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. 496, 2010
STEVEN L. NOWAK,	§	Board Case No. 2009-0409-B
Respondent.	§	

Submitted: August 18, 2010
Decided: September 22, 2010

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER

This 22nd day of September 2010, it appears to the Court that the Board on Professional Responsibility has filed its Report and Recommendation of Sanctions 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 has filed objections to the Board's Report. The Court has reviewed the matter pursuant to Rule 9(e) and concludes that the Board's Report should be approved.

NOW, THEREFORE, IT IS ORDERED that:

1. The Report of the Board on Professional Responsibility filed on August 9, 2010 (copy attached) is hereby APPROVED.

2. Respondent is suspended for a period of one year, such suspension to run retroactively to October 20, 2009, the date that this Court transferred the Respondent to disability inactive status.

3. Respondent shall pay the costs of these disciplinary proceedings pursuant to Disc. Proc. Rule 27.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

ATTACHMENT A

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:	)	**CONFIDENTIAL**
	)	Board Case No. 2009-0409-B
STEVEN L. NOWAK,	)	
Respondent	)	

BOARD REPORT AND RECOMMENDATION OF SANCTIONS

I. Procedural Background

Pending before a panel (the "Panel") of the Board on Professional Responsibility (the "Board") is a Petition for Discipline filed by the Office of Disciplinary Counsel (the "ODC") on May 5, 2010 in Case No. 2009-0409-B (the "Petition") against Steven L. Nowak, Esquire (the "Respondent"), a member of the Bar of the Supreme Court of the State of Delaware (the "Court").

Respondent, through his counsel, Charles Slanina, Esquire, filed Respondent's Answer to the Petition for Discipline (the "Response") in which Respondent effectively admitted each and every one of the factual allegations and legal conclusions relating to the violations alleged in the Petition (Tr. 17), although the Response alleged additional facts by way of "further answer" relating to certain of the allegations of the Petition and, in some cases, contained denials of allegations in the Petition that Respondent personally carried out certain of the alleged activities that were conducted by his employees.

The Board convened a hearing (the "Hearing") which was held before the Panel on June 23, 2010. The transcript of the Hearing is cited herein as "Tr. _____."

Action by the Panel constitutes action by the Board. (Rule 2(c), Delaware Lawyers' Rules of Disciplinary Procedure ("Disc. Proc. Rules")).

At the Hearing, the Panel received into evidence without objection ODC Exhibits 1 through 5 documents which had been attached to the Petition as Exhibits 1 through 5 (Tr. 4-5) and Respondent's Exhibit No. 1 (a letter dated June 21, 2010 from Carol A. Tavani, M.D., M.S., DFAPA, Executive Director, Christiana Psychiatric Services, to ODC) solely for consideration by the Panel in connection with sanctions to be imposed upon the Respondent. (Tr. 51-54). The Panel heard testimony from Respondent and legal argument from Patricia Bartley-Schwartz, Esquire of ODC and Mr. Slanina.

One unusual procedural aspect of this matter merits acknowledgment. By Order dated October 20, 2009, the Court ordered that Respondent be immediately assigned to disability inactive status pursuant to Disc. Proc. Rule 19(c). While Disc. Proc. Rule 19(c) provides that "any pending disciplinary proceedings against the Respondent shall be held in abeyance" during the time that an attorney is transferred to disability inactive status, Paragraph 2 of the October 20, 2009 Order provided that in the case of the Respondent, "all disciplinary proceedings involving Respondent shall continue forward in accordance with the normal rules and procedures of the Board on Professional Responsibility." It was for this reason that the Hearing went forward despite Respondent's continued disability inactive status.

II. Factual Findings

Because Respondent's Response effectively admitted the facts and violations alleged in the Petition, counsel for the ODC, counsel for Respondent and the

Panel treated the hearing as relating to sanctions (Tr. 3, 5 and 7), although the Panel did receive testimony from Respondent and reviewed the ODC exhibits relating to the factual circumstances surrounding the alleged violations to satisfy itself with respect to the existence of the alleged violations. Based on the factual allegations of the Petition admitted by Respondent and the credible uncontroverted testimony received at the Hearing from Respondent, the Board makes the factual findings which follow.

