IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF A MEMBER OF THE BAR OF THE SUPREME COURT OF THE STATE OF DELAWARE:	§	No. 530, 2005
	§	Board Case No. 54, 2004
JOHN E. O'BRIEN	§	

Submitted: November 4, 2005
Decided: November 22, 2005

Before **STEELE**, Chief Justice, **HOLLAND**, and **BERGER**, Justices.

ORDER

This 22nd day of November 2005, it appears to the Court that the Board on Professional Responsibility has filed its Report and Supplemental Report in this matter pursuant to Rule 9(d) of the Delaware Lawyers' Rules of Disciplinary Procedure. Neither the Respondent nor the Office of Disciplinary Counsel have filed objections to the Board's Reports. The Court has reviewed the matter pursuant to Rule 9(e) and concludes that the Board's Reports and recommendation of a public reprimand should be approved.

NOW, THEREFORE, IT IS ORDERED that the Report and Supplemental Report of the Board on Professional Responsibility filed on October 26, 2005 (copies attached) are hereby APPROVED. The matter is hereby CLOSED.

BY THE COURT:

Carolyn Berger
Justice

530, 2005

BOARD ON PROFESSIONAL RESPONSIBILITY

OF THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF A MEMBER OF THE BAR OF THE STATE OF DELAWARE	:	CONFIDENTIAL
	:	Board Case No. 54, 2004
JOHN E. O'BRIEN, Respondent.	:	

BOARD REPORT WITH RESPECT TO THE D.R.P.C. VIOLATIONS

Pending before a Panel of the Board on Professional Responsibility ("Board") is a Petition for Discipline filed on June 1, 2005 in Case No. 54, 2004 ("Petition") involving John E. O'Brien, Esquire ("Respondent"), a member of the Bar of the Supreme Court of the State of Delaware. Respondent filed an answer to the Petition on June 20, 2005.

A Panel of the Board convened on July 13, 2005. At the hearing, the Office of Disciplinary Counsel ("ODC") and the Respondent presented a Prehearing Stipulation ("Stipulation" or "Stip.") (1) containing admitted and disputed facts, and (2) admitted and disputed violations of the Delaware Lawyers Rules of Professional Conduct ("Rules" (or "DRPC").[1] Specifically, Respondent admits the allegations in Counts One and Three of the Petition. Stip. at ¶¶18-21. Respondent also admits a portion of the allegations in Count Two in that he admits that monthly reconciliations of his real estate escrow account were not performed for several months in 2001 and that his 2002 Certificate of Compliance inaccurately represented that they were. Stip. at ¶16; Tr. 6-9.[2] Respondent denies all remaining allegations.

[1] The Stipulation is attached as Exhibit A.

[2] References to "Tr." are to the transcript of the July 13, 2005 hearing.

At the July 13 hearing, the Board heard testimony from the Respondent whose testimony the Board found to be generally credible. Pursuant to the Board's request, the parties made written submissions on August 11, 2005.

FACTS[3]

The Respondent was admitted to the Bar in 1979. At all times relevant to the Petition, Respondent was engaged in the private practice of law as a solo practitioner with an office in Dover, Delaware. Stip. at ¶1.

In April 2001, Respondent's real estate paralegal, who reconciled the real estate escrow account, advised Respondent that there was an approximate $4,000 overage in that account. The paralegal believed the overage resulted from an error in the firm's computer software package. Stip. at ¶4. Respondent retained a CPA, Scott Slacum, to investigate the overage and to perform monthly reconciliations of the real estate account. At Slacum's request, Respondent forwarded all monthly bank statements to Slacum for reconciliation. In November 2001, Respondent learned that Slacum had not performed the monthly reconciliations. Stip. at ¶5. Between May and November 2001, Respondent's former part-time real estate paralegal, Michelle Mumford, embezzled approximately $94,000 from the firm's real estate account by stealing and forging Respondent's signature on the firm's escrow checks. Stip. at ¶6.[4]

After learning of the theft, Respondent retained another public accounting firm, Luff & Associates, to determine the extent of the theft and to complete the real estate escrow account reconciliations which Slacum had failed to perform. Luff recommended that the firm switch to a different software program. Luff then reconciled the real estate escrow account on a monthly basis for two years. After completing the reconciliation, Luff advised Respondent that there was

[3] The facts are drawn from the Stipulation and, where noted, Respondent's testimony.

