LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: RIGUER J. SILVA

98-DB-017

RULING OF THE DISCIPLINARY BOARD

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PROCEDURAL HISTORY

Formal charges were not filed in this matter because Respondent tendered an Affidavit of Consent Discipline and petitioned for a public reprimand with which Disciplinary Counsel concurred. Respondent admitted to having violated Rule 5.3(a)(b) in that he failed to properly supervise his nonlawyer assistant to the detriment of his client.

FACTUAL BACKGROUND

The evidence submitted establishes that Silva failed to properly supervise his secretary, Maria Suero. Respondent was hired in April 1994 by Jose Guerrero to handle the immigration of his wife and stepson for a total legal fee of $1,150.00. Mr. Guerrero also gave two additional money orders totaling $780.00 for costs. Upon receipt of these funds, Ms. Suero apparently took the money orders and converted them to her own use. At the same time, she informed both Respondent and Complainant that the matter had been filed with Immigration and Naturalization Service (INS) when the case, in fact, had never been filed. From December 1994 to April 1996, Ms. Suero apparently deceived Silva and the Guerreros about the status of their case. Respondent should have known that the matter was never filed, should have taken greater precautions with third party funds, and should have had office procedures in place to properly supervise his employees. The conduct violated Rule 5.3(a)(b).

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ANALYSIS

Respondent owed a duty to his clients and to the profession. He clearly acted negligently and the negligence caused injury to the clients by delaying their immigration matter. Respondent, however, gave restitution to the clients promptly.

The proposed discipline of a public reprimand is appropriate for the misconduct described. Pursuant to ABA Standard 7.3, a reprimand is generally appropriate when a lawyer negligently engages in conduct that violates a duty owed to the profession, and causes injury or potential injury to a client. The following ABA Standard 9.22 **aggravating factors** are present: (h) vulnerability of the victim; (i) substantial experience in the practice of law. The following **mitigating factors** are present: (a) no prior discipline; (d) restitution; (e) cooperative attitude toward proceedings; (g) character; (l) remorse.

The following review of the jurisprudence involving negligent supervision of nonlawyer employees illustrates the appropriateness of the proposed reprimand. For example, in *In re: John T. Keys, Jr.*, 567 So. 2d 588 (La. 1990), the court addressed the issue of an attorney's responsibility for the unauthorized removal by a secretary/office manager of over $40,000.00 from a client's succession account over a period of fifteen months and her use of such funds for office operating expenses. Justice Lemmon, writing for the majority, concluded that Keys did not authorize or know of the secretary's unauthorized withdrawals from the succession account but, nonetheless, a "lawyer has the duty to make reasonable efforts to ensure that the employee's conduct is compatible with the professional obligations of the lawyer." 567 So. 2d at 592 (citing 1 G. Hazard & W. Hodes, *The Law of Lawyering* § 463 (1985)). He reasoned that an attorney may choose to entrust his or her own funds to a secretary without supervision, but where it concerns client funds, the attorney must adequately safeguard the funds by utilizing reasonable

supervision of the employee who handles the client's funds. *Id.* Although the court recognized substantial mitigating factors and no aggravating ones except for substantial experience in the practice of law (which was "tempered by respondent's unblemished reputation"), it imposed a thirty-day suspension upon Keys. *Id.* at 593.

Following *Keys*, the court had a similar situation before it in *In re: J. Gregory Caver, Disciplinary Proceedings*, 93-2698 (La. 1/13/94); 632 So. 2d 1157. Caver had been charged with one count of negligent supervision of his employees and failure to maintain proper safeguards of the client trust account resulting in commingling and conversion of client funds for his own or another's use. Although Caver admitted that an inaccurate accounting of settlement proceeds was made to the client, he denied any conversion of client funds to his own use and maintained that the inaccurate accounting resulted solely from his employees' wrongdoing. Additionally, upon learning of the problem, he immediately provided a proper accounting and overpaid the client for his inconvenience. As in *Keys*, the only aggravating factor was substantial experience in the practice of law, but also similar to *Keys*, this aggravating circumstance cut both ways because Caver had never before had a complaint lodged against him. Finding *Keys* controlling, both the Hearing Committee and the Board had recommended a thirty-day suspension for Caver. In a *per curiam* opinion, however, the court retreated from its previous sanction in *Keys* stating:

