IN THE SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of a Member of the Bar of the Supreme Court of Delaware	§ § §	No. 127, 2009
RAYMOND J. OTLOWSKI, Respondent.	§ §	

Submitted: April 2, 2009
Decided June 23, 2009

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

ORDER

This 23rd day of June 2009, it appears to the Court that the Board on Professional Responsibility has filed a Report on this matter pursuant to Rule 9(d) of the Rules of the Delaware Lawyers' Rules of Disciplinary Procedure. Neither the Respondent nor the Office of Disciplinary Counsel has filed objections to the Board's Report. The Court has reviewed the matter pursuant to Rule 9(e) of the Rules of the Delaware Lawyers' Rules of Disciplinary Procedure and concludes the Board's Report should be approved.

NOW, THEREFORE, IT IS ORDERED that the Report filed by the Board on Professional Responsibility on March 11, 2009, (copy attached) is hereby **APPROVED**.

The Court hereby imposes a public reprimand. The Office of Disciplinary Counsel is directed to file within ten days of the date of this Order the costs of the disciplinary proceedings. Thereafter, the Respondent is directed to have all costs paid within thirty days.

The matter is hereby **CLOSED**.

BY THE COURT:

/s/ Randy J. Holland
JUSTICE

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March 11, 2009

Mr. Stephen D. Taylor
Court Administrator
Delaware Supreme Court
Carvel State Office Building
820 N. French Street, 11th Floor
Wilmington, DE 19801

Re: Board on Professional Responsibility of the Supreme Court of Delaware -- In the Matter of a Member of the Bar of the Supreme Court of Delaware - Raymond J. Otlowski, Respondent, Board Case No. 2008-0119-B

Dear Steve:

Enclosed is the original signed Board Report and Recommendation of Sanction dated March 9, 2009. Copies are being provided to Patricia Bartley Schwartz, Esquire of the Office of Disciplinary Counsel, Charles Slanina,Esquire, counsel for Respondent, Karen L. Valihura, Esquire, Chair of the Board on Professional Responsibility, and the other two panel members.

Sincerely,

Richard A. Levine

RAL:pl
Enclosure

cc: Patricia Bartley Schwartz, Esquire (w/enclosure)
Charles Slanina, Esquire (w/enclosure)
Karen L. Valihura, Esquire (w/enclosure)
Kathleen Furey McDonough, Esquire (w/enclosure)
Dr. Adele Ashley-Axon (w/enclosure)

BOARD ON PROFESSIONAL RESPONSIBILITY
OF THE SUPREME COURT OF DELAWARE

IN THE MATTER OF A MEMBER	)	**CONFIDENTIAL**
OF THE BAR OF THE SUPREME COURT	)	
OF DELAWARE,	)	**BOARD CASE NO. 2008-0119-B**
RAYMOND J. OTLOWSKI,	)	
RESPONDENT	)	

BOARD REPORT AND RECOMMENDATION OF SANCTION

I. Procedural Background

Pending before a panel of the Board on Professional Responsibility (the "Board) is a Petition for Discipline filed by the Office of Disciplinary Counsel (the "ODC") on January 7, 2009 in Case No. 2008-0119-B (the "Petition") against Raymond J. Otlowski, Esquire ("Respondent"), a member of the Bar of the Supreme Court of the State of Delaware.

Respondent, through his counsel, Charles Slanina, Esquire, filed a Response to the Petition on January 27, 2009 (the "Response") in which Respondent admitted each and every one of the factual allegations and legal conclusions related to the violation alleged in the Petition, although the Answer alleged additional facts by way of "further answer" relating to certain of the allegations of the Petition.

The Board convened a hearing (the "Hearing") by the panel on February 11, 2009.[1] Action by the panel constitutes action by the Board. (Rule 2(c), Disc. Proc. Rules)

At the hearing the panel received into evidence as ODC Exhibit 1 the audit report of Respondent's law practice books and records dated November 7, 2007 conducted by McBride Shopa & Company, P.A. on behalf of the Lawyers' Fund for Client Protection of the Bar of Delaware (the "LFCP"). The panel also heard testimony from Respondent and testimony on

[1] The transcript of the February 11, 2009 hearing is cited herein as "Tr. at ___."

