Committee ("DEC"). The seven-count complaint charged respondent with violations of: *R.*1:21-6(b)(1), (2) and (8) and *RPC* 1.15(d) (recordkeeping) (count one); Opinion 454 of the Advisory Committee on Professional Ethics, 105 *N.J.L.J.* 441 (May 15, 1980) (count two); *RPC* 1.15(a) (failure to safeguard client funds) (count three); *RPC* 1.15(a) and (d) (count four); *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and (d) (conduct prejudicial to the administration of justice) (count five); *RPC* 8.4(c) and (d) (count six); and *RPC* 1.1(a) (gross neglect) and *RPC* 1.4(a) (failure to communicate) (count seven). Respondent's answer essentially admitted the allegations of the complaint. The DEC hearing focused on respondent's testimony about his psychological problems.

Respondent was admitted to the New Jersey bar in 1969. He maintains an office in Union, Union County. On October 1, 1993 respondent was privately reprimanded for lack of diligence, failure to communicate and failure to cooperate with the DEC in connection with the preparation of a will.

As noted above, respondent admitted the allegations in each of the seven counts of the complaint, with the exception of the charge of gross neglect in the *Campolei* matter. Those allegations were as follows:

*COUNT ONE (Recordkeeping violations)*

On June 4, 1994 the DEC received a grievance alleging that respondent had failed to turn over escrowed funds to a client. As a result, respondent was the subject of a demand audit conducted by the Office of Attorney Ethics ("OAE") on September 29, 1994, October 11, 1994 and November 3, 1995. During the October 11, 1994 audit, the OAE advised respondent of the following deficiencies in his records:

1. No three-way reconciliations were prepared.
2. The deposit slips were not designated as "Attorney Trust Account" and "Attorney Business Account."
3. Some deposit slips did not contain client references.
4. No trust account receipts journal was maintained.
5. No trust account disbursements journal was maintained.
6. No business account disbursements journal was maintained.
7. No business account receipts journal was maintained.

8. No client ledger card was maintained for bank charges assessed to respondent's attorney trust account.

9. The client ledger cards did not contain running balances.

10. The checkbook did not contain running balances.

11. From the period of May 6, 1994 through December 17, 1994, respondent issued ten attorney trust account checks "to cash," totaling $2,055.

Respondent admitted his recordkeeping deficiencies. He explained that until 1992 he had never held money in his trust account and, therefore, had not maintained the required records; thereafter, as it became necessary for him to keep trust records, the new responsibilities came at a time "when [I] was not thinking clearly. . . ." Answer, exhibit HP-2 at 14.

*COUNT TWO (Drawing on Uncollected Funds)*

The September 29, 1994 audit of respondent's records revealed that respondent would often deposit clients' checks for fees into his business account, issue himself a business account check, deposit the business account check into his trust account and then issue himself a trust account check for the fees. A chart in the complaint illustrates nine occasions where respondent utilized this practice, for a total of $2,605 in fees.

Respondent admitted his misconduct in this matter and conceded that the OAE's analysis was "substantially correct." Respondent testified that he used this procedure because he was unaware of how much money was in his business account and knew that his trust account had a sufficient balance to cover his check. (The amounts respondent deposited were usually significantly in excess of the amounts drawn to himself). Respondent's answer stated that the policy of his bank was to make:

> immediately available for use to the Respondent the funds represented by checks he deposited into his account, regardless of what banks such checks were drawn on. Or, in other words, once a check was deposited **and recorded** to Respondent's Account [the bank] did not treat it as 'uncollected funds' but as funds immediately available.
> [Answer, exhibit HP-2 at 16]

Respondent testified that he took these steps on weekends to have money immediately available to himself, knowing that the checks would clear on the following Monday and no clients' funds would be invaded. In at least one instance, however, respondent utilized this procedure on a weekday.

*COUNT THREE (Negligent Misappropriation)*

On three occasions between May 21 and October 13, 1994, respondent neglected to make contemporaneous deposits to his trust account until after trust account checks that he had issued to himself for fees had cleared the bank, thereby invading other clients' funds and creating a shortage of funds in his trust account.

*COUNT FOUR (Negligent Misappropriation)*

On August 31, 1995 respondent's trust account balance was $18,759.34. However, as of that date respondent should have been holding $19,370.76 in the account. Therefore, respondent had a shortage in his trust account of $611.42. According to respondent, $200 of those funds consisted of a fee not yet withdrawn from the account.

At the November 3, 1995 audit respondent explained that, in or about mid-July 1995, the bank had mistakenly transferred $700 from his trust account to cover a shortage in his business account, thereby creating a shortage in the trust account. Respondent stated that he did not discover

the trust account shortage until sometime in October 1995. Respondent testified that he would not review his trust account bank statements for months if he did not make deposits to or withdrawals from the trust account. He claimed that, because there should have been no activity in the account from at least June to September 1995, he had not learned of the problem until mid-October 1995.

Respondent's failure to reconcile his trust account on at least a quarterly basis caused him to carry the $611.42 shortage for several months, until he deposited $1,051.36 on October 16, 1995.

