

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF A MEMBER § No. 259, 2004
OF THE BAR OF THE SUPREME §
COURT OF THE STATE OF §
DELAWARE: § Board Case Nos. 36, 46, 58, 59, 2003
§
BARBARA A. BRODOWAY, §
§
Respondent. §

Submitted: July 23, 2004
Decided: August 4, 2004

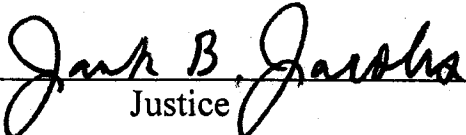
Before STEELE, Chief Justice, BERGER, and JACOBS, Justices.

ORDER

This 4th day of August 2004, it appears to the Court that the Board on Professional Responsibility has filed its Report 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 the Report of the Board on Professional Responsibility filed on June 16, 2004 (copy attached) is hereby APPROVED. The matter is hereby CLOSED.

BY THE COURT:


Justice

HIGHLY CONFIDENTIAL

**BOARD ON PROFESSIONAL RESPONSIBILITY OF THE
SUPREME COURT OF THE STATE OF DELAWARE**

In the Matter of a
Member of the Bar of
the Supreme Court of
Delaware:

BARBARA A. BRODOWAY,
Respondent.

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CONFIDENTIAL

Board Case Nos. 36,46,58,59, 2003

OPINION

This is the report of the findings and recommendations of the Panel of the Board on Professional Responsibility of the Supreme Court of Delaware in the above-referenced matter. A hearing was held on April 28, 2004, in the Supreme Court Hearing Room, 11th Floor, Carvel State Office Building, 820 North French Street, Wilmington, Delaware.

Prior to the hearing, the parties presented a Stipulation of Admitted Facts and Violations and a set of Joint Exhibits. Copies are attached as Exhibits A and B, respectively.

At the hearing, counsel for the parties made brief statements and arguments in support of the Stipulation. Transcript, pages 2-7 (Hereinafter "T- "). There were several witnesses.

Joseph McCulloch testified as the sole ODC witness. Mr. McCulloch is an auditor for the Delaware Lawyers Fund and was formerly a forensic examiner for the Department of Justice and the IRS. (T-6-7) He became involved when the ODC requested an investigative audit of the real estate escrow accounts of the Respondent's practice. (T-8)

A previous 1997 random audit had found irregularities. Exhibit 9 found that Respondent was finally in compliance in December of 1998. (T-20) Mr. McCulloch testified that apparently there was a reversion to the pre-December 1998 practices that resulted in the current violations. (T-25-26) Four overdraft notices were received by the ODC pursuant to new Rule 1.115A,

whereby the ODC receives overdraft notices as well as the law firms. (T-31) The immediate concern generated by the overdraft notices was that client funds were at risk, specifically that some type of misappropriation of funds by a lawyer. (T-30) McCulloch stated unequivocally that his investigation found no evidence of any misappropriation or theft of funds or any self-dealing by the Respondent. (T-31) In fact, on the day he arrived for the audit, one of the unaccounted checks had arrived by mail. (T-30) Moreover, the ODC raised no issues of any ongoing violations after June of 2003.

Exhibit 1 was Mr. McCulloch's report which details the steps which were taken to bring the accounting and bookkeeping practices of the Respondent into compliance. (T-11) Mr. McCulloch testified that as to the transactions prior to May 27, 2003, Respondent did not take a hands-on approach to check if there were sufficient funds in the account to cover the checks that were being issued. (T-57-58) She did not take sufficient hands-on approach with regard to either pre or post-closing procedures. (T-58) In effect, the fourth overdraft notice check resulted from certain wire transfers not being confirmed as received prior to issuing other checks. (T-9) The net effect of these practices was that the transactions of some of Respondent's clients were being funded by other clients. (T-13-14)

The Respondent's witnesses were Kelly Freeberry and Nancy Chrissinger Cobb.