1. Respondent is a member of the bar of the Supreme Court of the State of Delaware. He was admitted to the bar in 1987. At all times relevant to the Petition, the Respondent was engaged in the private practice of law. (Petition and Response, ¶1) Petitioner had clerked for Judge Taylor in the Superior Court following his admission and subsequently employed as an attorney by the firm now known as Prickett Jones & Elliott, P.A., the City of Wilmington and New Castle County before working as a non-attorney for a software company in Smyrna, Delaware. (Tr. 9 and 10) In 2002, Respondent opened a practice in Smyrna, Delaware handling real estate matters. (Tr. 9) The practice grew and by 2006 Respondent had 4 offices and 8 employees. (Tr. 10) Respondent's practice was going well through 2007 (Tr. 11) when Respondent handled as many as 800 real estate settlements per year. (Tr. 64)

2. Beginning with the economic downturn in 2008, Respondent's real estate practice declined and Respondent encountered financial difficulty. (Tr. 11 and 12) By 2008, Respondent was having marital troubles and struggling with bipolar disorder which had affected him since 1989. (Tr. 11, 12 and 13) Early in 2008, Respondent took a prescribed steroid for a rash which interacted poorly with his bipolar medication and

which further destabilized his situation. (Tr. 13 and 14) Throughout 2008, Respondent's practice declined and he lost most of his business and his staff. (Tr. 13)

3. As required by the Court, Respondent filed an Annual Registration Statement with the Court in each of 2008 and 2009 (ODC Exhibit 2). The statements were inaccurate with respect to the status of Respondent's financial books and records. (Tr. 18)

4. In July 2009, the auditor for the Lawyers' Fund for Client Protection ("LFCP") conducted an audit of the Respondent's law practice's books and records. The Audit Report outlined several deficiencies in the Respondent's law practice books and records under Rule 1.15(d). (A copy of the July 2009 audit report is ODC Exhibit 1.) The audit revealed:

(a) The Respondent had written a $1,000 check to himself out of Real Estate Escrow Account #05-483869-01 that was not earned. The Respondent replenished the account four days before the audit;

(b) The respondent made one or two transfers totaling $2,000 to himself out of Real Estate Escrow Account #2711-5446 that were not earned. The Respondent replenished the account during or four days before the audit;

(c) At the time of the audit there were thirty-six checks to clients and third parties that were outstanding longer than six months in Real Estate Escrow Account #2711-5446;

(d) Other deficiencies in the escrow accounts included the reconciled end-of-the-month cash balances could not be agreed to the total of all client funds held because neither report was prepared for the time period reviewed; the client subsidiary ledgers had negative balances and old balances; and the adjusted bank balance were not in agreement with the total of the client subsidiary ledgers for any of the six months during the time period reviewed; and

(e) The Respondent answered questions #8 and #9 incorrectly on his 2008 and 2009 Certificates of Compliance. Questions #8 and #9 should have been answered "No" since negative balances existed in the client subsidiary ledgers and the reconciled end-of-month cash balances did not agree to the client subsidiary ledger.

(Copies of the 2008 and 2009 Certificates of Compliance are ODC Exhibit 2.) (Petition and Response ¶ 4)

5. In light of the results of the July 2009 audit, the ODC asked the LFCP to perform a follow-up audit of the Respondent's law practice's books and records. The follow-up audit was performed in September 2009. The follow-up audit revealed the Respondent's books and records continued to be deficient in many areas. (A copy of the September 2009 audit report is ODC Exhibit 3.) (Petition and Response ¶ 5)

6. The follow-up audit revealed the Respondent had voided the thirty-six outstanding checks to clients and third parties from Real Estate Escrow Account #2711-5446 and had the checks reissued to himself. (Petition and Response ¶ 6)

7. On October 21, 2009, the Court of Chancery appointed Nicholas H. Rodriguez, Esquire, Receiver for the Respondent's law practice following his transfer to disability inactive. Kelly Freebery, a public accountant, assisted Mr. Rodriguez in balancing the Respondent's law practice's books and records. During the course of this process Ms. Freebery discovered:

