

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-284

IN THE MATTER OF :
: :
CATHERINE P. MITCHELL, :
: :
AN ATTORNEY AT LAW :
:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: October 19, 1994

Decided: January 5, 1995

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

Alfred E. Fontanella 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 public discipline filed by the District XI Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1972. She is also a member of the Mississippi and New York bars. She is no longer practicing in New Jersey. As of June 1992, she has been a resident of the State of North Carolina. It is her intention to apply for admission to that bar upon the resolution of this ethics matter.

At the DEC hearing, respondent amended her answer so as to admit each and every allegation of the ethics complaint, with the exception of the charge of willful violation of the recordkeeping

rules (count two), as opposed to negligent violation of said rules. The complaint also charged respondent with negligent misappropriation of trust funds (count one).

At the time relevant to these proceedings, respondent was a sole practitioner in Paterson, Passaic County.

In 1988, the Office of Attorney Ethics ("OAE") performed a random audit of respondent's attorney records for the two-year period ending on April 30, 1988. The audit revealed that respondent did not maintain her records in compliance with R. 1:21-6. Accordingly, the OAE issued a deficiency letter to respondent, dated July 26, 1988, outlining the necessary corrections to bring respondent's accounting records in compliance with the rules. By letter dated September 2, 1988, respondent represented to the OAE that the noted deficiencies had been remedied.

In early 1990, respondent's trust account records once again came to the attention of the OAE, this time as a result of an overdraft notice issued by respondent's bank. That overdraft was caused by the return of a \$4,500 personal check given to respondent by one of her clients, John McNulty, in connection with a mortgage refinancing handled by respondent in January 1990. According to respondent, on the morning of the closing, Mr. McNulty learned of the mortgage company's requirement that he pay off certain personal debts prior to closing. Mr. McNulty then handed respondent a personal check for \$4,500 to satisfy those debts. On February 12, 1990, respondent deposited the check into her trust account. She testified that, initially, she made no disbursements from the

McNulty account, with the exception of certain loan pay-offs with certified funds from the mortgage company. Instead, she waited for the \$4,500 check to clear the banking process. Several days later, when respondent telephoned the bank, she was informed that the check had cleared. She then began to make additional disbursements. On March 2, 1990, however, the bank sent respondent a notice of dishonor of the \$4,500 check because of a stale date (Exhibit OAE-4). Instead of January 1990, the check bore a January 1989 date. The return of that check caused a series of overdrafts in respondent's trust account.

Respondent did not promptly deposit funds in her trust account to cover the deficiency caused by the return of Mr. McNulty's check. As respondent testified at the DEC hearing, "...I did not have the funds. I have a child in college. It was right after Christmas. I just didn't have it." T9/10/1993 22. Respondent claimed that she had called several banks asking for a loan, unsuccessfully: "I was pretty much tapped out in terms of any sources of immediate money." T9/10/1993 64. Instead, respondent periodically deposited personal funds into the trust account to cover the shortage caused by the \$4,500 bounced check. Respondent also sent Mr. McNulty a notice that his check had been returned. Her efforts to obtain a replacement check were, however, unavailing. Respondent contacted Mr. McNulty by certified mail and in person. She also contacted his place of business, his wife and his children. Each time, despite promises of reimbursement, her efforts to collect the \$4,500 were fruitless. Ultimately, after

respondent filed a criminal complaint against Mr. McNulty, he gave her a certified check for \$4,500. Although the record is not clear when respondent deposited that check into her trust account, a schedule of the trust account shortages prepared by the OAE (Exhibit OAE-2) discloses that, on April 30, 1990, respondent's trust account had a shortfall of \$7,079.42 and that, by May 31, 1990, that shortfall had been corrected. A period of approximately three months, thus, elapsed between the return of the check and the replenishment of the trust account.

Notified by respondent's bank of her trust account overdraft, the OAE conducted another review of her attorney records. At that time, the OAE discovered that respondent's records were still not in compliance with the recordkeeping rules, notwithstanding the fact that respondent's records had been audited in 1988 and that she had certified that they were in conformance with the recordkeeping requirements.