Respondent's behalf from Charles F. Seitz, a certified public accountant. The Board also received a proffer of testimony on Respondent's behalf from Philip M. Finestrauss, Esquire and Leo John Ramunno, Esquire, both members of the Delaware Bar.

II. Factual Findings

Because Respondent's Response had admitted the facts and violations alleged in the Petition, counsel for the ODC, Respondent, and the panel treated the hearing as relating to sanctions (Tr. at 5-6), although the panel did receive testimony from Respondent and Mr. Seitz relating to factual circumstances surrounding the violations. Based on the factual allegations of the Petition admitted by the Respondent and the credible uncontroverted testimony received at the hearing from Respondent and Mr. Seitz, the Board makes the factual findings which follow.

1. The Respondent is a member of the Bar of the Supreme Court of Delaware. He was admitted to the Bar in 1974. At all times relevant to the Petition, the Respondent was engaged in the private practice of law as a solo practitioner in Newark, Delaware where he has practiced as a solo practitioner since 1980. (Petition and Response ¶ 1; Tr. at 14)

2. A random compliance audit of Respondent's financial books and records was conducted at Respondent's law offices in June of 2007 by the auditor for the LFCP. (Petition and Response ¶ 3; Tr. at 6)

3. On November 7, 2007, Mr. Francis J. Jones, Chair of the LFCP, provided the ODC with a report (the "Audit Report") concerning the June, 2007 compliance audit. A copy of the Audit Report was admitted without objection at the hearing as ODC Exhibit 1. (Petition and Response ¶ 3; Tr. at 4)

4. The Audit Report revealed the Respondent failed to properly maintain his law practice books and records as follows:

- The reconciled escrow bank balance did not agree with the subsidiary listing of client balances. As of May 31, 2007, the difference was $3,296.68;

- There were several negative client balances listed on the client subsidiary ledger. As of May 31, 2007, there were three negative account balances totaling $382.00; and

- There were a large number of outstanding checks on the attorney escrow account reconciliation that were over six months old. The amount of the outstanding checks as of May 31, 2007, was $194,695.18. (Petition and Response ¶ 4)

5. By letter dated December 4, 2007, Respondent, through counsel, advised the ODC that he was now involved in all aspects of his firm's books and records where in the past he had relied on his staff, which included his own daughter, for the required recordkeeping functions. (Petition and Response ¶ 5)

6. By letter dated February 1, 2008, Respondent, through counsel, reported he had made substantial progress toward resolving the deficiencies noted in the Audit Report. (Petition and Response ¶ 6)

7. By letter dated April 22, 2008, the Respondent, through counsel, reported there were only twenty-five outstanding checks with a balance of $15,058.16, and those were actively being researched. (Petition and Response ¶ 7)

8. By letter dated May 19, 2008, the Respondent, through counsel, reported that Charles Seitz, CPA, was scheduled to perform a review of the Respondent's books and records on May 24, 2008, to confirm the Respondent's progress in clearing the outstanding

checks as well as ongoing successful monthly reconciliation of the firm's accounts. (Petition and Response ¶ 8)

9. By letter dated June 19, 2008, the Respondent, through counsel, reported the Respondent had discovered his firm had been the victim of internal theft of approximately $162,000 from the Respondent's escrow account. The Respondent concluded based on information discovered by Mr. Seitz the thefts had been perpetrated by the Respondent's daughter who was employed by the firm. The Respondent had assigned his daughter the task of resolving the $194,695.18 in outstanding checks in the attorney escrow account. (Petition and Response ¶ 9; Tr. at 18) Prior to the discovery Respondent had trusted his daughter. (Tr. at 22)

