

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 96-408; 97-218; and 97-220

IN THE MATTER OF
EDWARD S. FODY
AN ATTORNEY AT LAW

Decision

Argued: December 18, 1996 (as to DRB 96-408)

Decided: June 29, 1998

Barry N. Shinberg appeared on behalf of the District X Ethics Committee on DRB 96-408. Respondent did not appear for oral argument on DRB 96-408, despite proper notice.

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

The matter under Docket No. DRB 96-408 was before the Board based on a recommendation for discipline filed by the District X Ethics Committee ("DEC"). The Board first considered the matter on December 18, 1996, when respondent failed to appear, despite proper notice of the proceedings. Respondent had also failed to appear at the DEC hearing below. The Board expressed concerns, first raised by the DEC, that respondent might have knowingly misappropriated client funds in that matter, although respondent was not charged

with that offense. The Board carried the matter, and reserved its decision and directed the Office of Attorney Ethics ("OAE") to conduct an audit of respondent's attorney trust and business accounts to determine the whereabouts of trust funds that had not been returned to clients. The OAE was unable to garner respondent's cooperation in the previously scheduled demand audit that prompted his temporary suspension. Accordingly, the OAE proceeded with two new complaints based on information that had already come to light in the course of its investigation. The complaints (Cohen and Amendolaro, Jr., DRB 97-218 and DRB 97-220) each alleged knowing misappropriation of client funds. Those matters proceeded on a default basis, pursuant to R: 1:20-4(f), and were reviewed on the record by the Board on September 18, 1997, along with the previously carried matter under Docket No. 96-408.

* * *

Respondent was admitted to the New Jersey bar in 1974. He maintained a law office in Boonton, New Jersey. Respondent was temporarily suspended on August 19, 1996, following his failure to cooperate with the DEC and failure to account for \$29,000 in estate funds since 1993. The suspension was continued by the Court on September 9, 1996, based on respondent's failure to appear after an Order to Show Cause was issued. On March 11, 1997 respondent was reprimanded for failure to cooperate with the DEC. Before that, on March 21, 1995, respondent was reprimanded for failure to cooperate with the DEC during

an investigation of two cases and for failure to act with diligence in one of the cases. In re Fody, 139 N.J. 432(1995).

DRB Docket No. 96-408

I - The Amendolaro, Sr. Matter

James and Mary Amendolaro, Sr., the grievants in this matter, engaged respondent to represent them in the sale of their house. The only reference to the facts of this matter is contained in the remarks of Barry N. Shinberg, the presenter at the DEC hearing:

James and Mary Amendolaro reside in Florida and have filed their grievance from Florida. I've communicated with them and they have elected not to appear for this hearing. The Amendolaros alleged that they had contacted [sic] to sell their house in New Jersey and Mr. Fody was representing them, and as a result of some problems that had arisen, that transaction did not go through. The property allegedly was sold for much less than was originally requested, and the buyer who had put up \$1,000, Mr. Shah, had requested a return of its deposit.

The respondent agreed to represent the grievants on a contingent basis in an action against the Shahs to recoup the loss suffered as a result of the distressed sale of the property, and as a result of the respondent's failure to file an answer and/or a counterclaim, a judgment was entered against the grievants for \$600. When the grievants found out about the judgment as a result of a TRW type of search, they contacted the respondent who said that he was surprised about it and that he would immediately take care of it, and the grievants alleged that he did absolutely nothing to try to either vacate a judgment or properly represent the grievant.

As a result of that allegation and as a result of the respondent's failure to cooperate, I based my factual [sic] strictly on what the grievant had said So I am not sure that there is going to be much testimony on that issue, especially since the respondent

isn't here for me to question him on [sic].

The complaint alleged violations of RPC 1.1(a) (gross neglect), RPC 1.4(a) (failure to communicate) and RPC 8.1(b) (failure to cooperate with the disciplinary authorities).

The DEC also found violations of RPC 1.1(a), RPC 1.4(a), and RPC 8.1(b). Concerned that respondent might have knowingly misappropriated the \$1,000 deposit, the DEC urged an investigation of the matter:

The panel [] finds clear and convincing evidence that respondent Fody violated the RPC's charged in Count One. We also request that the Office of Attorney Ethics determine from a review of respondent Fody's business and trust account records whether he has removed the \$1,000 deposit and, thereby, also violated additional RPC's.

II - The O'Grady Matter

Lynn O'Grady, the grievant in this case, testified that in October 1995 she sold her house to clients of respondent and that respondent was responsible for paying off the mortgage on the house with \$12,160 that he had retained at closing. In November 1995, when O'Grady's bank informed her that the mortgage had not been paid, she contacted her attorney in the transaction, James LaSala, to arrange for the payment.

LaSala testified that he first telephoned respondent about the mortgage payoff in early December 1995. Respondent told him that there was a mix-up and that the problem would be rectified. A short time later, respondent sent LaSala a copy of his December 11, 1995 letter addressed to the mortgagee-bank, with a copy of a check attached. The letter purported

to show that respondent had forwarded a trust account check to the bank to pay off the mortgage. LaSala then called the bank to confirm that it had received the check. It had not. Thereupon, LaSala called respondent, who stated that he would cancel that check and issue a follow-up check. LaSala never received a copy of a second transmittal letter or check. The bank informed him that no payment had been received.