(a) In April 2008, the Respondent conducted a real estate settlement for Lorraine and Warren Johnson. As part of that settlement the Respondent issued a check on behalf of the Johnson's to Capital One in the amount of $1,883. On may 15, 2009, the Respondent voided that check, paid a $35 stop payment fee, and issued a check to himself for the remaining $1,848;

(b) In August 2009, the Respondent wrote checks to himself from 16 client trust accounts totaling $1,902.14 that were not earned;

(c) As of February 11, 2010, the Respondent's client subsidiary ledgers showed he held $39,445.73 in trust for clients and third parties. (A list of the clients is ODC Exhibit 4); and

(d) As of February 11, 2010 the Respondent only had $15,254.04 in his escrow account. (A copy of the escrow accounts statements are ODC Exhibit 5). (Petition and Response ¶ 7)

8. In the years prior to 2008, Respondent had utilized the services of an accountant to assist keeping his financial records in order but could no longer afford the services of the accountant in 2008. (Tr. 15) Respondent "was never much of a numbers guy as far as understanding Quick Books" and "always relied on the accountants". (Tr. 19) When Respondent ceased utilizing the services of an accountant, his financial affairs were handled by his staff. Respondent described his ability to handle financial matters during this period of time as follows:

> "They'd say, well, you need to do this, you need to address this account; and if there were shortages, they'd say, you need to make a transfer to flesh this out. I'd say, okay, well, just take care of it; 'cause I was more in the, you know, producing the legal, the legal work.
>
> "And when we didn't have money to pay the accountants to make sure everything was square, I wasn't really in a position to step in and fill that role." (Tr. at 21-22)

Asked about a specific payment to his firm from his escrow account, Respondent admitted that he did not confirm the understanding that he reached from his staff that it was okay to make the payment stating "I should have looked into it more, more closely. I mean, I, you know, did it on a wing and a prayer." (Tr. at 25) Asked about another financial transaction which was made from an incorrect account, Respondent testified as follows:

> "We have – and, again, this is certainly not best practices; it's probably worst practices – we have a check cabinet, a locking cabinet. There's – we had, we had so many different checking accounts. Every bank in town came in and gave us a presentation, oh, you know, if you sign up with our checking account, we'll give you, I don't know, a toaster or something. And so we had so many checks, and they were all different colors. And I don't know – you

> know, I was trying to make a transfer out of, out of one account into my operating account. I think it was my rental account. And I grabbed the check out of the cabinet and I wrote the check, and that's the only, that's the only thing I can think happened is that I just grabbed the wrong check because we had so many checks laying around. That was a function of just a messy organization we had. And I think that was during the audit. I think that was during the audit." (Tr. at 27-28)

When asked if his paralegal assistant, Adrienne Hegman, was responsible for reconciling books at the end of the month during 2008 and 2009, Respondent answered as follows:

> "Yes, she was – I relied on her to do that, and I asked her, did you, did you reconcile – and she did reconcile – when the statements came in, she reconciled it against Quick Books and she generated reports. I can't say that I ever looked at the reports, but she generated the reports and I looked and I saw, oh, there's a report. I didn't study them like I should have." (Tr. 58-59)

Respondent described how he would assist his staff with accounting problems during 2008 and 2009 as follows:

> "… when my paralegals would come to me say, hey, what's – you know, what do we do about this, you know, particular accounting issue, my response would probably be more like, I don't know, figure it out, don't you know somebody who can help you with this." (Tr. 19

III. Standard of Proof

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

IV. Violations of the Rules

The Petition alleges and the Response admits violations of five separate rules of the Delaware Lawyers' Rules of Professional Conduct (the "Rules") as follows:

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

Rule 1.15(a) requires "a lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with representation separate from the lawyer's own property" and that property of clients or third persons must be appropriately safeguarded. By permitting checks to be issued to his Operating Account from client escrow accounts that were not earned and by transferred funds to himself from client escrow accounts that were not earned, the Respondent violated Rule 1.15(a).