10. Following the discovery that his daughter had embezzled funds from his escrow account, Respondent went to his bank and filed affidavits of forgery. (Tr. at 18) Respondent also consulted with Mr. Seitz and Mr. Slanina, closed the account, opened a new escrow account, notified the ODC of the theft and notified the police. (Tr. at 18)

11. Respondent subsequently caused his financial books and records to be reconstructed to detail all thefts. (Tr. at 36) Respondent subsequently borrowed $337,000.00 by mortgaging his house and at the suggestion of Mr. Seitz, deposited $246,000.00 into his escrow account to cover the funds apparently stolen by his daughter. (Tr. at 24, 25)

12. Respondent has subsequently caused checks to be issued to all victims of the theft from his escrow account (Tr. at 25, 38) and the accounts are now in compliance (Tr. at 38)

13. On October 8, 2008, the LFCP auditor performed another audit. As of that date, the amount of money that had been stolen by Respondent's daughter from the escrow account was $213,069.41. (Petition and Response ¶ 10)

14. Prior to the June, 2007 audit report, Respondent had brought his financial books and records to Charles Seitz, a certified public accountant for review (Tr. at 5, 34) but Mr. Seitz had advised Respondent that Mr. Seitz would be unable to review them at that time. (Tr. at 16)

III. Standard of Proof

Allegations of professional misconduct set forth in the ODC's Petition must be established by clear and convincing evidence. (Rule 15, Disc. Proc. Rules)

IV. Violations of the Rules

The Petition alleges and the Response admits six counts alleging violations of six separate rules of the Delaware Lawyers' Rules of Professional Conduct as follows.

COUNT ONE: RESPONDENT FAILED TO IDENTIFY AND SAFEGUARD CLIENT FUNDS IN VIOLATION OF RULE 1.15(a)

Rule 1.15(a) requires that a lawyer holding the property of clients or third persons shall identify and appropriately safeguard such property, and shall maintain complete records of such property for a period of five years after the completion of the events that they record. By failing to safeguard client funds, which resulted in the theft of approximately $213,069.41 from the Respondent's escrow account, the Respondent violated Rule 1.15(a). (Petition and Response ¶¶ 14 and 15)

COUNT TWO: RESPONDENT FAILED TO PROMPTLY DELIVER TO CLIENTS FUNDS IN VIOLATION OF RULE 1.15(b)

Rule 1.15(b) requires that a lawyer shall promptly deliver to a client any funds that the client is entitled to receive. By failing to promptly deliver funds to clients who they were entitled to receive, the Respondent violated Rule 1.15(b). (Petition and Response ¶¶ 16 and 17)

COUNT THREE: RESPONDENT FAILED TO MAINTAIN BOOKS AND RECORDS IN VIOLATION OF RULE 1.15(d)

Rule 1.15(d) sets forth detailed and specific requirements for the maintenance of attorneys' books and records and handling of practice-related funds. The Respondent failed to properly maintain his books and records in violation of Rule 1.15(d) in that (1) the reconciled escrowed bank balance did not agree with the subsidiary listing of client balances, (2) negative client balances were listed on the client subsidiary ledger, and (3) at the time of the audit, checks more than six months old and totaling $194,695.18 had been outstanding from the Respondent's attorney escrow account. (Petition and Response ¶¶ 18 and 19)

COUNT FOUR: RESPONDENT FAILED TO SUPERVISE NONLAWYER ASSISTANTS IN VIOLATION OF RULE 5.3

Rule 5.3 states that in employing non-lawyer assistants "a lawyer having direct supervisory authority over a non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer ... and a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by the lawyer if the lawyer ... has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." By failing to have reasonable safeguards in place which would assure an accurate accounting of his financial books and records in compliance with the Rules and by failing to supervise his employee(s) generally with respect to compliance with the Rules and specifically regarding safeguarding of escrow funds, the Respondent violated Rule 5.3. (Petition and Response ¶¶ 20 and 21)

COUNT FIVE: RESPONDENT ENGAGED IN CONDUCT INVOLVING MISREPRESENTATION IN VIOLATION OF RULE 8.4(c)

Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." By filing with the Supreme Court an Annual Registration Statement in 2007 which inaccurately reported the Respondent had a pre-certification review, the Respondent violated Rule 8.4(c). (Petition and Response ¶¶ 22 and 23)

COUNT SIX: RESPONDENT ENGAGED IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE IN VIOLATION OF RULE 8.4(d)

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 Delaware Supreme Court relies upon the representations made by attorneys in the Certificates of Compliance filed with their Annual Registration Statements each year in the administration of justice governing the practice of law in Delaware. By filing with the Supreme Court an Annual Registration Statement in 2007 which inaccurately reported the Respondent had a pre-certification review, the Respondent violated Rule 8.4(d). (Petition and Response ¶¶ 24 and 25)

V. Recommended Sanction

The ODC requested that Respondent receive a public reprimand as the only appropriate sanction in this matter. (Tr. at 41) Respondent, by his counsel, concurred with the ODC recommendation. (Tr. at 54) For the reasons which follow, the panel accepts the recommendation of the ODC and recommends that Respondent be subject to a public reprimand.

VI. Rationale for Recommended Sanction

In making its recommendation, the panel has utilized the four-part framework set forth in the ABA Standards for Imposing Lawyer Sanctions (1991 & Supp. 1992) ("ABA

Standards") as required in *In re Steiner*, 817 A.2d 793, 796 (Del. 2003). A preliminary determination of the appropriate sanction is made by assessing the first three prongs of the test: (1) the ethical duty violated; (2) the lawyer's state of mind; and (3) the actual or potential injury caused by the lawyer's misconduct. *Id.* (4) Once the preliminary determination is made, the fourth prong addresses whether an increase or decrease in the preliminarily determined sanction is justified because of the presence of mitigating or aggravating factors. *Id.*

The panel has also been mindful that the objectives of the lawyer disciplinary system in Delaware are to protect the public, to protect the administration of justice, to preserve confidence in the legal profession, and to deter other lawyers from similar misconduct.[2] The focus of the lawyer disciplinary system in Delaware is not on the lawyer but, rather, on the danger to the public that is ascertainable from the lawyer's record of professional misconduct.[3]

We turn to a discussion of the rationale for the panel's recommendation.

1. The Ethical Duties Violated. As previously recited, ODC alleged, Respondent admitted and the panel determined that the Respondent committed misconduct in violation of Professional Rules of Conduct 1.15(a) (failure to safeguard client funds), 1.15(b) (failure to promptly deliver funds to clients or third parties), 1.15(d) (failure to properly maintain financial books and records), 5.3 (failure to supervise non-lawyer), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), and 8.4(d) (engaging in conduct that is prejudicial to the administration of justice governing the practice of law in Delaware). Under the ABA Standards, this misconduct constituted violations of duties owed by Respondent to clients (Rules 1.15 and 8.4(c)), and violations of duties owed by Respondent to the legal system (Rules 5.3 and 8.4(d)). See ABA Standards 4.0, 5.0 and 6.0.

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[2] *In re: Francine R. Solomon*, No. 361 (Del. 2005), quoting *In re Bailey*, 821 A.2d 851 at 866 (Del. 2003).
[3] *In re Hull*, 767 A.2d 197, 201 (Del. 2001).

2. State of Mind. The ODC contends that Respondent's failure to maintain his financial books and records appropriately was knowing but that his conduct with respect to the other alleged violations was negligent. (Tr. at 42-44) Respondent contends that his conduct with respect to all matters alleged in the Petition was negligent. The panel has concluded that Respondent acted negligently with respect to all matters alleged in the Petition. The panel concludes that there is no clear and convincing evidence that Respondent had actual knowledge or conscious awareness of the recordkeeping deficiencies constituting violations of Rule 1.15(d) prior to the June, 2007 random audit. See definition of knowledge in ABA Standards and *In re Doughty*, 832 A.2d 724, (Del. Supr. 2003). Indeed, even prior to the audit, Respondent had sought to have his financial records reviewed by Mr. Seitz (Tr. at 15) though that review did not occur (Tr. at 35-36).