[4] Mumford was prosecuted and convicted. Tr. 26. She was ordered to pay restitution but Respondent has only received approximately $400 from her. Tr. 26-27.

an overage of $9,297.88 in the escrow account and that the amount embezzled was $94,020.00. Stip. at ¶7.[5]

Respondent next implemented another software program upgrade as recommended by his firm's title insurance company, Old Republic. He hired a consultant, Carolyn Pearcy, to oversee the upgrade. Pearcy advised Respondent that she believed that the $9,297.88 overage was the result of yet another software issue. Stip. at ¶8. Respondent subsequently hired a new public accountant, Charles Seitz. To date, Seitz has not been able to identify the reason for the overage or to whom it belongs. Tr. 32, 59. The overage amount is currently being held pending escheat to the state.

Between November 2001 and May 2004, Respondent explored various ways to replace the funds stolen by Mumford. Respondent initially contacted the bank that had cashed the forged checks and asked it to accept responsibility. Stip. at ¶9. After several months, the bank denied responsibility because the theft had not been timely discovered. Id.; Tr. 34-35. Respondent also explored possible recoveries from his insurance coverage, including his liability and malpractice carriers. Stip. at ¶10. After several months, the carriers denied any coverage except for $2,000. Id.; Tr. 35.

In the Spring of 2003, Respondent began investigating his personal means to replace the stolen money which eventually led to the refinance of his primary residence. Stip. at ¶11; Tr. 37. Prior to December 2003, he submitted an application to refinance his home to a mortgage company, Southard Street Mortgage, which was offering an attractive interest rate. Stip. at ¶11; Tr. 57. After a six to nine month period, the mortgage company denied the loan. A re-application was made and denied. In May 2004, Respondent applied to his personal bank. Tr.

[5] Initially, Luff identified an overage of approximately $50,000. Luff, however, made several input errors and the overage was reduced to $9,297.88. Tr. 31-32.

38. In July 2004, the bank approved a mortgage which became the source of the funds used to replace the stolen funds. Tr. 36.[6]

In May 2004, Respondent was notified of an audit by the Lawyers Fund for Client Protection ("LFCP"). The audit was scheduled for June 17, 2004 but, at Respondent's request, it was rescheduled for July 8, 2004. On July 6, 2004, Respondent, through his counsel, reported to the ODC that a former part-time employee had embezzled approximately $94,000 from the real estate account between May and November 2001. Stip. at ¶13. On July 7, 2004, Respondent deposited $83,008.11 in personal funds into the real estate account completing the replacement of the stolen funds. Id. at ¶14.

On July 8, 2004, Martin Zukoff, an auditor for the LFCP conducted an audit and issued a report dated July 15, 2004. The audit revealed that between May and November 2001, a former part-time employee had stolen approximately $94,000 from the real estate escrow account. The audit also revealed that since September 2001, there had been unidentified funds of $9,297.88 in the real estate account. Id. at ¶15.

ADMITTED VIOLATIONS OF THE DRPC

As set forth in the Stipulation, Respondent has admitted violations of Rule 1.15(a) (Count One – failure to identify and safeguard client funds) and Rule 5.3 (Count Three – failure to supervise non-lawyer assistants). Respondent also admits that he violated Rule 1.15(d) by failing to have monthly reconciliations performed in 2001 (Tr. 6) and that he violated Rules 8.4(c) and (d) because his 2002 Certificate of Compliance was inaccurate with respect to his representation that monthly reconciliations had been performed in 2001. Stip. ¶16; Tr. 6-9.

