PCB 83

[03-Feb-1995]

STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: PCB File No. 93.05

Peter J.R. Martin, Respondent

NOTICE OF DECISION NO. 83

This matter involves the embezzlement of over $100,000 from Respondent's attorney trust account by his office manager. Respondent and Bar Counsel stipulated as to the facts (which we have accepted and incorporated herein as our own as Attachment A) but differ in their view as to the appropriate sanction. Pursuant to A.O. 9, Rule 8(D), we held a hearing on January 6, 1995, and heard argument from Bar Counsel, who recommended a period of suspension not to exceed three months, and from Respondent's counsel, John Kellner, Esq. Respondent himself also addressed the Board.

After consideration of briefs and oral arguments, we recommend to the Supreme Court that Respondent be publicly reprimanded.

FACTS

Respondent has been a member of the Vermont Bar for nearly 25 years and has no record of any prior disciplinary infractions. He has maintained a small law practice, generally with the help of one associate and some support staff in St. Albans, where he has engaged in general practice.

From 1978 to 1992, Respondent employed one Cynthia Coon as a secretary and eventually as an office manager and bookkeeper. Ms. Coon handled the financial management of the law firm. She paid all expenses - taxes, payroll, supplies - and managed the income. She had signature authority on almost all of Respondent's office-related non-trust accounts.

Respondent placed enormous trust in Ms. Coon and did not personally review or supervise any of the accounts in his office. In 1988, Respondent learned that Ms. Coon had failed to pay some $10,000 in federal payroll taxes. Ms. Coon assured him that she would resolve this problem and Respondent left it to her to do so. He assumed that his yearly audits by a Certified Public Accountant gave him sufficient independent oversight.

In 1991, Respondent learned that his law firm owed $40,00 in delinquent payroll taxes. Again, he was reassured by Ms. Coon that she was on top of the problem and that the debt was being resolved. Respondent did not undertake a personal review of the firm's financial records and bookkeeping.

In 1992, Respondent learned that Ms. Coon had embezzled some $130,000 from

him and his client trust accounts. The diversion of funds had been accomplished by a number of methods, including forgery. Respondent found that $113,000 of the embezzled funds had come from the Mary Morey estate of which he was the executor.

At the time Ms. Coon unlawfully diverted these funds, Respondent did not have in place appropriate accounting and audit procedures as required by the Code of Professional Responsibility.

Respondent was shocked when he learned of the embezzlement. He immediately reported Ms. Coon to local law enforcement and brought a civil suit against her. He retained an accountant to audit his books and identify how the money was taken and from which accounts. He notified every client of the diversion and began making every effort to repay them.

Respondent acknowledged complete responsibility for these losses and co-operated fully with Bar Counsel throughout the pendency of these disciplinary proceedings. Respondent has been financially and emotionally devastated by Ms. Coon's betrayal of his trust. There is no doubt that Respondent is extremely remorseful for the damage caused by his neglect of his professional responsibility to safeguard client property.

Respondent has fully repaid all injured client except the Morey Estate, which is still owed approximately $30,000. Respondent fully acknowledges his obligation to repay the Estate and continues in his efforts to satisfy that obligation.

Respondent now has in place appropriate accounting and audit measures.

CONCLUSIONS

Disciplinary Rule 9-102(B)(3) provides:

A lawyer shall maintain complete records of all funds, securities and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them.

Disciplinary Rule 9-102(C) provides a detailed description of how every attorney shall maintain a trust accounting system. Respondent has conceded that he violated both of these disciplinary rules.

We find that Respondent's misconduct was due to his gross negligence in turning over financial matters to a bookkeeper without proper oversight. It is easy to understand how Respondent came to place so much trust in an employee who was so integral to his practice. However, it is difficult to understand how Respondent could have ignored the early warning signs that of bookkeeping trouble - the $10,000 debt to the IRS which grew to $40,000. Those incidents should have prompted Respondent to take a good, hard look at how financial matters were being handled in his office.