The ODC does not contend that any of Respondent's other violations are knowing and the panel agrees. Rather, it appears that Respondent was the victim of theft by a dishonest employee. While an attorney is responsible for supervising his employees to make sure such dishonest acts do not occur *In re Bailey*, 821 A.2d 851, 863-64 Del. Supr. 2003, there is no evidence that Respondent was aware of any facts that would have put him on notice of his employee's dishonesty. In fact, because the dishonest employee was the Respondent's adult daughter who had given him no prior reasons to be suspicious of her handling of financial affairs (Tr. at 17), Respondent had less reason to doubt her honesty than the honesty of an ordinary employee and it was her dishonesty that resulted in the violations of Rules 1.15(a) and 1.15(b). Respondent's failure to supervise his daughter in violation of Rule 5.3 was negligent. The panel also accepts Respondent's testimony that his filing with the Delaware Supreme Court of an Annual Registration Statement in 2007 which inaccurately reported that Respondent had a pre-

certification review in violation of Rules 8.4(c) and 8.4(d) was negligent and resulted from a misunderstanding by Respondent of the rules relating to pre-certifications and his misunderstanding of the role that Mr. Seitz had played with respect to review of his records at the time of the certification. (Tr. at 27-28)

3. Injury Caused by Respondent's Misconduct. The record demonstrates that Respondent's misconduct led to the theft of substantial funds from Respondent's client escrow account and that these thefts would have resulted in substantial loss to clients and third parties if Respondent had not made restitution.

4. Rationale for Determination of Sanction.

In the panel's view, analysis of the ethical duties violated by Respondent, Respondent's state of mind and the injury caused by Respondent's misconduct conform to ODC's recommendation of a sanction of public reprimand. The ethical duties violated direct the panel to the following factors contained in the ABA Standards: 4.1 (for violation of Rule 1.15), 4.6 and 5.1 (for violation of Rule 8.4(c)), 6.0 (for violation of Rule 8.4(d)), and 7.0 (for violation of Rule 5.3). These provisions generally reserve the sanction of disbarment for knowing or intentional misconduct or criminal behavior which has caused serious or potentially serious injury to the client or a significant or potentially significant adverse effect on the legal proceeding. Where, as in this matter, the conduct involves negligent acts with less serious or no injury, the appropriate sanction is generally public reprimand (see ABA Standards 4.13, 4.63, 5.13, 6.13 and 7.3). Of course, these general principles must be applied against the facts of each particular case, including the presence or absence of any mitigating or aggravating factors. Those facts and factors are discussed below.

A. Aggravating and Mitigating Factors.

ABA Standard 9.22 sets forth the following non-exhaustive list of aggravating factors:

(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge wrongful nature of conduct;
(h) vulnerability of victim;
(i) substantial experience in the practice of law;
(j) indifference to making restitution; and
(k) illegal conduct, including that involving the use of controlled substances.

(ABA Standard § 9.22)

The only aggravating factor relevant to this matter is Respondent's substantial experience in the practice of law. The panel concluded that this aggravating factor alone does not justify imposition of a sanction more severe than reprimand, particularly in light of the numerous mitigating factors present and discussed below.

B. Mitigating Factors.

ABA Standard 9.32 sets forth the following non-exhaustive list of factors to be considered in mitigation:

(a) absence of a prior disciplinary record;
(b) absence of a dishonest or selfish motive;
(c) personal or emotional problems;
(d) timely good faith effort to make restitution or to rectify consequences of misconduct;
(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
(f) inexperience in the practice of law;
(g) character or reputation;

(h) physical disability;
(i) mental disability or chemical dependency including alcoholism or drug abuse when:
  (1) there is medical evidence that the Respondent is affected by a chemical dependency or mental disability;
  (2) the chemical dependency or mental disability caused the misconduct;
  (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
  (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely;
(j) delay in disciplinary proceedings;
(k) imposition of other penalties or sanctions;
(l) remorse;
(m) remoteness of prior offenses.