Following that second demand audit, respondent submitted reconstructed records to the OAE by letters dated March 27, 1991 and December 1, 1991. Those submissions, however, continued to be inadequate, as set forth in the OAE's letters of November 6, 1991 and January 10, 1991 (Exhibits E and F to the complaint). For example, as noted by the OAE, the schedules of client balances did not match the trust account bank statement balance; the reconciliations indicated a debit balance with respect to a number of client accounts; and there were no reconciliations of client liabilities to the bank statement balances at any date.

On March 20 and March 30, 1992, respondent submitted to the OAE a final version of her records. That submission, too, continued to be deficient. There were no three-way reconciliations and no running balances on client ledgers; client ledger transactions were not in order by date; and the reconciliations showed uncorrected errors. In addition, it was found that respondent's trust account remained out-of-trust in the amount of \$4,263.55 as of December 31, 1991, a period of ten months after the demand audit.

Respondent's repeated failure to maintain her attorney records in compliance with R. 1:21-6 caused the OAE to charge her with wilfull failure to keep required records (count two). At the DEC hearing, however, respondent testified that she had her attorney records maintained and reconciled by accountants at all times. In fact, the record reveals that respondent successively utilized the services of at least four individual accountants. Each time that she received word from the OAE that her records were not in conformance with the rules, she would hire another accountant, only to discover that their accounting practices were also deficient. At the DEC hearing, the OAE presenter recognized respondent's demonstrated attempts to obtain professional assistance with her attorney records:

As to the failure to keep proper records count, we do, after having heard her testimony, agree with her that she did not keep improper records on purpose. We don't believe that she set out to ignore the accounting rules because she is an evil women [sic].

We charged her with with wilfull failure to keep the records properly, but I do not mean to say at this point,

having heard her testify, that she intentionally set out to violate the court rules because of an evil nature. She has explained what happened.

What happened is, she hired a series of incompetent people. However, that is not justification for what happened because she was on notice as to the correct way of keeping records. She had instructions from our office. She had a book from our office and she had actual knowledge of correct bookkeeping procedures.

What she did that was wrong -- and this is very wrong -- was due [sic] nothing to check the work of these folks. Now, she may have looked at documents that they handed her, but she didn't take the time to sit down and make sure they were the correct type of documents and they were carrying out the requirements in the rules and the panel can look at our instructions book. It's really very simplistic, what needs to be done.

[T9/10/1993 101-102]

Although the foregoing seems to suggest that the OAE withdrew the charge of willful failure to maintain records (count two) — as respondent's counsel so understood — after the Board hearing the presenter denied an agreement or commitment to withdraw that charge. See letters of October 24, November 3, November 14 and December 1, 1994.

At the DEC hearing, respondent conceded that she should bear ultimate responsibility for her deficient bookkeeping practices.

* * *

The first count of the ethics complaint charged respondent with negligent misappropriation of trust funds. That charge stemmed from the OAE's second review of respondent's trust account records, following the overdraft caused by the McNulty check. As charged in

the complaint, for a period of three years, from January 1, 1989 through December 31, 1991, respondent negligently misappropriated client funds by issuing checks in excess of the funds standing to the credit of the client in behalf of whom the check had been drawn. As a result, funds belonging to other clients were invaded. A review of Exhibit OAE-2 shows trust account shortages in twenty-nine of the thirty-six months between January 31, 1989 and December 31, 1991. Those shortages ranged from \$1,325.75 (on September 30, 1990) to \$11,762.08 (on March 31, 1990). The complaint alleged that, as of July 17, 1992, the date of the complaint, the trust account shortages had not been covered. (The record is not entirely clear on whether the shortfalls were remedied after the filing of the complaint).

Respondent conceded that her trust account showed shortages even before the return of the McNulty check. She blamed those shortages, however, on improper recordkeeping by her accountants. She claimed that, at no time, did any of her accountants inform her that her trust account was overdrawn; that she believed that, between 1989 and 1991, her trust account contained enough legal fees to cover any shortages; that no client sustained any loss, and that she encountered some problems with her bank's services, namely, that the bank erroneously deducted certain fees and charges from the trust account and that the bank mistakenly recorded a \$100,000 deposit as a \$10,000 deposit.