COUNT TWO: 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 the law practice's 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).

COUNT THREE: 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 non-lawyer assistants, the Respondent violated Rule 5.3.

COUNT FOUR: RESPONDENT ENGAGED IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR 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 Certificates of Compliance in 2008 and 2009, each of which contained misrepresentations to the Court relating to the Respondent's maintenance of his law practice's books and records, the Respondent violated Rule 8.4(c).

COUNT FIVE: 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 Certificates of Compliance in 2008 and 2009, each of which contained misrepresentations to the Court relating to the Respondent's maintenance of his law practice's books and records, the Respondent violated Rule 8.4(d).

V. Recommended Sanction

The ODC requested that the Panel recommend Respondent receive a suspension of no less than one year. (Tr. 95 and 106) Respondent, by his counsel, concurred that suspension is the appropriate sanction, but submitted that the Panel should recommend a suspension of six month and one day. (Tr. at 110) Respondent's counsel suggested and ODC did not object that the period of suspension be made retroactive to October 20, 2009, the date that the Supreme Court of Delaware transferred the Respondent to disability inactive status (Tr. 111, 115 and 116), relying upon the Court's precedent in *In the Matter of A Member of the Bar of the Supreme Court of the State of Delaware: Allan Wendelburg, Esquire*, Case No. 501, 2006 approving without opinion the decision of the Board.

It is the Board's responsibility to determine the appropriate disciplinary sanction. Disc. Proc. Rule 9(d)(iv) For the reasons set forth below, the Panel has determined to recommend that Respondent be suspended for a period of one year, such suspension to run retroactively to October 20, 2009, the date that the Supreme Court of Delaware transferred Respondent to disability inactive status.[1]

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 &

[1] In adopting the recommendation of Respondent's counsel (to which ODC made no objection and suggested was supported by precedent) that the suspension run retroactively to the date of Respondent's transfer to disability inactive status, the Panel observes that Respondent's eligibility to act as a member of the Bar will not likely be meaningfully affected by the suspension because the term of the suspension will likely have expired prior to or just subsequent to the Court's disposition of this matter. While this circumstance would ordinarily not occur because disciplinary proceedings are generally held in abeyance while an attorney remains on disability inactive status pursuant to Disc. Proc. Rule 19(c), the possibility of the suspension expiring while the attorney is on inactive disability status exists in cases such as this (and presumably *Wendelburg*) where the customary applicability of that Rule has been modified by the Court's order transferring the attorney to disability inactive status.

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 effectively admitted and the Panel determined that the Respondent committed misconduct in violation of Professional Rules of Conduct 1.15(a) (failure to safeguard funds), 1.15(d) (failure to properly maintain financial books and records), 5.3 (failure to supervise non-lawyers), 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

[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).

(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.

2. State of Mind. Both the ODC (Tr. 96-97; Tr. 106-107) and counsel for Respondent agree and the Panel finds that Respondent acted with "knowledge" in that Respondent was consciously aware of his obligations to manage a law office and accurately report to the Delaware Supreme Court in the annual Certificate of Compliance, but failed to do so. See *In Re Bailey*, supra. Respondent's testimony admitted his lack of understanding of his financial affairs. The fact that Respondent was unable to continue the services of an accountant upon whom he had relied because of inadequate funds (Tr. at 19) does not excuse his poor financial conduct. Respondent demonstrated by his testimony that during the relevant period he had a relative indifference to his obligations to comply with Rule 1.15 for maintaining proper books and records and Rule 8.4(d) when making representations to the Delaware Supreme Court about his Certificate of Compliance. This approach to his reporting obligations demonstrated a level of indifference that falls well short of the required conduct of members of the Delaware bar. Because Respondent's bookkeeping failures did not cease after the July 2009 audit but continued through the September 2009 audit (Petition and Response ¶ 5), the Panel agrees with ODC that Respondent's conduct can be characterized as a "sustained and systematic failure to exercise even a modicum of diligence with respect to his recordkeeping." (Tr. 97 and 98) The Panel agrees with ODC and Respondent's counsel that under the circumstances of this case Respondent's violations are properly characterized as knowing. See also the definition of "knowledge" in the ABA Standards and *In Re Doughty*, 832 A2d 724 (De. Super. 2003).