We agree with Bar Counsel that normally such gross neglect requires suspension. The Commentary to Standard 2.13 of the ABA Standards for Imposing Lawyer Sanctions suggests that a public reprimand is appropriate

when the lawyer acts negligently but that suspension is appropriate when the lawyer is grossly negligent. Similar cases from other jurisdictions support her argument. See, for example, In the Matter of Librizzi, 569 A.2d 257,263 (N.J. 1990)(failure to reconcile bank account for 12 years led to $25,000 shortage and a six month suspension from practice); In the Matter of Scanlon, 697 P.2d 1084 (Ariz. 1985) (lawyer who allowed a secretary whom he had found stealing money from his operating account to continue to handle trust accounts was suspended for six months after the secretary embezzled $30,000 from him); and Louisiana State Bar Assn v. Keys, 567 So.2d 588 (La. 1990) (lawyer who learned of secretary's improper withdrawal of $22,000 from trust account and who reimbursed the account, but did not notify the client, was suspended for thirty days).

We decline to recommend a suspension here because of the many mitigating factors present (absence of a prior disciplinary record, absence of a dishonest or selfish motive, timely good faith effort to make restitution, full and free disclosure to disciplinary board, character and reputation, imposition of other penalties and sanctions, and remorse) and the presence of only one aggravating factor (substantial experience in the practice of law). Under the ABA Standards, those mitigating factors can properly be applied to so reduce the level of sanction.

Further, there is no suggestion that Respondent poses any threat to the public or to the profession. It is highly unlikely that he will ever again violate the Code of Professional Responsibility. The only argument favoring suspension is Bar Counsel's concern that a strong message needs to be sent to the Bar in light of the recent and distressing flurry of minor trust account

violations. We believe the Supreme Court can make that message clear to the Vermont Bar by publicly reprimanding Respondent in this case.

For all of the foregoing reasons, we respectfully recommend to the Vermont Supreme Court that it publicly reprimand Respondent for violating DR 9-102.

Dated at Montpelier, Vermont this 3rd day of February, 1995.

PROFESSIONAL CONDUCT BOARD

/s/

_____

Deborah S. Banse, Chair

/s/ /s/

_____ _____

George Crosby Donald Marsh

/s/ /s/

_____ _____

Joseph F. Cahill, Esq. Karen Miller, Esq.

/s/ /s/

_____ _____

Nancy Corsones, Esq. Garvan Murtha, Esq.

_____ _____

Paul S. Ferber, Esq. Robert F. O'Neill, Esq.

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Nancy Foster Ruth Stokes

/s

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Rosalyn L. Hunneman Jane Woodruff, Esq.

/s/

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Robert P. Keiner, Esq. Edward Zuccaro, Esq.

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STATE OF VERMONT

PROFESSIONAL CONDUCT BOARD

In re: PCB File No. 93.05

Peter J. R. Martin, Esq. - Respondent

STIPULATION OF FACTS

NOW COME Shelley A. Hill, Bar Counsel, and Peter J. R. Martin, Respondent, and hereby stipulate to the following facts:

1. Respondent, Peter J. R. Martin, Esq., was admitted to practice law in the state of Vermont on February 3, 1970, and is currently on active status.

2. Respondent practices with one associate in St. Albans, Vermont. Respondent's practice is a typical small town Vermont practice. He represents both individual and institutional clients in a variety of matters, and handles virtually all kinds of cases.

3. Over the years, Respondent has generally employed one associate and some support staff. Among his support staff, Respondent employed a woman named Cynthia Coon for fourteen years, from approximately 1978 to 1992. During the

first five years that Ms. Coon was employed by Respondent she worked as a secretary, and during the last nine years of her employment with Respondent, Ms. Coon worked as Respondent's secretary, bookkeeper and office manager. As bookkeeper and office manager, Ms. Coon oversaw the financial management of Respondent's law firm, including managing income and paying expenses. She had signature authority on almost all of Respondent's office-related non-trust accounts. Ms. Coon was additionally responsible for computing the firm's withholding taxes, for dealing with the Internal Revenue Service, and for seeing that the firm's financial obligations to the Internal Revenue Service were met. Ms. Coon was also responsible for retrieving and managing the office mail. Respondent trusted Ms. Coon completely.

4. Respondent always had a certified public accountant prepare his office tax returns, and he believed that this gave him some measure of protection and oversight concerning the office financial affairs, but prior to 1992, Respondent had no process in place by which he personally reviewed or supervised the accounting system in his office.