[6] In addition, on December 23, 2003, Respondent deposited $11,011.89 of personal funds into the real estate escrow account to replace a portion of the stolen funds. Stip. at ¶12.

DISPUTED VIOLATIONS OF THE DRPC

Respondent disputes that the $9,297.88 overage in his real estate account violates Rule 1.15(d). He also denies that he made inaccurate representations with respect to the overage and the stolen funds in his 2002, 2003 and 2004 Certificates of Compliance in violation of Rule 8.4(c) and Rule 8.4(d). Specifically, he denies that his answers to Items 6(c) and 6(e) on his 2002 Certificate of Compliance and his answers to Items 7(c) and 7(e) on his 2003 and 2004 Certificates of Compliance were inaccurate.

ANALYSIS OF DISPUTED VIOLATIONS

1. Did the Overage Constitute a Violation of Rule 1.15(d)?

Count Two of the Petition alleges that Respondent violated Rule 1.15(d) by failing to maintain his books and records from May 2001 through July 2004 which resulted in an overage of $9,297.88. Rule 1.15(d) requires a lawyer engaged in the private practice of law to maintain financial books and records on a current basis which conform to ten specific subparagraphs set forth in the Rule. With respect to fiduciary accounts, Rule 1.15(d)(9)(D) requires:

> The reconciled total cash balance must agree with the total of the client or third party balance listing. There shall be no unidentified client or third party funds. The bank reconciliation for a fiduciary account is not complete unless there is agreement with the total of client or third party accounts.

The Board concludes that the overage in the real estate account violated Rule 1.15(d)(9)(D). Respondent could not reconcile the cash balance in the account to agree with the total of client and third party balance listing. Moreover, the overage constituted "unidentified client or third party funds." If, as Respondent testified, they cannot be traced to a client, then they must be third party funds.

The Board's conclusion is supported by In Re Doughty, 832 A.2d 724 (Del. 2003). In Doughty, the attorney's account contained excess or "imprest" funds that did not belong to any

client. An audit revealed monthly variances which "appeared to be greater than the total balance of client funds." Id. at 726. The Board found that Doughty violated Rule 1.15(b) and (d). While the opinion does not expressly analyze whether the "imprest" funds constituted unidentified third party funds under Rule 1.15(d), it is reasonable to assume that they did because the opinion makes clear that they did not belong to any clients and Doughty denied that they were his.

2. **Did Respondent Violate Rules 8.4(c) and (d)?**

Counts Four and Five of the Petition allege violations of Rules 8.4(c) and (d) with respect to Respondent's 2002-2004 Certificates of Compliance. Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Rule 8.4(d) provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." The issue before the Board is whether Respondent's answers to Items 6(c) and 6(e) on his 2002 Certificate of Compliance and Items 7(c) and 7(e) on his 2003 and 2004 Certificates of Compliance were inaccurate.

Item 6(c) on the 2002 Certificate of Compliance (and its renumbered counterpart, Item 7(c) on the 2003 and 2004 Certificates of Compliance) states as follows:

> If, through error, any funds disbursed for a client have been in excess of funds received from that client, resulting in a negative client balance, a timely transfer was made from the operating or business account to cover the excess disbursement. **NOTE**: IF THERE WERE NO NEGATIVE BALANCES, ANSWER "N/A."

Respondent answered "N/A" to Items 6(c) and 7(b) on his 2002-2004 Certificates of Compliance.

Item 6(e) on the 2002 Certificate (and its renumbered counterpart, Item 7(e)) state as follows:

> There are no unidentified client funds.

Respondent answered "yes" to Items 6(e) and 7(e).