3. Injury Caused by Respondent's Misconduct. Happily, there is no evidence that Respondent's misconduct caused any actual injury to any specific client or third party. (Tr. 98) However, Respondent's lack of financial control over his practice created the potential for such injury and the discrepancies between the cash available in Respondent's escrow accounts and the escrow balances does not assure that no losses will be discovered. In fact, Respondent expects that there may be many persons who have experienced small losses who have not yet come forward and it would be cost prohibitive to conduct the auditing necessary to determine. (Tr. 83, 84, 86, 90 and 91) Moreover, the Court has held that "[a] lawyer's duty to maintain proper books and records exists for the purpose of protecting not only the lawyer but the lawyer's clients, and the failure to fulfill that duty presents serious risks to the lawyer's clients, even if no actual harm results." *In re Benson*, 774 A.2d 258, 262-63 (Del. 2001).

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 potential injury caused by Respondent's misconduct conform to the ODC's recommendation and Respondent's counsel's concession that suspension is the appropriate sanction in this matter. When a lawyer (as is the case here) knows or should know that he is dealing improperly with client property and causing injury or potential injury to a client, suspension is generally appropriate under the ABA Standards. See ABA Standard 4.12. Likewise, suspension is generally appropriate when a lawyer (as is the case here) knows that false statements or documents are being submitted to the Court and takes no remedial action and causes an adverse or potentially adverse effect on the legal system, see ABA Standard 6.12, or when the lawyer's conduct is a knowing

violation of a duty owed as a professional to the legal system that caused actual injury or potential injury to the public and the legal system. See ABA Standard 7.2.

5. Aggravating and Mitigating Factors. ABA Standard Section 9.1 provides that aggravating (Section 9.22) and mitigating (Section 9.32) circumstances should also be considered to increase or decrease the degree of discipline to be imposed. *In re Bailey*, supra, 821 A.2d at 866. The aggravating and mitigating circumstances discussed in the ABA Standards and their applicability to this matter are discussed below.

Aggravating Factors

A. Prior Disciplinary Offenses. There is no evidence in the record that this aggravating factor exists.

B. Dishonest or Selfish Motive. ODC did not contend that Respondent acted with a dishonest or selfish motive and Respondent's counsel agreed and contended that the absence of dishonest or selfish motive should be a mitigating factor. (Tr. 111) The Panel does not find that dishonest or selfish motive is an aggravating factor. However, as discussed below, the Panel does not believe that the absence of dishonest or selfish motive should be a mitigating factor in this case.

C. Pattern of Misconduct. The evidence before the Panel reflects a pattern of misconduct by Respondent, even after the first audit. This is considered by the Panel to be an aggravating factor.

D. Multiple Offenses. The evidence before the Panel reflects multiple offenses by Respondent, even after the first audit. This is considered by the Panel to be an aggravating factor.

E. Bad Faith Obstruction of the Disciplinary Process. There is no evidence in the record that this aggravating factor exists.

F. Submission of False Evidence or False Statements During the Disciplinary Process. There is no evidence in the record that these aggravating factors exist.

G. Refusal to Acknowledge Wrongful Nature of Conduct. Respondent has acknowledged the wrongful nature of his conduct in his testimony (Tr. 34) and by admitting the allegations of the Petition.

H. Vulnerability of Victim. There is no evidence in the record that this aggravating factor exists.

I. Substantial Experience in the Practice of Law. Respondent has been a member of the Delaware Bar for 23 years and was engaged in a substantial private practice commencing in 2006. ODC cited Respondent's experience as an aggravating factor and the Panel concurs.

J. Indifference to Making Restitution. There is no evidence in the record that this aggravating factor exists.

K. Illegal Conduct, Including that Involving Use of a Controlled Substance. There is no evidence in the record that these aggravating factors exist.

