

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF A MEMBER )  
OF THE BAR OF THE SUPREME )  
COURT OF DELAWARE ) Case No. 61, 2011  
)  
JEFFREY K. MARTIN, )  
)  
Respondent. )

Submitted: May 11, 2011

Decided: June 22, 2011

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

***ORDER***

This 22<sup>nd</sup> day of June 2011, it appears to the Court that:

(1) The Office of Disciplinary Council charged Jeffrey K. Martin with violations of Rule 7(c) of the Delaware Lawyers' Rules of Disciplinary Procedure and Rules 1.15(b), 1.15(d), 5.3, 8.4(c), and 8.4(d) of the Delaware Lawyers' Rules of Professional Conduct. The Board on Professional Responsibility concluded that Martin violated each of those rules and recommended a public reprimand and a one year period of probation with conditions. We agree with the Board's recommendation.

(2) In early 2009, one of Martin's employees contacted the ODC and claimed, among other things, that Martin had not been paying federal, state, and local payroll taxes. An audit in February 2009 revealed that (1) Martin's operating and trust accounts had not been reconciled and there were no entries for the client

subsidiary ledgers for Martin's trust account for the period between June and December 2008, (2) Martin had not filed federal, state, or local payroll tax reports for the last two quarters of 2008, and (3) Martin had not paid federal, state, or local payroll taxes for the last quarter of 2007 nor all of 2008.

(3) Based on the audit findings, Martin agreed to a private admonition for violations of DLRPC Rules 1.15(b), 5.3, and 8.4(d). He also agreed to a condition on his private admonition; he agreed to provide a pre-certification by a licensed certified public accountant for his 2010 and 2011 Certificates of Compliance, reporting on his compliance with record keeping requirements. Then, on August 11, 2010, the ODC filed a Petition for Discipline against Martin. On October 27 and November 22, 2010, the Board of Professional Responsibility held hearings regarding the seven counts of rules violations the ODC charged against Martin.

(4) First, the ODC charged Martin with violating the terms of his private admonition—and, consequently, DLRDP 7(c)<sup>1</sup>—when he failed to provide a pre-certification for his 2010 certificate of compliance. Martin stipulated that he failed to provide the required pre-certification and that his failure is grounds for

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<sup>1</sup> Del. Lawyers' Rules of Disciplinary Proc. R. 7. Grounds for discipline.

It shall be grounds for disciplinary action for a lawyer to:

...

(c) Violate the terms of any conditional diversion or private or public disciplinary or disability disposition;

...

discipline in this case. Martin and the ODC jointly stipulated that Martin reported his failure and that the Board could consider his self-reporting as a mitigating factor. The Board accepted all of the stipulations.

(5) The ODC also asserted that Martin violated DLRPC 1.15(b)<sup>2</sup> when he failed to promptly pay various federal and state payroll taxes. As an additional consequence of failing to promptly pay these taxes, the ODC asserted that Martin violated DLRPC 8.4(d).<sup>3</sup> Martin admitted to these violations. The Board agreed. As part of its “findings and conclusions,” however, the Board found that Martin “was using good faith efforts to make payments in a timely fashion,” but that “the taxes were not paid on time, and the amounts were not minor.”

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<sup>2</sup> Del. Lawyers’ Rules of Prof’l Conduct R. 1.15. Safekeeping Property.

...  
(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.  
...

<sup>3</sup> *Id.* 8.4. Misconduct.

It is professional misconduct for a lawyer to:  
...  
(d) engage in conduct that is prejudicial to the administration of justice;  
...

(6) The ODC also charged Martin with violating DLRPC 1.15(d)<sup>4</sup> by failing to properly maintain his law practice's books and records. After an auditor reviewed the books and records of Martin's law practice, the auditor explained in his report that Martin did not prepare client subsidiary ledgers during the time period the auditor reviewed. The Board found that Martin entered, monitored, and

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<sup>4</sup> Specifically, the charges related to DLRPC Rule 1.15(d)(9)(A), 1.15(d)(9)(B), and 1.15(d)(10), which relevantly provide:

...

(d) A lawyer engaged in the private practice of law in this jurisdiction, whether in an office situated in this jurisdiction or otherwise, must maintain on a current basis financial books and records relating to such practice, and shall preserve the books and records for at least five years following the completion of the year to which they relate, or, as to fiduciary books and records, five years following the completion of that fiduciary obligation. The maintenance of books and records must conform with the following provisions:

...

(9) With respect to all fiduciary accounts:

(A) A subsidiary ledger must be maintained and preserved with a separate account for each client or third party in which cash receipts and cash disbursement transactions and monthly balances are recorded.

(B) Monthly listings of client or third party balances must be prepared showing the name and balance of each client or third party, and the total of all balances.

...

(10) If a lawyer maintains financial books and records using a computer system, the lawyer must cause to be printed each month a hard copy of all monthly journals, ledgers, reports, and reconciliations, and/or cause to be created each month an electronic backup of these documents to be stored in such a manner as to make them accessible for review by the lawyer and/or the auditor for the Lawyers' Fund for Client Protection.