* * *

At the conclusion of the ethics hearings, the DEC found that respondent had negligently misappropriated client funds, in violation of RPC 1.15(a). The DEC also found that respondent had wilfully failed to maintain required records, in compliance with R. 1:21-6 and RPC 1.15(d). The DEC's finding in this regard, however, appears to be at odds with its conclusion that "[r]espondent did not pay attention to the record keeping in her trust account. Her conduct was by mistake. There was substantial negligence and she made a serious mistake."

CONCLUSION AND RECOMMENDATION

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

Respondent admitted that she negligently misappropriated trust funds and that she failed to maintain required attorney records. As noted earlier, respondent did not concede that the latter was the result of wilfull conduct. Respondent blamed it on negligence, instead. The Board agrees. Respondent demonstrated good faith and diligence by retaining accountants to oversee her attorney records. It is unquestionable, however, that that duty cannot be delegated. Accordingly, respondent must shoulder the ultimate responsibility for her accountants' mistakes.

It is also undisputed that, for a period of three years, respondent's trust account showed shortages ranging from \$1,300 to

\$11,000. Albeit the \$4,500 McNulty deficiency was caused by the return of a check that, according to respondent's bank, had already cleared the banking process, the fact remains that respondent failed to take quick action to replenish her trust account, thereby causing it to be out-of-trust for at least three months before the correction of the \$4,500 deficiency. In fact, although the McNulty problem was presumably corrected by May 31, 1990 — Exhibit OAE 2 shows no shortages for that month — there was a recurrence of those shortages beginning the following month, June 1990, through December 1991.

Discipline for inadequate recordkeeping and negligent misappropriation of clients funds has ranged from a public reprimand to a lengthy term of suspension. See In re Bate, 120 N.J. 376 (1990), and In re Goldfarb, 120 N.J. 335 (1990) (public reprimand for negligent misappropriation as a result of the attorneys' failure to collect \$8,000 at a closing of title. For a period of five months, the attorneys were unable to determine the cause of the shortage because of their failure to perform quarterly reconciliations of their trust account records for an extended period of time); In re Hennessy, 93 N.J. 324 (1983) (public reprimand for failure to account for \$3,000 given to the attorney at a closing of title. The whereabouts of the funds were not questioned until ten years later, at which time it was discovered that the attorney did not have the funds in his trust account and that his bookkeeping had been shoddy); In re James, 112 N.J. 580 (1988) (three-month suspension after the attorney relegated his

accounting and bookkeeping responsibilities to his secretary for a period of twenty-four years, culminating in considerable trust account shortages); and In re Librizzi, 117 N.J. 481 (1990) (six-month suspension for failure to reconcile trust account for a twelve-year period, resulting in a \$25,000 shortage. After the attorney discovered that a \$1,000 client check had been dishonored, he failed to return the funds to the trust account, notwithstanding the fact that the client's father ultimately repaid him in "drips and drabs." The Court labeled the attorney's bookkeeping violations as extremely serious).

Here, unlike attorneys James and Librizzi, respondent at all times sought professional assistance to reconcile and maintain her attorney records. Unfortunately, her accountants were incompetent and ignorant of the proper attorney bookkeeping procedures. Accordingly, her failure to maintain required records was not as negligent as that of the attorneys in James and Librizzi, who either abdicated that responsibility to an employee or did nothing at all to comply with the rules. Moreover, the McNulty shortage was in no way a product of respondent's negligence. Respondent could not have known that the McNulty check would be returned for a stale date. In fact, she was prudent enough to communicate with the bank prior to the disbursement of funds, at which time she was assured that the check had cleared. It is her failure to promptly replenish the trust account that is at issue. However, as respondent testified, she had no funds to deposit into the account, attempted to obtain bank loans unsuccessfully and eventually

covered all shortages that resulted from the return of the check, albeit as each one of them occurred.

Respondent's extensive involvement in civic and legal organizations, her cooperation with the DEC and the absence of disciplinary history since her bar admission in 1972 has been considered by the Board, as has the fact that respondent is no longer practicing in New Jersey, having moved permanently to North Carolina.

In light of the foregoing, the Board unanimously recommends that respondent receive a reprimand. Three members did not participate.

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
Chair
Disciplinary Review Board