Mitigating Factors

A. Absence of Prior Disciplinary Record. There is evidence in the record that this mitigating factor exists. This is Respondent's first proceeding for a violation of the Rules.

B. Absence of a Dishonest or Selfish Motive. Although there is no evidence of dishonest or selfish motive by Respondent, and Respondent's counsel cited such absence as a mitigating factor, the Panel does not believe that the absence of a dishonest or selfish motive should be considered a meaningful mitigating factor in this matter. Respondent's incredible indifference to his financial recordkeeping responsibilities and his willingness to issue checks to himself without more careful investigation may have been affected by the needs of his law practice for cash. In response to one of his counsel's questions concerning the issuance of checks to himself, Respondent acknowledged that at the time the firm had a cash crunch and was trying to make payroll and that "when [his paralegal] said, hey, there's monies available, I mean I was, I was happy to hear that it was available. I mean, you know, it was music to my ears, but I believed it was my money, not client money." (Tr. at 25)

C. Personal or Emotional Problems. Respondent's testimony and Respondent's Exhibit 1 confirm that Respondent was suffering from Bipolar Disorder in 2008 and was being treated for depression. Although the Respondent's condition is appropriately considered a mitigating factor, the Panel notes that Respondent testified he had been suffering from Bipolar Disorder for many years and the Panel believes that Respondent should have taken action to ameliorate the symptoms of this disorder.

D. Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct. There is no evidence in the record that this mitigating factor exists.

E. Full and Free Disclosure to Disciplinary Board and Cooperative Attitude toward Proceedings. There is evidence that Respondent has provided full and

free disclosure to the Panel and ODC to the extent that he is able to do so and that Respondent was responsive to the circumstances where clients sought reimbursement of funds from him.

F. Inexperience in the Practice of Law. Respondent has had substantial experience in the practice of law and this is not a mitigating factor.

G. Character or Reputation. No evidence was presented that would have character or reputation considered as a factor in the imposition of sanctions.

H. Physical Disability. There is no evidence in the record that this mitigating factor exists.

I. Mental Disability or Chemical Dependency. Apart from the factor of personal emotional problems discussed above, there is no evidence in the record relating to physical disability, mental disability or chemical dependency.

J. Delay in Disciplinary Proceedings. There is no evidence in the record that this mitigating factor exists.

K. Imposition of Other Penalties or Sanctions. The Panel is unaware of any other penalties or sanctions except that Respondent has transferred to disability inactive status. Respondent's counsel suggested that the fact that Respondent has "lost his practice" and "lost so very much in responding to this" should be a mitigating factor. (Tr. at 112) The Panel believes that Respondent's own knowing actions have caused the loss of his practice and does not consider imposition of other penalties or sanctions a separate mitigating factor.

L. Remorse. Respondent testified that he was "filled with regret over, over the way it turned out" and the Panel finds Respondent testimony in this respect to be credible and that Respondent's remorse is a mitigating factor.

M. Remoteness of Prior Offenses. There is no evidence in the record that this mitigating factor exists.

VII. Conclusion and Precedents

Both ODC (Tr. 101) and counsel for Respondent (Tr. 109) contend that *In re Bailey*, supra, is the case most similar to this case and the Panel agrees. ODC also pointed to *In re Shamers*, 873 A.2d 1089 (Del. 2005) and *In re Becker*, 947 A.2d 1120 (Del. 2008) as relevant cases which followed *Bailey*.[4] Respondent's counsel cited four other cases involving discipline of attorneys whose failure to maintain books and records led to losses which resulted in sanctions of public reprimand, not suspension. (Tr. 107) To the extent two of these cases were decided prior to *Bailey* (*In the Matter of H. Cubbage Brown*, Del. Supr. No. 389, 2005 and *In the Matter of Andre M. Beauregard*, Del. Supr. No. 25, 2004) the Panel has determined to focus on *Bailey* and cases decided after it. The two cases decided after *Bailey* involved thefts by employees facilitated by poor recordkeeping and joint recommendations by ODC and counsel for sanctions of reprimand with conditions.