*COUNT FIVE (Cunningham)*

In Spring 1992 Glenn T. Cunningham retained respondent to represent him in a bankruptcy proceeding. By the Summer of 1993 respondent held $10,196.32 in his trust account in behalf of Cunningham. Six days before respondent received the bankruptcy court's authorization to release fees to himself, he issued a trust account check to himself for a portion of his legal fees, in the amount of $935.

During the September 29 and October 11, 1994 audits, respondent admitted advancing fees to himself before receiving the court's authorization, but explained that "he needed the funds at the time of the disbursement to make ends meet."

*COUNT SIX (Grieb)*

Respondent represented Thomas Grieb in a bankruptcy proceeding. During the September 29, 1994 audit, respondent admitted that he issued trust account checks to himself as legal fees prior to his receipt of the bankruptcy court's order of approval. A review of respondent's canceled trust account checks revealed that not only did he pay himself fees before receiving the court's approval,

but in one instance he issued to himself $230 in fees even before he prepared his application for the court order. In that application respondent incorrectly stated that no fee had been paid as of that time.

According to respondent's canceled trust account checks, he issued eleven checks to himself, totaling $2,810, prior to receiving a court order for the disbursement of the fees. Respondent admitted that, since there were no objections filed to his application and he had no money coming in, he paid himself from funds held in trust on behalf of Grieb, in anticipation of the court's approval. After respondent received the court's approval, he issued to himself a trust account check for the balance of his fees.

*COUNT SEVEN (Campolei)*

Respondent represented Elenore F. Campolei in connection with a bankruptcy proceeding. On May 12, 1995 Campolei sent a letter to the court regarding respondent's failure to adequately represent her and to return her calls. Campolei complained that respondent had failed to file the necessary documents in her behalf. Therefore, she had been instructed by the court personnel to appear for a deficiency hearing on April 24, 1995. Ultimately, respondent filed the necessary documents and the deficiency proceeding was vacated. Respondent, however, failed to inform Campolei that she did not have to appear on April 24, 1995. Furthermore, as a result of respondent's failure to file Campolei's case by the deadline, her driver's license was suspended for failure to pay surcharge fees. She also had to pay a $50 license restoration fee.

On May 18, 1995 the court entered an order to show cause why respondent should not be compelled to disgorge any fees paid by Campolei. Respondent failed to reply to the order by the due

date of June 5, 1995 and failed to appear before the court on June 12, 1995. On June 14, 1995 the court directed respondent to repay $300 to Campolei within fifteen days. Respondent failed to comply with the order.[1] On September 4, 1995 the court ordered respondent to show cause on September 25, 1995 why he should not be held in contempt of court. Respondent requested an adjournment of the hearing, which was granted until October 10, 1995. Pursuant, however, to the court's September 4, 1995 order, both respondent and Campolei had to appear. The formal ethics complaint alleged that, in requesting the adjournment, respondent completed a standardized form stating that he had notified the parties of the adjournment. Respondent, however, did not so advise Campolei. As a result, Campolei unnecessarily appeared in bankruptcy court for a third time.[2] Respondent, in turn, contended in his answer that he never saw the form, which was filled out by court personnel.

Respondent admitted that he did not read the court's September 4, 1995 order carefully. He understood that, because the hearing was in response to an order to show cause, the court was his adversary. Respondent testified that it never occurred to him that Campolei was required to be present in court.

* * *

As noted above, respondent essentially admitted the allegations against him in the complaint. The emphasis of the testimony before the DEC was on respondent's psychological problems. Respondent explained that he had encountered a great deal of difficulty in being diagnosed and in

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[1]Respondent testified that he repaid Campolei as soon as he had available funds.

[2]The complaint stated that Campolei filed her own notice of automatic stay with two creditors because respondent had failed to do so. In his answer, respondent denied knowledge of those events. The DEC did not make a finding in this regard.

finding a psychiatrist. Respondent submitted into evidence a report from his treating psychiatrist, attesting to his severe clinical depression, beginning in 1991. Exhibit HP-3. Since May 1995, respondent has been treated with Prozac and has remained "free of any significant depressive symptomomatology [sic]." The psychiatrist opined that in 1992 and 1993 respondent suffered from untreated or inadequately treated major clinical depression. The psychiatrist added that,

> as is typical with major depression, his ability to function professionally as well as his judgement were seriously impaired during these periods. During these periods of depressive illness, there was no way that Mr. Kessler could have functioned adequately as an attorney, as the degree of his impairment due to his psychiatric condition was so severe.

At the DEC hearing, respondent stated that in 1996 and 1997 he did not miss any time from his employment due to depression.