Respondent's counsel contended to the panel that factors (a), (b), (c), (d), (e), (g), (i), (k) and (l) should be considered. The ODC did not contest this contention and the panel concurs.

C. Conclusion. The panel finds that the mitigating factors presented in this matter more than offset the single aggravating factor, namely, Respondent's substantial experience in the practice of law. In particular, the panel commends Respondent for his timely good faith efforts to make restitution and his cooperation with the ODC following his receipt of the audit and subsequent events. (Tr. at 18, 24-26) The panel also recognizes the significant financial burden assumed by Respondent (Tr. at 24) and the deep pain suffered by Respondent as a result of betrayal by his own child. Respondent has accepted responsibility for his misconduct without reservation and the panel finds his expression of remorse to be sincere (Tr. at 26-27). However, the panel finds that these mitigating factors are insufficient to avoid the sanction of public reprimand. The panel believes that a private sanction would not serve the purpose of providing notice to the legal community and the public that violations with respect to

maintenance of proper financial books and records will be dealt with severely by the Board and by the Delaware Supreme Court. See *In re Benson*, 774 A.2d 258, 262-263 (Del. Supr. 2001).

D. Precedent. Finally, the panel believes that imposition of the sanction of public reprimand in this matter is consistent with Delaware Supreme Court precedent in similar matters. Both ODC and counsel for Respondent directed the panel's attention to four prior decisions of the Delaware Supreme Court, namely, *In re O'Brien*, 888 A.2d 232 (Del. Supr. 2005) approving the Report and Supplemental Report of the Board on Professional Responsibility filed on October 26, 2005 (a copy of which is attached); *In re Froelich*, 838 A.2d 117 (Del. Supr. 2003); *In re Doughty*, supra.; and *In re Benson*, supra. Each of these cases involved violations relating to financial recordkeeping and reporting to the Delaware Supreme Court. In the most recent case, *O'Brien*, supra, the Delaware Supreme Court approved the Board's recommendation of a public reprimand for violations relating to financial recordkeeping and negligent supervision of an employee who stole money from the attorney's escrow account. The panel considers it significant that the Board had rejected both an ODC recommendation for a six-month and one day suspension and Mr. O'Brien's request for imposition of a private admonition and instead imposed the public reprimand without imposition of any period of probation.

The panel is aware that in each of the *Froelich, Doughty* and *Benson* cases the Delaware Supreme Court imposed a sanction of public reprimand and a two-year probation for recordkeeping violations uncovered as a result of random audits. At the hearing in this matter, the Chairman of the panel pointed out to ODC counsel that the Delaware Supreme Court had imposed both a public reprimand and a two-year probation in prior cases and asked ODC counsel why no probation was recommended in this case (Tr. at 55). ODC counsel responded as follows:

> "We do not feel that a probationary period would be appropriate in this matter because we don't feel that it is necessary. It really was a discrete, isolated incident, and that Mr. Otlowski responded appropriately. Although the first time he responded, he was negligent in the response by having his daughter do it and not following it as carefully, but he did respond in both circumstances. We don't feel that there would be a problem ongoing in the future. We don't feel there would be any need for a probationary period in this matter." (Tr. at 55-56)

ODC counsel went on to distinguish *In re Benson*, supra as a case involving "ongoing problems leading up to the actual imposition of the public reprimand which required follow-through on a regular basis for the two-year probationary period." (Tr. at 56) ODC counsel sought to distinguish the appropriateness of imposing probation against the respondent in *Froelich*, supra but not in this case as follows:

> "In *Froelich*, I think Mr. Froelich just had so many, so many different matters that were brought before the Board, the six case, the six instances of the returned checks and his bookkeeping and records that required some type of probationary period following the imposition of the sanction. We don't feel that those facts are present in this case, and that's why we're not recommending any type of probationary period." (Tr. at 57)