Respondent testified that he answered "N/A" to Items 6(c) and 7(c) because he did not believe that the internal theft from the escrow account constituted an "error" and that there were no negative balances with respect to any client as a result of erroneous overdrafts. Tr. 40-41. As he further explained, "It's just an overall theft of monies that were in the account at that time, not particularly belonging to any client." Tr. 42. No client account showed a negative balance because the "float" from ongoing deposits into the real estate account offset the $94,000 deficit. Tr. 58, 64. Respondent's accountant had, however, established a separate "Mumford" account which noted a $94,000 negative balance. Tr. 44.

The parties have not provided the Board with any authority on whether Items 6(c) and 7(c) are intended to apply to stolen funds. Read literally, the item asks the attorney if through "error" funds were disbursed for a client in excess of funds received from that client resulting in a negative client balance and, if so, whether a timely transfer of funds was made to cover the excess disbursement. In general, the word "error" connotes a "mistake," Guarino v. Celebreeze, 336 F.2d 336, 339 (3rd Cir. 1964); see also *Webster's Unabridged Dictionary* (2nd Ed.) at p. 621 (defining error in this context as meaning "something incorrectly done through ignorance or carelessness, an inaccuracy; an oversight; falsity.") Given the language used in the Certificate, the Board concludes that Respondent did not incorrectly answer Items 6(c) and 7(c). There was not an erroneous or mistaken disbursement of client funds which is what the question asked. While the better practice would have been to disclose the negative balance resulting from the

theft of funds (and immediately replace such funds), under the circumstances, the ODC has not proved the violations alleged.[7]

Likewise, Respondent's answers to Items 6(e) and 7(e) were not inaccurate. The evidence shows that in 2001-2004, Respondent had an overage in his real estate account. Respondent was working to identify the source of the overage (which ultimately turned out to be $9,297.88). During this period, no clients made claims. There is no evidence that the unidentified overage belonged to a client as opposed to a third party. Although Mr. Zukoff's report (Petition Ex. 1 at p. 2) states that there were "unidentified client funds from 2001", the report does not explain if the funds were client funds or third party funds. Absent evidence that the funds belonged to a client, it is equally likely they belonged to a third party. Items 6(e) and 7(e), however, only asked if there were "unidentified client funds." It did not ask if there were "unidentified client or third party funds". Accordingly, the Board concludes that Respondent did not inaccurately answer items 6(e) and 7(e).

Date: 8/30/05 Betty Pease Krahmer

Date: 8-25-05 David J. Ferry, Jr.

Date: 8/26-05 Elizabeth M. McGeever

[7] The Board notes that 2005 Certificate of Compliance has been changed. The pertinent question (Item 8) now reads:

> "With respect to the client subsidiary ledger of the attorney trust/escrow account(s), negative balances did not exist OR if a negative balance did exist for any client, then a timely transfer was made from the operating or business account to cover the negative balance."

& MTS RJH CBJ BJ HDR 580, 2005
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BOARD ON PROFESSIONAL RESPONSIBILITY

OF THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF A MEMBER OF THE BAR OF THE STATE OF DELAWARE	:	CONFIDENTIAL
	:	Board Case No. 54, 2004
JOHN E. O'BRIEN, Respondent.	:	

SUPPLEMENTAL REPORT ON SANCTIONS

A. Introduction

On September 14, 2005, a panel of the Board of Professional Responsibility ("Board") filed its report addressing various admitted and disputed violations of the Delaware Lawyer Rules of Professional Conduct ("Rules"). On September 21, 2005, the Board heard additional testimony from Respondent and oral argument on sanctions. Relying on In re Bailey, 821 A.2d 851 (Del. 2003), the Office of Disciplinary Counsel ("ODC") recommends that Respondent be suspended for six months and one day. Respondent argues that a private admonition is appropriate relying on several cases in which a private admonition and/or probation was imposed for books and records violations and inaccurate Certificates of Compliance. Respondent also relies on In re Benson, 774 A.2d 258 (Del. 2001), which involved a public reprimand but argues that mitigating factors exist to lessen the sanction imposed here from a public reprimand to a private admonition. As explained below, the Board recommends that Respondent be publicly reprimanded. The Board also addresses in this supplemental report a procedural issue concerning ODC's request to amend the Petition.