Bailey was a case characterized by the Court as a "case of first impression" relating to ethical duties of the managing partner of a law firm with respect to the firm's compliance with recordkeeping and tax obligations under the Code. *Bailey*, supra, 821 A.2d at 853. As in the instant case, an audit by the LFCP disclosed

[4] *Shamers* involved a two-year suspension and *Becker* involved a three-year suspension. These cases involved actual substantial losses and other factors not found in the instant case.

discrepancies in Bailey's firm's escrow account and disclosed the issuance of checks from the escrow account to the firm's operating account. There were also failures to perform reconciliations, overdrafts and other violations. *Bailey* (unlike this matter) also involved a failure by Bailey's firm to file various tax returns and to make tax payments in violation of Rules 1.15(a), 1.15(b), 1.15(d), 5.3(b), 8.4(c) and 8.4(d).

Prior to the Board's hearing in *Bailey*, the ODC and Bailey had entered into a stipulation admitting various violations and including a joint recommendation of sanction of a public reprimand and three years of probation with conditions. Following several days of testimony, the Board rejected the stipulation's recommended sanction and recommended that Bailey be suspended for a period of six months and a day.

On appeal, both Bailey and ODC argued to the Court that the suspension was too severe a sanction. The Court, citing Rule 4.12, held that 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. The Court considered the aggravating factor of Bailey's substantial experience in the practice of law and his pattern of misconduct and the mitigating factors of his lack of prior disciplinary record, his extensive remedial efforts, his cooperation with the disciplinary process and the imposition of other penalties sustained by Bailey in connection with the failure to make tax payments.

In the instant case, ODC contended to the Panel that the appropriate sanction in this matter is suspension of no less than one year. In seeking a sanction more severe than in *Bailey,* ODC pointed to the fact that *Bailey* involved a one-time invasion into client trust funds and in the present matter, there were at least two invasions into the

trust accounts and several other instances where trust funds were transferred without proper accounting. (Tr. 103) Respondent's counsel submitted that a suspension of six months and one day as in *Bailey* would be the appropriate sanction. (Tr. 109, 111 and 114) Respondent's counsel pointed to several cases which had preceded *Bailey* and resulted in public reprimands instead of suspension despite actual client losses through internal thefts. (Tr. 107-108) Respondent's counsel also suggested a distinction between *Bailey* and the instant case in that the instant case, unlike *Bailey*, suggests no self-dealing. As discussed above, the Panel does not find an absence of self-dealing as an applicable mitigating factor here. Respondent's improper withdrawals from his client escrow accounts, while not directly paid to a third-party as in *Bailey*, did occur at a time when the firm needed funds to meet its own payroll.

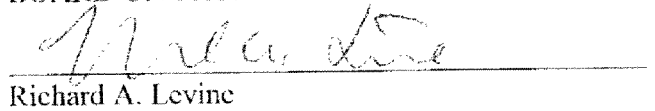
While the Panel finds the distinctions between this matter and *Bailey* to be minimal, the Panel's decision to accept the ODC recommendation for a sanction of a suspension of one year is supported by several other factors. First, the *Bailey* case was a matter of first impression, but has now been on the books for seven years and its lesson should be better known by members of the Delaware Bar, including Respondent. To the extent the lesson was not learned by Respondent, it suggests that the deterrent factor of *Bailey* has not resounded adequately and perhaps imposing an enhanced sanction upon Respondent will serve as a better deterrent to similar behavior by other members of the Bar. See *Bailey*, supra, 821 A.2d at 866, citing *In re Figliola*, 652 A.2d 1071, 1076 (Del. 1995) for the proposition "The objectives of the lawyer disciplinary system 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". Second, the Panel

agrees with ODC that the fact that Respondent made more than a single withdrawal from the client escrow accounts is a distinction from the *Bailey* case that matters. Finally, the Panel was frankly shocked by the indifference shown by Respondent to the financial records of his firm, even after being alerted to these deficiencies by the July 2009 audit.

* * *

Based on the foregoing considerations, the Panel recommends to the Court 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 Disc. Proc. Rule 27.

BOARD ON PROFESSIONAL RESPONSIBILITY



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