Finally, ODC counsel explained the distinction between the imposition of a probationary period in *In Re Doughty*, supra, and her recommendation that a period of probation is not appropriate in the case at Bar as follows:

> "*Doughty*, I think the reason there was a probationary period, too, is he was in a unique situation where he was a Delaware office for an out-of-state law firm, and the books and records in that matter were so in disarray, he wasn't complying actually with the Delaware books and records recordkeeping. It was done according to wherever the out-of-state home office was. And I think a period of probation was applicable in that matter just because we needed to make sure that he fully understood his requirements as a managing partner of the Delaware law firm how to

maintain the books and records according to Delaware as opposed to the out-of-state jurisdiction." (Tr. at 56-57)

As previously noted, the panel has adopted the ODC's recommendation that Respondent receive a public reprimand without imposition of a probationary period. The panel accepts the distinctions between the *Froelich, Doughty* and *Benson* cases cited by ODC counsel and the panel does not believe its decision is inconsistent with the prior Delaware Supreme Court precedents. In particular, the panel recognizes that in the most recent similar case, *In re O'Brien*, supra, the Delaware Supreme Court accepted the Board's recommendation of a public reprimand with no discussion or imposition of a period of probation. The panel believes that its conclusion to accept the ODC recommendation of public reprimand without a period of probation is not inconsistent with the other three Delaware Supreme Court precedents. There is no discussion in any of the *Froelich, Doughty* or *Benson* cases of a rationale for the imposition of the probation in addition to the public reprimand. In fact, it appears that in each of *Froelich, Doughty* and *Benson*, it was the Board that had imposed the period of probation together with the public reprimand and that the Delaware Supreme Court had carried forward imposition of that additional sanction (i.e., probation) without separate discussion.[4]

Finally, the panel is comforted in adopting the ODC's recommendation that imposition of a period of probation upon Respondent is not necessary in light of Respondent's voluntary undertaking to terminate his independent office and to practice as of counsel with his colleagues, Philip M. Finestrauss, Esquire (for criminal law matters) and Leo John Ramunno, Esquire (for real estate matters) (Tr. at 29-30). By virtue of these relationships, Respondent will

[4] In both *In re Benson*, supra and *In re Doughty*, supra, the Board had imposed a private admonition together with a two-year probation period and the Delaware Supreme Court substituted a public reprimand for a private admonition and retained the two-year probation with no separate discussion relating to the probation. In *In re Froelich*, the Delaware Supreme Court adopted a Board recommendation for a public reprimand together with a two-year probation period, again with no separate discussion of the imposition of the probation.

no longer be "running the practice" and the financial matters relating to the practice will be handled by Messrs. Finestrauss or Ramunno (Tr. at 30). In Respondent's own words, "I would not touch a cent." (Tr. at 30)

* * *

Based on the foregoing considerations, the panel recommends as action of the Board that the sanctions set forth in Section V of this Report be imposed upon Respondent, including the imposition of costs of these disciplinary proceedings pursuant to Rule 27, Dis. Proc. Rules.

BOARD ON PROFESSIONAL RESPONSIBILITY

Richard A. Levine

Kathleen Furey McDonough

Adele Ashley-Axon

Dated: March 9, 2009

no longer be "running the practice" and the financial matters relating to the practice will be handled by Messrs. Finestrauss or Ramunno (Tr. at 30). In Respondent's own words, "I would not touch a cent." (Tr. at 30)

* * *

Based on the foregoing considerations, the panel recommends as action of the Board that the sanctions set forth in Section V of this Report be imposed upon Respondent, including the imposition of costs of these disciplinary proceedings pursuant to Rule 27, Dis. Proc. Rules.

BOARD ON PROFESSIONAL RESPONSIBILITY

Richard A. Levine

Kathleen Furey McDonough

Adele Ashley-Axon

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Dated: March 9, 2009

& MTS BTH C85 BJ HDL 530, 2005 #1

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.	:	

2005 OCT 26 P 3:47

FILED SUPREME COURT

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. Berry, Jr.

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