5. In 1988, Respondent learned that his law firm owed approximately $10,000 in delinquent payroll taxes to the Internal Revenue Service. Respondent discussed the issue with Ms. Coon, who assured him that she was taking care of the problem and that the obligation was being paid. Respondent did not undertake a personal review of his financial records and bookkeeping at that point to see if the problem was other than a failure to comply on a timely basis by Ms. Coon.

6. On May 29, 1990, Respondent executed a Power of Attorney to Ms. Coon

authorizing her to confer with the Internal Revenue Service regarding his and his firm's tax liability and issues arising therefrom.

7. In August 1991, Respondent learned that his law firm then owed $40,000 in delinquent payroll taxes. Respondent was shocked at this revelation, and was again reassured by Ms. Coon that she was on top of the situation and had worked out an agreement with the Internal Revenue Service to pay $5,000 twice per month. Respondent did not undertake a personal review of the firm's financial records and bookkeeping.

8. In early 1991, Respondent had been appointed by the Franklin Probate Court to be the Executor of the Estate of Mary H. Morey. Mrs. Morey had named Respondent to act as Executor of her Estate in her Last Will and Testament. Mrs. Morey left several heirs surviving her. The value of Mrs. Morey's Estate was approximately $300,000, and Respondent established a trust account for the Estate at the Franklin Lamoille Bank (Account Number 0001-01129).

9. In April 1992, Respondent received a telephone call from an official at the People's Trust Company concerning some suspected irregularities in a checking transaction involving his general office account. Respondent immediately went to the bank, and was informed during a meeting with the bankers that the bank had traced an April 30, 1991 purchase of a bank check (payable to the U.S. Government for $7,267.30) to a check from Respondent's general account. The deposit amount in Respondent's general account used to purchase the bank check had, in turn, been traced to a withdrawal from the Morey Estate trust account. Respondent's purported signature on the Morey

Estate check was a forgery.

10. Respondent returned to his office, which had closed for the day, and immediately telephoned Ms. Coon to confront her with what he had just learned. Ms. Coon informed Respondent that she could explain what had happened, and said that she would come to the office to speak with him the next day (Saturday).

11. The next day, Respondent and Ms. Coon met. At that time Ms. Coon admitted to Respondent that she had taken the money referred to in Paragraph 9 of this Stipulation out of the Morey Estate account to satisfy a personal financial emergency. Respondent questioned Ms. Coon as to whether she had ever taken other funds from this or any other account, and Ms. Coon assured him that this transaction was the only one. Ms. Coon then said she had to leave but promised to return the next day, Sunday, at 8:00 o'clock a.m. to continue the meeting with Respondent. Ms. Coon did not arrive on Sunday.

12. When Ms. Coon failed to appear on Sunday as planned, Respondent examined the Morey Estate account with the aide of a banker friend and other colleagues and immediately initiated and filed on the following day a civil lawsuit against her in the Franklin Superior Court for the amount then ascertained to be missing. Respondent also telephoned an attorney in the Franklin County State's Attorney's office to notify that office of what had occurred, and notified the heirs of the Morey Estate of what had transpired.

13. Respondent immediately retained an accountant to audit the Morey Estate account. The accountant determined that a total of $113,527.61 had been

misappropriated from the Morey Estate account. Ms. Coon had perpetrated this misappropriation by forging Respondent's signature to dozens of checks, making telephone calls to the Franklin Lamoille Bank misrepresenting that she had been authorized by Respondent to request transfers of sums from the Morey Estate savings accounts to the Morey Estate checking account into other accounts (including Peter J. R. Martin, P.C. office accounts), and committing other fraudulent and deceptive acts, including making fraudulent entries in the account records. Ms. Coon never had signature authority on the Morey Estate account.

14. Respondent reviewed other office-related accounts and funds, and determined that Ms. Coon had also misappropriated funds from certain of those sources. Respondent has learned that Ms. Coon misappropriated a total of approximately $20,000 from other practice-related and trust sources, including title insurance policies, real estate deposits and other accounts.

15. Further investigation by Respondent revealed that Ms. Coon and her husband, John, had received a satisfaction of judgment from the United States Government in the amount of $7,267.30 on May 1, 1991, the day after she purchased the bank check in like amount payable to the United States Government.

16. All tolled, it appears that Ms. Coon unlawfully removed approximately $134,000 from the Morey Estate account and from other of Respondent's office and trust accounts and other practice-related funds.