B. Request to Amend Petition

At the end of the July 13, 2005 hearing to address the Rules' violations and at the September 21, 2005 hearing on sanctions, an issue arose as to whether the Respondent's delay in

replacing the stolen funds during the period from November 2001 to July 2004 constituted an additional violation of Rule 1.15(a). July 13, 2005 Tr. at 85-88 and 103; Sept. 21, 2005 Tr. at 62-63. After the September 21, 2005 hearing, the parties made several written submissions, which are attached hereto as Exhibits A through D. Respondent argued that Count One of the Petition did not specifically allege a Rule 1.15(a) violation with respect to Respondent's alleged failure to safeguard client funds during the period from November 2001 until July 2004. ODC argued in response that the Petition could be amended to conform to the evidence (Exhibit A hereto). After Respondent objected on the grounds that ODC never formally moved to amend the Petition and that an amendment after the hearing would prejudice Respondent (Exhibit B hereto), ODC filed a written request pursuant to Rule 15(b) of the Delaware Lawyers Rules of Disciplinary Procedure ("DLRDP") seeking to add a new Count Six to the Petition (Exhibit C hereto). Respondent objects to the request on procedural and substantive grounds (Exhibit D hereto). Among other things, Respondent claims that he will be prejudiced by the amendment because he entered into the Prehearing Stipulation and proceeded to the July 13, 2005 hearing on the basis of the allegations in the Petition. Respondent also claims prejudice because he released a witness at the July 13, 2005 hearing who would have testified to Respondent's efforts post-theft to protect his clients. ODC responds by saying that the release of a witness who would have testified to post theft remedial efforts cannot be prejudicial because such testimony is irrelevant to proposed Count Six. ODC does not address Respondent's other claim of prejudice

The Board agrees that the amendment to include Count Six should not be permitted. Respondent entered into the Prehearing Stipulation and proceeded to the July 13, 2005 hearing on the basis of the allegations in the Petition. Under DLRDP 9(d)(1), the petition was supposed

to inform the Respondent clearly and specifically of his alleged misconduct. While the inclusion of proposed Count Six in the Petition may not have altered Respondent's defense, the Board has no way of determining that with any degree of certainty. Accordingly, in the exercise of its discretion, the Board denies ODC's request to amend the Petition.[1]

C. The Board's Recommendation of a Public Reprimand

In reaching its recommendation of a public reprimand, the Board considered the ABA Standards for Imposing Lawyer Sanctions ("ABA Standards") and the factors considered under the Standards. Specifically, the Board reviewed the ethical duties violated (duty to client, the public, legal system or the profession), the Respondent's mental state (intentional, knowing or negligent), and the extent of actual or potential injury caused by the misconduct.

The Board concludes that the ethical duties violated included duties to clients and the legal system. The Board also concludes that Respondent's mental state was negligent at times and knowing at times. Respondent was negligent in his supervision of the employee who stole funds from his client escrow account. Respondent was also negligent during the period from May 2001 to November 2001 when he did not realize that the accountant to whom the bank account statements were being sent, Scott Slacum, CPA, was not performing monthly reconciliations of Respondent's escrow account. By the time he filed his 2002-2004 Certificates of Compliance, however, Respondent was aware that monthly reconciliations had not been performed in 2001 and his representation to the contrary was knowing.

In terms of injury, the Board concludes that there was no actual injury to any client. Respondent's conduct, however, certainly created the potential for client injury.

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[1] The Board notes that even if it did allow the amendment and even if it did find an additional Rule 1.15(a) violation, such violation would not change the recommended sanction. The Board also notes that it has taken into account Respondent's delay in replacing the stolen funds and considers it to be an aggravating factor.