While the ODC Petition for Discipline did not specifically charge Martin with violating Rule 1.15(e), the Board considered the charges of Rule 1.15(d) violations in light of the Rule 1.15(e) requirement that "[a] lawyer's financial books and records must be subject to examination by the auditor for the Lawyers' Fund for Client Protection, for the purpose of verifying the accuracy of a certificate of compliance filed each year by the lawyer pursuant to Supreme Court Rule 69."

managed “client fiduciary transactions” into his computerized records, and no client suffered any apparent harm. The Board also explained, however, that while this circumstance was “laudable as far as it goes,” Martin had to get an auditor to attest that his ledger complied with the rules, and the auditor “concluded the opposite.” Because “[Martin’s] subsidiary ledger could not produce the information in the format required[,]” the Board concluded that he had violated DLRPC 1.15(d).

(7) Relatedly, the ODC asserted that Martin violated DLRPC 5.3<sup>5</sup> by failing to have reasonable safeguards in place and failing to adequately supervise his non-lawyer assistant’s conduct to assure an accurate accounting of his

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<sup>5</sup> Del. Lawyers’ Rules of Prof’l Conduct R. 5.3. Responsibilities regarding non-lawyer assistants.

- With respect to a nonlawyer employed or retained by or associated with a lawyer:
- (a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
  - (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
  - (c) 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 a lawyer if:
    - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
    - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or 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.

practice's books and records. The Board concluded that Martin violated DLRPC 5.3 because while his office manager was intelligent, had impressive demeanor, and apparently wished to comply with all rules and do a good job, Martin had never instructed her with respect to Rule 1.15's bookkeeping requirements. In its "findings and conclusions," the Board found that despite monthly meetings between Martin and his staff regarding the client accounts:

[T]here was no effort to read [] Rule 1.15; and [Martin] apparently blithely went on, thinking his books and records contained all necessary information, and therefore his bookkeeping and his computer program were adequate. There was apparently no basis for him to have made that assumption.

(8) Finally, the ODC charged Martin with violating DLRPC 8.4(c)<sup>6</sup> by filing Certificates of Compliance in 2009 and 2010 that contained misrepresentations relating to the maintenance of his law practice's books and records. As with Martin's asserted failure to pay taxes, the petition asserted that this violation also constituted a violation of Rule 8.4(d) because it constituted "conduct prejudicial to the administration of justice." In Martin's 2009 and 2010 Certificates of Compliance, he answered "Yes" to the following item:

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<sup>6</sup> Del. Lawyers' Rules of Prof'l Conduct R. 8.4(c). Misconduct

It is professional misconduct for a lawyer to:

...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

...

With respect to attorney trust/escrow account(s), there is a client subsidiary ledger maintained with monthly listings of client balances stating client name, balance, cash receipt and cash disbursement transactions, and the total of all client balances.

Given that Martin's subsidiary ledgers did not comply with DLRPC 1.15(d), the Board concluded that Martin violated DLRPC 8.4(c) and 8.4(d) by answering "Yes" to that item. The Board also concluded that the ODC had not sufficiently proven that Martin made misrepresentations with respect to five other items it claimed he misrepresented in his 2009 and 2010 Certificates of Compliance.

(9) The Board then addressed its recommendation for sanctions according to the four part framework detailed in the ABA Standards for Imposing Lawyer Sanctions. First, the Board considered the ethical duties Martin violated, and explained that while the violations "should not in any way be minimized," Martin displayed "no dishonesty and no intentional wrongdoing." Second, the Board considered Martin's state of mind. Specifically, the Board determined that (1) for his failure to obtain a pre-certification, Martin knew or should have known of the requirement, (2) for his failure to pay taxes, Martin knew of his obligation and still did not pay, and (3) for all of the other charges, Martin acted negligently. Third, the Board considered the injury that Martin's misconduct caused and determined that Martin injured no client, and no clients claim any injury. Based upon these three considerations and Martin's history of misconduct, the Board determined that

the preliminarily appropriate sanction was a public reprimand, along with a period of probation.

(10) Under the fourth part of the ABA framework, the Board addressed the aggravating and mitigating factors in this case. The Board found the following aggravating factors applicable: (1) prior disciplinary offenses, (2) pattern of misconduct, (3) multiple offenses, (4) with respect to several of the charges, Martin's refusal to acknowledge the wrongful nature of his conduct, and (5) substantial experience in the practice of law. The Board also found the following mitigating factors applicable: (1) timely good faith effort to rectify the consequences of misconduct, and (2) character or reputation.

(11) After applying the aggravating and mitigating factors to the preliminary sanction, the Board explained:

[A]lthough what [Martin] knew or did not know about the condition of his books may be subject to question, it is clear that in the past and present, and continuing to this day, [Martin] has not properly addressed the need for accurate subsidiary ledgers. Following *In re Benson*, a private admonition would not be appropriate, and this Panel finds that a public reprimand is appropriate and recommended for [these] violations . . . .

In addition to the public reprimand, the Board recommended a one year period of probation as serving "the need of the public and the Bar."