* * *

The DEC determined that respondent was guilty of each of the allegations in the complaint. Accordingly, the task before the DEC was to suggest the appropriate quantum of discipline. In recommending a reprimand, the DEC pointed out that the OAE had not alleged that respondent was in flagrant or wilful noncompliance with his recordkeeping responsibilities. In addition, the DEC found that respondent had not acted with intent to defraud his clients in any of these matters. Although the DEC was mindful of respondent's psychological problems, it was troubled

> . . . by the fact that Respondent universally answered by saying that he was not thinking clearly as a result of the depression. The Panel was acutely mindful of Respondent's diagnosis and the sequelae of that illness. Yet, as pointed out by the Presenter, the machinations which Respondent was required to perform to obtain modest amounts of cash *i.e.* depositing moneys in his business account, then depositing a business account check into his Trust Account and (before it cleared) drawing a check from his Trust Account to himself required some thought process.
> [Hearing panel report at 6]

The DEC cited two cases, *In re Moras,* 131 *N.J.* 164 (1993), and *In re Liotta-Neff*,147 *N.J.* 283 (1997). In *Moras*, a six-month suspension was imposed where an attorney issued a trust account check against uncollected funds to accommodate a friend. When the attorney discovered that the friend's covering check would not be honored, he failed to stop payment on the trust account check. As a result, other clients' funds were invaded to the extent of $15,000. In *Liotta-Neff*, a reprimand was imposed where an attorney's commingling of personal and trust funds resulted in the negligent misappropriation of client funds. The attorney's psychological problems were taken into consideration as mitigation.

The DEC found this matter more analogous to *Liotta-Neff.* Mistakenly referring to respondent's unblemished record (as noted above, respondent has been privately reprimanded), the DEC recommended that he be reprimanded and that for two years he submit an annual accounting of his books and records, certified by an accountant approved by the OAE.

* * *

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.

As stated above, respondent essentially admitted, and the DEC found, that respondent was guilty of the misconduct charged in these matters. With regard to the specific counts of the complaint, most of the DEC findings were appropriate and supported by clear and convincing evidence. In *Cunningham* and *Grieb,* however, the basis for the finding of conduct prejudicial to the administration of justice is unknown. Nothing in the record compels that finding. Therefore, the Board dismissed the allegations of violations of *RPC* 8.4(d) in both of those matters.

On the other hand, the record supports a finding that respondent failed to safeguard client funds when he drew against uncollected funds in his trust account (count two) in violation of *RPC* 1.15(a). Although the complaint did not specifically charge respondent with a violation of that *RPC*, the record developed below - indeed, respondent's admission in this context - supports such a finding. Accordingly, the complaint is deemed amended to conform to the proofs. *In re Logan*, 70 *N.J.* 222 (1976).

In sum, respondent violated *R.*1:21-6(b)(1), (2) and (8) and *RPC* 1.15(d) (count one) Opinion 454 and *RPC* 1.15(a) (count two), *RPC* 1.15(a) (count three), *RPC* 1.15(a) and (d) (count four) *RPC* 8.4(c) (count five) *RPC* 8.4(c) (count six) and *RPC* 1.4(a) (count seven).

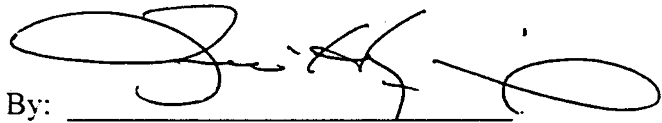
As to the quantum of discipline for respondent's violations. Respondent presents a sad picture of an individual who had severe psychological problems. Although, as noted by the presenter in four of the seven counts of the complaint (two, three, five and six) respondent's mental state cannot serve to mitigate his misconduct, the Board considered his condition as a mitigating factor in some instances. In light of the fact that respondent now appears to have his condition under control, a majority of the Board determined to refrain from suspending respondent and to impose only a reprimand. *See In re Liotta-Neff, supra*, 147 *N.J.* 283 (1997).

In addition, for two years respondent must submit to the OAE an annual accounting of his attorney records, to be certified by an accountant approved by the OAE. Furthermore, respondent

must present to the OAE a psychiatric report attesting to his fitness to practice law. The psychiatrist must be approved by the OAE. One member dissented, voting for a three-month suspension. One member did not participate.

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

Dated: 9/28/98



By: ______________________
Lee M. Hymerling
Chair
Disciplinary Review Board

*SUPREME COURT OF NEW JERSEY*

*DISCIPLINARY REVIEW BOARD*
*VOTING RECORD*

**In the Matter of Michael H. Kessler**
**Docket No. DRB 97-341**

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**Argued: November 20, 1997**

**Decided: September 28, 1998**

**Disposition: Reprimand**

| Members | Disbar | Three-Month Suspension | Reprimand | Admonition | Dismiss | Disqualified | Did not Participate |
|---|---|---|---|---|---|---|---|
| Hymerling | | | x | | | | |
| Zazzali | | | x | | | | |
| Brody | | | x | | | | |
| Cole | | x | | | | | |
| Lolla | | | x | | | | |
| Maudsley | | | x | | | | |
| Peterson | | | | | | | x |
| Schwartz | | | x | | | | |
| Thompson | | | x | | | | |
| **Total:** | | 1 | 7 | | | | 1 |

Robyn M. Hill 10/16/98

Robyn M. Hill
Chief Counsel