17. Ms. Coon used the amounts taken from the above sources to benefit

herself and to pay office obligations of Respondent. In that regard, Respondent believes that approximately $84,000 of the $134,000 unlawfully misappropriated by Ms. Coon from office- related sources went to his benefit, unbeknownst to him at the time.

18. In addition to misappropriating money from law firm accounts and sources, Ms. Coon also unlawfully removed funds from the account of a business of which Respondent was a co-owner and for which she kept the financial books.

19. Respondent was not involved in, nor did he know about, the above-described misappropriation of money. Respondent voluntarily took and passed a polygraph exam clearing him of any wrongdoing, and confirming that he did not know of any of the activities in which Ms. Coon had engaged until after the April 1992 discovery of those activities. Investigation has revealed no unusual financial activity in Respondent's personal financial accounts during the relevant time frame.

20. The Franklin County State's Attorney has filed in the Franklin District Court a criminal felony prosecution of Ms. Coon, charging her with thirty-four counts of forgery, twenty- four courts of grand larceny, and four counts each of passing a forged check and petty larceny, most of which are felonies. That prosecution remains pending.

21. Immediately upon learning about Ms. Coon's misappropriation of funds, and since that time, Respondent has directed virtually his entire efforts in the practice of law toward identifying and reimbursing all of the clients

and entities who lost money as a result of Ms. Coon's unlawful activities, and satisfying his and his firm's obligations to the Internal Revenue Service and State of Vermont.

22. Respondent began making this restitution to these various entities prior to involvement of Bar Counsel. Respondent has made great strides toward making the above-described reimbursements. Respondent has now fully repaid all injured clients of whom he is aware other than the Morey Estate. The loss to the Morey Estate has now been reduced to only $40,000 out of the initial loss of $113,527.61. Respondent has also signed a Notice of Obligation of Responsibility to the heirs of Mary Morey, acknowledging liability to repay them fully.

23. Respondent now has appropriate accounting and audit measures in place, and is in compliance with the requirements of the Code.

24. As an attorney, Respondent owes certain legal and ethical obligations with respect to money held in trust for clients and for other individuals or entities to whom he owes a fiduciary obligation such as the heirs of the Morey Estate. Respondent is responsible for prompt notification to clients of receipt of funds he holds in trust, maintaining proper records of the trust funds, and being prepared to render appropriate accounts and rendering appropriate accounts.

25. Respondent failed in his various responsibilities in the proper management of money that he held in trust for the Morey Estate and the other clients referenced above.

26. Respondent feels great remorse for failing to supervise properly his employee, and for meeting his fiduciary responsibilities under the Code, and for having unwittingly benefitted from Ms. Coon's nefarious activities.

27. Respondent has received no prior discipline from this Board.

28. Respondent has cooperated fully with the disciplinary proceedings.

29. Respondent had no dishonest or selfish motive.

30. Respondent had an excellent character and reputation in the community.

31. Respondent has made a timely good faith effort to make restitution and to rectify the consequences of the misconduct.

32. Respondent has substantial experience in the practice of law.

Dated at Montpelier, Vermont this 12th day of October, 1994.

/s/

_____

Shelley A. Hill

Bar Counsel

Dated at St. Albans, Vermont this 30th day of September, 1994.

/s/

Peter J. R. Martin

Respondent

Approved as to form:

/s/

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John L. Kellner

Attorney for Respondent

APPENDIX TO DECISION NO. 83

ENTRY ORDER

SUPREME COURT DOCKET NO. 95-074

MARCH TERM, 1995

In re Peter J.R. Martin, Esq.	}	APPEALED FROM:
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	}	

} Professional Conduct Board

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} DOCKET NO. 93.05

In the above entitled cause the Clerk will enter:

Pursuant to the recommendation of the Professional Conduct Board filed February 9, 1995, and approval thereof, it is hereby ordered that Peter J.R. Martin, Esq., be publicly reprimanded for the reasons set forth in the board's Notice of Decision attached hereto for publication as part of the order of this Court. A.O. 9, Rule 8E.

BY THE COURT:

/s/

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Frederic W. Allen, Chief Justice

/s/

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Ernest W. Gibson III, Associate Justice

/s/

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John A. Dooley, Associate Justice

/s/

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James L. Morse, Associate Justice

/s/

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Denise R. Johnson, Associate Justice

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