Subsequently, in March 1996, LaSala filed an Order to Show Cause to compel respondent to pay over the funds to the bank, as the mortgage still had not been discharged. Just before the return date of the Order to Show Cause, respondent paid off the mortgage. He did not appear on the return date of the Order to Show Cause or otherwise respond to it. The court ordered respondent to pay counsel fees, which, according to LaSala, were never paid.

The complaint alleged violations of RPC 1.1(a) (gross neglect), RPC 1.4(a) (failure to communicate) and RPC 8.1(b) (failure to cooperate with the disciplinary authorities). Although the complaint did not charge respondent with a violation of RPC 1.15(a) (knowing misappropriation), the DEC noted in its report that respondent might have knowingly misappropriated O'Grady's funds and might have later replenished his trust account.

The DEC found violations of RPC 1.1(a), RPC 1.3, RPC 1.4(a) and RPC 8.1(b). In addition, the DEC expressed concern that respondent might have knowingly misappropriated the \$12,160 and might have been "stalling" the client until he could replenish his account to pay off the mortgage.

III - The Amendolaro, Jr. Matter

In 1990 respondent was retained to represent the grievant, James Amendolaro, Jr., in a personal injury matter. Respondent and Amendolaro signed a contingency fee agreement dated December 7, 1990. When the case was settled in 1995, respondent received a settlement check in the amount of \$25,000. In December 1995 he had Amendolaro sign both the check and a closing statement authorizing respondent to pay off certain medical bills, retain funds for his contingency fee and remit the balance to Amendolaro. Amendolaro testified that respondent did not pay the medical bills and did not send him his share of the settlement funds, approximately \$5,000. Amendolaro also testified that he called respondent twenty to thirty times, to no avail. The one time Amendolaro reached respondent, he was told that respondent was attempting to reduce the amount of the medical bills. According to Amendolaro, one of his medical providers obtained a judgment against him because the medical bills were not paid. That provider was owed in excess of \$4,000. There is no indication that respondent did anything to protect his client's interests in this regard. In fact, Amendolaro testified that a few days after the DEC hearing, he was due in court to contest the judgment.

The complaint alleged violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate), RPC 1.16(d) (declining or terminating representation) and RPC 8.1(b) (failure to cooperate with the disciplinary authorities).

The DEC found violations of RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.16(d) and RPC

8.1(b). Here, too, the DEC urged an investigation of whether the \$25,000 settlement proceeds had remained inviolate in respondent's trust account. The DEC was concerned that respondent might have knowingly misappropriated those funds. Finally, the DEC found a pattern of neglect, in violation of RPC 1.1(b), and recommended that respondent be disbarred.

DRB 97-218 [Default]

The Cohen Matter

On March 27, 1997 the OAE mailed a copy of the complaint to respondent by regular and certified mail to his last known office address listed in New Jersey Lawyer's Diary and Manual. The certified mail was returned as unclaimed on April 21, 1997. The regular mail envelope was not returned. When the time to file an answer expired, the OAE forwarded a second letter to respondent, on April 22, 1997, by both regular and certified mail. The letter warned respondent that, if he did not file an answer within five days, the matter would be certified directly to the Board for the imposition of discipline. Neither the certified mail nor the regular mail had been returned to the OAE by the time the matter was certified to the Board on May 27, 1997. Respondent did not file an answer to the complaint.

The complaint alleged that respondent was retained by Philip and Martha Cohen in connection with the sale of their residence. On June 17, 1996 respondent deposited into his trust account a \$12,500 down payment. On July 9, 1996 respondent deposited an additional

\$1,000, representing the second portion of the deposit.

The closing took place on July 31, 1996. Between June 18, 1996 and July 25, 1996 respondent made five disbursements from his trust account to himself and to other clients. The disbursements caused respondent to be out of trust by at least \$4,585.

After the July 31, 1996 closing, respondent deposited the net sales proceeds of \$269,164.05 into the Cohens' personal bank account, in accordance with their instructions. Respondent, however, failed to remit the \$13,500 deposit to the Cohens. The Cohens made repeated requests to respondent in person and by telephone for the return of the deposit, but respondent made a number of excuses for his failure to remit the funds.

Eventually, on December 5, 1996, respondent sent the Cohens their closing documents. Although the documents showed that a \$12,925 credit was due to the Cohens, (the \$13,500 deposit less respondent's closing fee of \$575), respondent did not deliver those funds to the Cohens.

The complaint charged respondent with violations of RPC 1.15(a) (knowing misappropriation of trust funds), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), In re Wilson, 81 N.J. 451(1979), and In re Hollendonner, 102 N.J. 21(1985).

According to the complaint, respondent should have been holding in his trust account at least \$85,249 in behalf of several clients. When respondent's trust account was frozen because of his temporary suspension, his trust account balance was only \$9,415.89,

indicating a potential shortage of \$75,833.11.

DRB 97-220 [Default]

The Amendolaro, Jr. Matter

On April 17, 1997 the OAE mailed a copy of the complaint to respondent by regular and certified mail to his last known office address listed in the New Jersey Lawyer's Diary and Manual. The certified mail receipt was returned indicating delivery on April 19, 1997. The regular mail envelope was not returned. Respondent did not file an answer. Thereafter, on May 9, 1997, the OAE sent a letter to respondent indicating that, if he did not file an answer within five days, the matter would be certified directly to the Board for the imposition of discipline. The certified mail receipt was returned as unclaimed on June 4, 1997. The regular mail envelope was not returned. Respondent did not file an answer to the complaint.

According to the complaint, respondent was retained by James P. Amendolaro, Jr. in connection with a personal injury matter. This matter stems from the Amendolaro, Jr. matter cited above. In accordance with the fee agreement dated December 7, 1990, respondent proposed to disburse the anticipated settlement of \$25,000 as follows: \$8,076.57 for respondent's fee, \$10,573.80 for the payment of medical expenses, \$525.53 for legal expenses and \$5,824.10 to the Amendolaros.

On October 6, 1995 respondent deposited the \$25,000 settlement into his trust account. From October 6, 1995 to January 1996 respondent made a number of disbursements to himself and to other clients. On February 5, 1996 respondent's trust account balance was

only \$159. He had not paid Amendolaro his share of the settlement proceeds or the medical expenses. The complaint alleged that on February 5, 1996 respondent was out of trust by at least \$16,238.90.

Amendolaro made repeated requests to respondent for his share of the settlement proceeds and the payment of his medical expenses. Respondent, however, made a number of excuses for his failure to properly disburse the funds.

The complaint charged respondent with knowing misappropriation, in violation of RPC 1.15(a), RPC 8.4(c) and In re Wilson, supra, 81 N.J. 451 (1979).

* * *

Upon a de novo review of the record, the Board was satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. In DRB 96-408, the Board found violations of RPC 1.1(a), RPC 1.3, RPC 1.4(a) and RPC 8.1(b) in both O'Grady and Amendolaro, Jr. Although the DEC found a violation of RPC 1.16(d) in Amendolaro, Jr. for respondent's failure to deliver Amendolaro's share of the settlement proceeds, RPC 1.15(b) (safekeeping property) more properly addresses this type of misconduct. The Board found that respondent violated that rule by failing to turn over Amendolaro's share of the settlement proceeds. The Board also found that respondent's conduct in the two matters constituted a pattern of neglect, in

violation of RPC 1.1(b). The Board dismissed Amendolaro, Sr. in its entirety because of the DEC's sole reliance on the "testimony" of the presenter and the lack of competent evidence to substantiate the charges in the complaint.

The Board was particularly troubled by respondent's ongoing failure to cooperate with the disciplinary authorities. The within matters came on the heels of two prior reprimands for similar refusal to cooperate in the investigation of ethics matters. In the matter under Docket No. DRB 96-408, respondent did not appear at either the DEC or the Board hearings. Undeniably, respondent's conduct in this regard was nothing short of contempt for the disciplinary process.

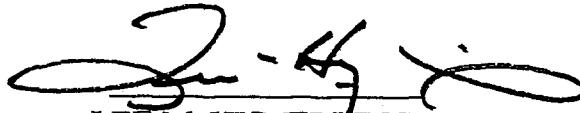
With regard to the default matters (DRB 97-218 and DRB 97-220), pursuant to R. 1:20-4(f) the allegations contained in the complaint are deemed admitted because of respondent's failure to answer the complaints. The complaints in each case contain sufficient facts to support findings of knowing misappropriation of more than \$91,000 in client funds. For respondent's conduct in these two matters (Cohen and Amendolaro, Jr.) alone respondent must be disbarred. "[M]aintenance of public confidence in this Court and in the bar as a whole requires the strictest discipline in misappropriation cases." In re Wilson, 81 N.J. 451, 461 (1979). In Wilson, supra, the Court announced the bright-line rule that knowing misappropriation of client funds will almost invariably result in disbarment. The Court placed the highest priority on the maintenance of public confidence in the Court and in the bar, such that "mitigating factors will rarely override the requirement of disbarment."

Id. at 461. Although the use of such terms as “almost invariable” and “rarely override” raised the possibility of a departure from the automatic disbarment rule, since 1979 the Wilson rule has been applied without exception. Every attorney who has been shown to have knowingly misappropriated client funds has been disbarred. The Board, therefore, unanimously determined to recommend that respondent be disbarred.

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

Dated:

6/29/98



LEE M. HYMERLING

Chair

Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Edward S. Fody
Docket Nos. DRB 96-408, DRB 97-218 & DRB 97-220

Decided: June 29, 1998

Disposition: Disbar

Members	Disbar	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:	9						

Robyn M. Hill 7/15/98
Robyn M. Hill
Chief Counsel