Kelly Freeberry was hired in 2003 to do monthly reconciliations of the real estate escrow accounts for Respondent, after the intervention of the ODC. (T-63) When she first began her work there were approximately 1,500 to 1,700 outstanding checks that had been unaccounted for. (T-64) As of today there are only a few hundred. (T-64) All have been identified and the persons to whom they were made out have been notified and asked to identify whether or not the checks will be cashed in the foreseeable future. (T-67) She also testified that Ms. Brodoway had

stopped practicing voluntarily in late December of 2003, and that she was most impressed by the care with which Ms. Brodoway was addressing the concerns and taking care of the business. (T-65) She testified that when she arrived the workload was so great and was such a mess that it would have been impossible to remedy the problems within three months. (T-66) Ms. Brodoway has paid her over \$5,500 for services in attempts to bring the accounts into compliance. (T-66) She anticipates the compliance will be accomplished by the end of June or July, 2004. (T-67)

Nancy Chrissinger Cobb, a law school classmate, a former partner of the Respondent, and friend, testified as to her character. (T-136) The Respondent has represented her in several real estate transactions and all were done to Ms. Cobb's satisfaction. (T-139) She praised Respondent's substantive knowledge of the substantive law and her ability to represent her clients effectively. (T-139-140) She also testified, as Ms. Freebery has expressed on several occasions, her extreme, deep remorse for creating the situation that led to these proceedings and that Respondent took full responsibility for the situation. (T-139)

The other witness was the Respondent. She testified that she affirmed the admitted facts and the violations. (T-96) The primary problem was with her real estate practice. She used paralegals to process the transactions. (T-90) However, a paralegal was doing the post-closing procedures, and Respondent did not do a "hands on" job of supervising the transactions. (T-90) When they got farther and farther behind, she admitted that she was not aware of it because of her negligent supervision. (T-95-96) A majority of the outstanding checks that were the subject of the problem related to recording fees and satisfaction pieces and the issuance of title premiums. (T-100; 113-114)

Since then, she has hired professionals, including Kelly Freebery, to address the problem. (T-103) Respondent indicated that she has closed her practice as of December 22, 2003, and

held her last real estate closing on December 22, 2003. She continues to take steps to bring the accounting in compliance, including the use of a computerized system and the assistance of Ms. Freebery in maintaining that system. (T-110)

At no time through any aspect of the investigation was there any findings of any client funds being misappropriated. (T-30-31)

Respondent conceded that she was responsible for the real estate accounts within the firm and that it was her mistakes that lead to the situation. (T-88) She had no explanation for why the violations occurred other than the real estate boom created and continued unabated when she anticipated it would abate. (T-71-72) Her previously normal twenty closings a month reached sixty closings a month during the Summer of 2003 and capped at seventy-eight closing in the month of August, 2003. (T-72) She offered no explanation why she did not follow the suggestion of the ODC that she cut back on the number of closings during the Spring and Summer of 2003 to concentrate on bringing her accounts into compliance. (T-133) In retrospect, she recognized that she should have followed that suggestion. (T-133) She gave rather poignant testimony that acknowledged that she miscalculated her ability to carry on the practice of law and address the deficiency. (T-105) She stated that many of the stale checks were premium checks to title insurance companies. (T-100) Apparently, the title insurance companies and others involved in the real estate industry were also backed up because of the boom and some of the title insurance companies were not clearing the checks sent to them. (T-100-101) In addition, some mortgage companies were delaying in wiring funds necessary to fund closings. (T-55; 95) She stated that the Downs episode affected her most because it caused an epiphany that her delays were affecting other people directly and she had to close down her practice in order to address the problems. (T-105) She did not realize until after she closed down the practice the

stress under which she had been operating and the problems she had been creating. (T-119) She stopped practicing in late December 2003. Since then she has worked on remediation issues. (T-108) She dismissed her staff at the end of the year, which included two paralegals and a clerk, for economic reasons.