(12) We have the “inherent and exclusive authority to discipline members of the Delaware Bar.”<sup>7</sup> Although Board recommendations are helpful, we are not bound by those recommendations.<sup>8</sup> We review the record independently and determine whether there is substantial evidence to support the Board’s factual findings.<sup>9</sup> We review the Board’s conclusions of law *de novo*.<sup>10</sup>

(13) Martin’s core objection to the Board’s recommendation relates to the Board’s finding that he did not maintain subsidiary ledgers for the trust accounts properly. Martin contends that the auditor’s opinion that his ledgers were nonconforming elevated “form over substance.” The Board considered and rejected this argument on the basis of the auditor’s testimony that Martin’s computerized systems could not produce the report that DLRPC 1.15 requires. The record provides substantial evidence to support this finding.

(14) The ODC’s core objection to the Board’s recommendation relates to the Board’s finding that the ODC had not proven sufficiently that Martin made misrepresentations with respect to the five other items in his 2009 and 2010

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<sup>7</sup> *In re Abbott*, 925 A.2d 482, 484 (Del. 2007) (quoting *In re Froelich*, 838 A.2d 1117, 1120 (Del. 2003)).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

Certificates of Compliance that the ODC alleged he misrepresented. The ODC argues that the Board improperly evaluated Martin's responses to those items under a "knowing" mental state, rather than a negligence mental state. The Board, however, explained that it "simply was not convinced that ODC [] met its burden of proving . . . that the items were answered incorrectly [at all]." Consequently, the mental state under which the Board evaluated the misrepresentations is not determinative.

(15) Martin asks that any admonition we issue be private, in order to protect his personal reputation. He agrees, however, that he "would be willing to accede to whatever remedy this Court in its wisdom imposes with regard to the appropriate level of (and appropriate time period for) [] future scrutiny . . . ." The ODC, meanwhile, argues that the appropriate sanction for these violations should be "no less than a public reprimand and two-year probation."

(16) Like the Board, we find *In re Benson*<sup>11</sup> instructive. In particular, we find the following quotation from this Court's opinion in that case relevant:

Although the Board [recommended] a private sanction for Benson, we do not agree for several reasons. First, Benson's violations were not isolated incidents but continued without correction for several years. Second, Benson's violations are of a type that could be readily repeated, and a public sanction, in addition to probation, will serve as an important preventive measure. Third, public discipline affords the

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<sup>11</sup> 774 A.2d 258 (Del. 2001).

Court the opportunity to inform not only other members of the Bar but the general public that the Court takes very seriously a lawyer's obligation to maintain orderly books and records and to fulfill tax obligations. 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 our view, a public sanction will deter other lawyers from similar misconduct. Moreover, this Court's means of monitoring a lawyer's compliance with record keeping obligations is dependent upon the lawyer's accurate, written representations as part of the annual registration process. Even though Benson did not make intentional misrepresentations to the Court in this case, she clearly failed to exercise the required care and attention in making her annual certifications.

A public sanction also is consistent with this Court's prior decisions in other cases involving similar disciplinary charges of failing to maintain proper books and records and/or failing to pay payroll taxes. . . . A private sanction may be appropriate for a lawyer who has engaged in an isolated record-keeping violation or for an isolated incident involving delinquent payroll taxes, but Benson's [repeated] negligent failure[s] . . . reflects a pattern of misconduct that justifies the imposition of a public reprimand rather than a private admonition.<sup>12</sup>

On the basis of our analysis in *Benson*, Martin's previous violations, and his disregard for the conditions of the private admonition that he already received for this same conduct, we agree with the Board's recommendation. Martin should be publicly reprimanded for his violations of DLRDP 7(c) and DLRPC 1.15(b), 1.15(d), 5.3, 8.4(c), and 8.4(d).

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<sup>12</sup> *Id.* at 262–63 (citations omitted).

NOW, THEREFORE, IT IS ORDERED that Jeffrey K. Martin is publicly reprimanded and subject to a public one year period of probation, subject to the following terms:

(1) The period of probation shall begin June 23, 2011 and end June 22, 2012;

(2) Within 90 days from the date of this Order, and again with Martin's 2012 Certificate of Compliance, Martin shall file with the Office of Disciplinary Counsel an affidavit by a licensed certified public accountant that all of Martin's law practice books, records, and bank accounts are being maintained in full compliance with Delaware Lawyers' Rules of Professional Conduct Rule 1.15, and that all law practice payroll tax obligations have been satisfied;

(3) Martin shall cooperate with relevant federal, state, and local authorities with respect to the payment of any payroll tax, penalty, and/or interest that may be due;

(4) Martin shall promptly and fully cooperate with the Office of Disciplinary Counsel in its efforts to monitor compliance with his probation, including quarterly written reports as to any late payments or past-due amounts, and the status and progress of any negotiations or discussions with

governmental authorities concerning payroll tax, penalty, or interest obligations; and

(5) Martin shall pay the costs associated with the investigation of this matter by ODC, including the cost of the audit.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice