<u>Matter of Bailey, Jr.</u>
Del. Supr. No. 334, 2002 (5/2/03)
Board Case No. 50, 2000

<u>Disciplinary Rules Involved:</u> DLRPC 1.15(a), 1.15.(b), 1.15(d), 5.3, 8.4(c), 8.4(d)

<u>Sanctions Imposed:</u> Six-Month and One-Day Suspension

The Supreme Court of Delaware ("Court"), following an *en banc* hearing, accepted the Report and Recommendation for Sanctions of the Board on Professional Responsibility ("Board") and, by Order dated May 2, 2003, suspended James F. Bailey, Jr., Esquire from the practice of law in Delaware for a period of six months and one day. This suspension becomes effective on June 1, 2003.

Mr. Bailey was admitted to the Bar of the Supreme Court of Delaware in 1975. He is the managing partner of the law firm of Bailey & Wetzel, P.A. in Wilmington, Delaware. As managing partner, Mr. Bailey is responsible for the maintenance of the firm's books and records and is responsible to ensure that the firm is timely filing and paying all employee payroll taxes and corporate taxes. Furthermore, Mr. Bailey is responsible for supervising any employees to whom these tasks might be delegated. Mr. Bailey testified at the Board hearings that he had no personal knowledge of the non-compliant state of his books and records until after an audit was performed by the auditor for the Lawyers' Fund for Client Protection in November 2000.

The sanction of a six-month and one-day suspension was imposed upon Mr. Bailey by the Court based on his ethical misconduct in violation of numerous books and recordkeeping Rules of the Delaware Lawyers' Rules of Professional Conduct ("Rules"). The Court held that "the managing partner of a law firm has enhanced duties, vis-a-vis other lawyers and employees of the firm, to ensure the firm's compliance with its recordkeeping and tax obligations under the Delaware Lawyers' Rules of Professional Conduct." Furthermore, the Court held that the managing partner must "discharge those responsibilities faithfully and with the utmost diligence." The Court found that Mr. Bailey knowingly failed to discharge his responsibilities as managing partner of his law firm in this regard.

The bookkeeping violations included (1) failure to reconcile the escrow account for a one-year period; (2) the escrow account held more than the $500.00 of firm funds allowed under the Rules; (3) overdraft balances in an inactive escrow account for approximately one year; (4) discrepancies in the escrow account from January through June 1999 whereby checks totaling $27,800.00 were withdrawn from that account and deposited into the firm operating account, and non-existent "deposits in transit" were noted on the escrow account books to reconcile the account balances; (5) failure to reconcile the operating account for approximately one year; (6) overdraft balances in the operating account every month from September 1998 through March 2000 and from September 2000 through January 2001; (7) failure to timely file and pay federal, state, and city payroll taxes for approximately one year; (8) failure to timely file and pay the firm's corporate taxes for three years; (9) failure to timely file and pay Delaware gross receipts taxes for two quarters in 2000; (10) Mr. Bailey's failure to timely pay his total individual income tax obligations for calendar years 1998 through 2000; and (11) Mr. Bailey's false certification to the Supreme Court that he was in compliance with his tax and/or recordkeeping obligations for four years.

The Board determined, and the Court affirmed, that Mr. Bailey knowingly caused the invasion of client trust funds by directing the extraordinary expenditure of firm funds to satisfy a personal debt. The Board found that Mr. Bailey knew, or should have known, that the firm did not have the ability to assume this expenditure given the constant overdraft status of the operating account. The Court additionally held that if Mr. Bailey, as the managing partner of his firm and the partner responsible for the maintenance of the firm's books and records, had been carrying out his responsibilities with the diligence required, the invasion of trust funds would not have occurred or could have been rectified in a more timely manner.

The Court held that, given the fact that there was an invasion of client trust funds, this case required a more severe sanction than those previously decided cases in which there were merely books and recordkeeping and tax violations. The Court held that Mr. Bailey's position as manager of the firm required that he diligently supervise his employees in their duties. The Court further held that Mr. Bailey's conduct over the period of time in question reflected a "sustained and systematic failure" on his part to ensure that the firm was in compliance with its financial recordkeeping and tax obligations. Finally, the Court held that this prolonged period of non-supervision could not be characterized as negligence but knowing misconduct on the part of the managing partner of the firm, Mr. Bailey.

The Court held that although no clients were harmed, serious client injury could have resulted. The Court found that Mr. Bailey's substantial experience in the practice of law and his pattern of misconduct constituted aggravating factors in the case. The Court held that Mr. Bailey's lack of a prior disciplinary record; his extensive remedial measures (hiring an outside accountant to review his books and records and to perform payroll and individual tax filings); his cooperation with the disciplinary process; the imposition of other penalties (penalties and interest of the taxing authorities and the cost of remedial measures); and his remorse for his misconduct operated as mitigating factors in this matter. In determining the appropriate sanction in this matter, the Court found that Mr. Bailey's knowing and systematic disregard of his obligations as managing partner, which resulted in the books and records and tax violations and the invasion of client trust funds, warranted a six-month and one day suspension.