The Board has considered aggravating and mitigating circumstances. The Board finds the following aggravating factors:

1. Respondent has engaged in a pattern of misconduct involving violations of several Rules including failure to safeguard client property, failure to supervise a non-lawyer assistant, and filing inaccurate Certificates of Compliance with the Supreme Court (ABA Standard §9.22(c));
2. Respondent's misconduct consists of multiple offenses (ABA Standard §9.22(d));
3. Respondent has substantial experience in the practice of law, having been admitted to the Delaware Bar in 1979 (ABA Standard §9.22(i));
4. Respondent has a prior disciplinary record (ABA Standard §9.32(a)). The Board, however, gives this factor very little weight. The prior disciplinary matter was a public reprimand in 1989 for a tax withholding issue involving Respondent's previous law firm. Sept. 21, 2005 Tr. 11-12. This public reprimand is remote time-wise and involves conduct different from the conduct at issue in this proceeding.
5. Respondent did not promptly replace the stolen funds after discovering the theft.

The Board finds the following mitigating factors exist:

1. Respondent has exhibited remorse and has recognized the wrongfulness of his conduct, as evidenced by his admissions to several of the allegations in the Petition, his testimony and his willingness to pay the costs of this proceeding and the LFCP audits of his firm (ABA Standard §9.32(l));
2. Respondent has cooperated with the ODC (ABA Standard §9.32(e));

3. Respondent has engaged in substantial remedial efforts to correct his misconduct including retaining outside accountants and obtaining additional computer software, and incurred approximately $42,000 in accounting fees (ABA Standard §9.32(d)); see also Bailey, 821 A.2d at 866.

The ODC recommends a sanction of a six month and one day suspension relying on Bailey. Bailey involved rule violations and conduct not present here. Bailey was the managing partner of a firm which, among other things, failed timely to file and pay various federal and state taxes. 821 A.2d at 854-55. Bailey himself was personally delinquent in paying his federal income taxes. Id. at 855. His firm's operating account was in a repeated overdraft situation for an extended period of time. Id. at 864. Moreover, Bailey knowingly invaded his firm's client escrow funds to pay a personal debt. Id. at 861-64. The Bailey court relied on In re Figliola, 652 A.2d 1071 (Del. 1995), where the attorney had knowingly misappropriated firm and client funds. Id. at 1077. While suspension is appropriate in cases of knowing misappropriation of client funds (id.), here no such misappropriation exists.

The Board has also considered ABA Standard 4.12, cited in Bailey, which provides "suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." Even if suspension would otherwise be appropriate under that Standard, the Board believes that the mitigating factors discussed above and the lack of actual client injury warrant a lesser sanction of a public reprimand.

The Board rejects Respondent's request for imposition of a private reprimand. Such a sanction is not consistent with prior precedent. In Benson, the Court imposed a public reprimand for an attorney who failed to maintain her law practice books and records in accordance with

Rule 1.15, failed to timely file and pay various federal and state taxes and filed inaccurate Certificates of Compliance. Respondent argues that the Supreme Court and the Board have been willing to lessen the public reprimand sanction in cases which do not involve tax issues or where the attorney is not directly responsible for maintenance of the firm's books and records. Here, Respondent was directly responsible for his firm's books and records. While no tax issues are present, this case does involve an additional factor not present in the private admonition cases on which Respondent relies. Respondent did not promptly replace the funds that were stolen from his client escrow account even though it appears that he had the ability to do so by, for example, seeking to refinance his home at an earlier point in time or using other property he owned as collateral for a loan.

In addition, the Board believes that a public reprimand, and not a private admonition, will more appropriately further the objectives of the disciplinary system by protecting the public and the administration of justice, preserving confidence in the legal profession and deterring other attorneys from similar misconduct.

Date: _____ Betty Pease Krahmer

Date: 10-19-05 David J. Ferry, Jr.

Date: 10/19/05 Elizabeth M. McGeever, Chair