She testified as to the personal cost of her violations. She has not taken a salary since the end of 2003, although she continues to pay the costs of practice, including lease and the expenses for Ms. Freebery. (T-111) She has been the sole support for her student husband and since the beginning of 2004, her sole source of income has been savings. (T-111)

The Office of Disciplinary Counsel indicated that Respondent has made substantial efforts since January 1, 2004 to rectify the consequences of the conduct in this matter by hiring a bookkeeper to address the specific issues that caused the problems and that she has made a significant expenditure of funds to remedy the problems that did exist to remove any potential injury. (T-110)

The ODC was not satisfied that the Respondent had cooperated fully in connection with the investigation of this matter particularly at the outset of the investigation before Respondent was represented by Mr. Slanina. (T-150)

The panel is convinced by the testimony of Respondent that she has recognized the wrongfulness of her conduct, and that she is deeply remorseful. (T-118-120) She has, in effect, suspended herself from the practice of law, and expressed no intention of returning to a practice like that which generated the circumstances from which these violations arose. (T-119)

The Board finds that the facts and violations are as set forth in the Stipulation.

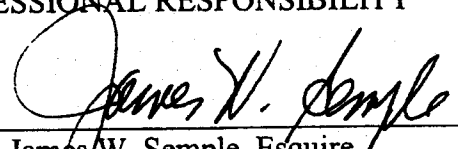
The ODC recommended that Respondent be suspended for six (6) months and one (1) day, and be required to re-apply for reinstatement. (T-165) The ODC argued that the decision in

In Re Bailey, 821 A.2d 851 (Del.2003) (ordering a six-month plus one day suspension despite a stipulation between the ODC and the respondent-attorney that the sanction should be a public reprimand and three years of public probation) controlled this case.

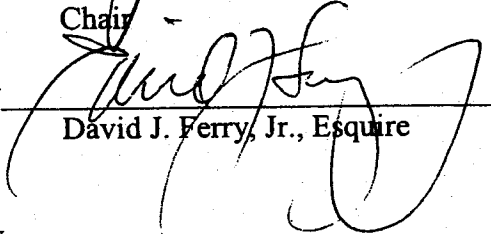
The respondent argued that the case of *In re Froelich*, 2003 WL 22931315 (Del. Supr. 2003) was more relevant.

The Panel finds that this case is closer to *Froelich* than *Bailey**. The Panel recommends that Respondent be subject to a Public Admonition, and be placed on Probation for a period of two (2) years, during which time she may not practice alone or be personally responsible for compliance with accounting and bookkeeping standards. Further, during the period of probation, the Panel recommends that the Respondent must have a practice monitor or mentor who shall oversee her administrative responsibilities in the event she returns to the private practice of law.

PANEL OF THE BOARD OF
PROFESSIONAL RESPONSIBILITY

By 
James W. Semple, Esquire

Chair

By 
David J. Ferry, Jr., Esquire

By _____
Donald A. Blakey, Ph.D

Dated: 6-14-04

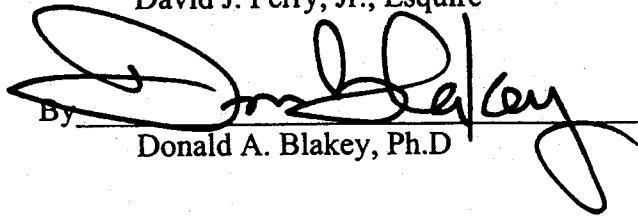
* The Chair of this Panel was involved in the Panel that heard the *Froelich* case, and in the Panel that heard Bailey's petition for reinstatement.

**DRAFT
HIGHLY CONFIDENTIAL**

**PANEL OF THE BOARD OF
PROFESSIONAL RESPONSIBILITY**

By _____
James W. Semple, Esquire
Chair

By _____
David J. Ferry, Jr., Esquire

By  _____
Donald A. Blakey, Ph.D

Dated: May 15, 2001

CERTIFICATE OF SERVICE

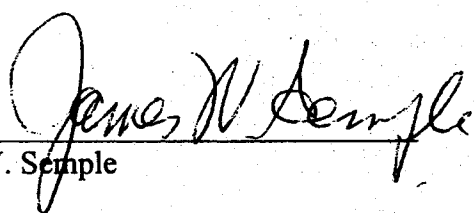
The undersigned hereby certifies that on this 16th day of June, 2004 he forwarded two copies of the attached Opinion of the Panel of the Board of Professional Responsibility were forwarded to the following, in the manner indicated:

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