> Based on our review of the findings and recommendations of the Hearing Committee and the Disciplinary Board, and of the record filed herein, this court declines to adopt the recommended thirty-day suspension sanction. Given that this is *the first and only complaint made against respondent; that the inaccurate accounting undeniably was attributed solely to respondent's employees' wrongdoing; that unlike the attorney in Keys, respondent derived no financial benefit from his employees' wrongdoing*, and this lack of supervision did not extend over a long period of time; that *the amount involved is not sizable (less than $5,000)*; that the disciplinary proceedings have been delayed over six years; and that *respondent promptly made not only full restitution, but also*

compensated his client for any consequential inconvenience, we conclude that the appropriate sanction is a reprimand.

632 So. 2d at 1157-58 (emphasis added).

The above italicized text corresponds to the similarities in the instant case. Silva has had no prior complaints, the problems at issue resulted solely from Ms. Suero's wrongdoing, Silva derived no financial benefit from Suero's theft of clients' funds,[1] the total amount taken was less than $5,000.00, and Silva made restitution to the clients when he learned of the problems and compensated them by continuing their matters for free after their cases were delayed by Suero's actions.

Similarly, although the following cases contain fewer facts than the ones discussed above, they also support the recommended sanction of reprimand. First, *In re: Vincent DeSalvo and Jack P. Harris*, 91-DB-01, involved unethical solicitation allegedly by the lawyers' nonlawyer employees.[2] Both lawyers received a public reprimand. Next, in *In re: Robert E. Jones, III*, 93-DB-014, the Board also reprimanded the lawyer for failing to promptly disburse entrusted funds, thus commingling funds of a client with his own funds, and failing to properly supervise a nonlawyer employee. Finally, in *In re: Larry E. Broome*, 615 So. 2d 1333 (La. 1993), the court imposed a ninety-day suspension on Broome where his office staff obtained a personal injury settlement for a client by falsely representing to the adjuster and attorney for the insurance company that a timely suit had been filed when, in fact, no suit had been filed. Although the

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[1] Apparently there were other clients injured similarly by Ms. Suero, but unlike the Guerreros, they chose not to file complaints against Respondent because he returned their money and continued representing them for free with INS.

[2] *See* the dissent by Orlando N. Hamilton, Jr. wherein he stated that: "[T]he weight of the evidence seems to me to reflect intentional solicitation on the part of Respondents rather than negligent supervision."

Hearing Committee found that Broome did not personally participate in the fraud, they found him grossly negligent in failing to supervise his office staff and recommended a sixty-day suspension. The Board recommended increasing the sanction to a ninety-day suspension and the court agreed.

Silva's misconduct compares more closely with the misconduct of Caver, Jones, DeSalvo and Harris than with the fraudulent misrepresentations made by Broome or with the huge sums of money converted into the attorney's own operating account by Keys. The closest case seems to be *Caver* and the court's enumerated factors distinguishing Caver's conduct from Keys' actions are instructive in the instant case.

RULING OF THE DISCIPLINARY BOARD

In light of the above analysis of the ABA recommended sanction, aggravating and mitigating factors, and applicable case law, the proposed consent discipline of a reprimand for respondent seems reasonable. Therefore, the Board orders that Riguer J. Silva be disciplined by a public reprimand. Further, the Board orders that Mr. Silva be assessed with all costs of these proceedings.

LOUISIANA ATTORNEY DISCIPLINARY BOARD
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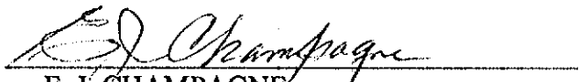
By: 
E. J. CHAMPAGNE
FOR THE ADJUDICATIVE COMMITTEE

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NO. 98-DB-017

DISSENT

I respectfully dissent from the Panel's recommendation. The record reflects that Maria Suero, the respondent's secretary, stole the money and misinformed both the respondent and the complainant. Maria Suero continued to deceive the respondent and the complainant about the status of the case.

A public reprimand is not warranted. An attorney should not be obligated to question an affirmative representation made by a trusted employee. The record contains no evidence that Maria Suero had any pattern of such behavior, or that the respondent had any reason not to believe her. This appears to be an isolated incident of intentional misconduct by the respondent's secretary.

The charges against the respondent should be dismissed.

DATE: July 14, 1998

HOMER ED BAROUSSE, JR.,
BOARD MEMBER